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HOW DOES LAW PROTECT IN WAR?

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

Volume II

Cases and Documents

Second Edition

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HOW DOES LAW PROTECT IN WAR

SECOND, EXPANDED AND UPDATED EDITION

VOLUME II

PART III: CASES AND DOCUMENTS

by

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INTERNATIONAL COMMITTEE OF THE RED CROSS

Geneva 2006

PART III

CASES AND DOCUMENTS

Chapter 1

General Statements on International Humanitarian Law

I. General Multilateral Treaties

Document No. 1, The Hague Regulations

[**Source:** Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, October 18, 1907; reprinted from Schindler, D. & Toman, J (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Leiden/Boston, Nijhoff Publishers, 4th ed., 2004, pp. 60-87.]

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

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

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

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

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

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

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

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

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood.

The High Contracting Parties, [...] have agreed upon the following:

Article 1

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

Article 2

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

Article 3

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

Article 5

The present Convention shall be ratified as soon as possible. [...]

Article 6

Non-Signatory Powers may adhere to the present Convention. [...]

Article 8

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

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

Annex to the Convention Regulations Respecting the Laws and Customs of War on Land

SECTION I: ON BELLIGERENTS

CHAPTER I: THE QUALIFICATIONS OF BELLIGERENTS

Article 1

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

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

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

Article 2

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

Article 3

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

CHAPTER II: PRISONERS OF WAR

[...]

Article 20

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

CHAPTER III: THE SICK AND WOUNDED

Article 21

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

SECTION II: HOSTILITIES

CHAPTER I: MEANS OF INJURING THE ENEMY, SIEGES, AND BOMBARDMENTS

Article 22

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

Article 23

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

(a) To employ poison or poisoned weapons;

(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

(d) To declare that no quarter will be given;

(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;

(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

(i) A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Article 24

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

Article 25

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

Article 26

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

Article 27

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

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

Article 28

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

CHAPTER II: SPIES

Article 29

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

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

Article 30

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

Article 31

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

CHAPTER III: FLAGS OF TRUCE

Article 32

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

Article 33

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

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

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

Article 34

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

CHAPTER IV: CAPITULATIONS

Article 35

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

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

CHAPTER V: ARMISTICES

Article 36

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

Article 37

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

Article 38

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

Article 39

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

Article 40

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

Article 41

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

SECTION III: MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

Article 42

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

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

Article 43

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

Article 44

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

Article 45

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

Article 46

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

Private property cannot be confiscated.

Article 47

Pillage is formally forbidden.

Article 48

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

Article 49

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

Article 50

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

Article 51

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

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

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

Article 52

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the

resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

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

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

Article 53

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

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

Article 54

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

Article 55

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

Article 56

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

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

Document No. 2, The 1925 Geneva Chemical Weapons Protocol

[**Source:** Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925; reprinted from Schindler, D. & Toman, J (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Leiden/Boston, Nijhoff Publishers, 4th ed., 2004, pp. 107-123.]

The undersigned Plenipotentiaries, in the name of their respective Governments:

[Here follow the names of Plenipotentiaries]

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The High Contracting Parties will exert every effort to induce other States to accede to the present Protocol. Such accession will be notified to the Government of the French Republic, [...].

[...]

In witness whereof the Plenipotentiaries have signed the present Protocol. [...]

[Several States, among them France, Iraq, (the former) USSR and the UK have made a reservation when becoming Parties to the Protocol, along the lines of the following wording used by the UK:

"The [...] Protocol shall cease to be binding on [...] toward any power at enmity with [...] whose armed forces or whose allies, fail to respect the prohibitions laid down in the Protocol".]

Document No. 3, Conventions on the Protection of Cultural Property

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

[**Source:** Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954. Available on http://www.icrc.org/ihl]

The High Contracting Parties, [...]

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; [...]

Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935;

Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace; [...]

Have agreed upon the following provisions:

CHAPTER I: GENERAL PROVISIONS REGARDING PROTECTION

Definition of Cultural Property

Article 1. For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

Protection of Cultural Property

Art. 2. For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

Safeguarding of Cultural Property

Art. 3. The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

Respect for Cultural Property

Art. 4. 1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph I of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall, refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

4. They shall refrain from any act directed by way of reprisals against cultural property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

Occupation

Art. 5. 1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.

3. Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Conventions dealing with respect for cultural property.

Distinctive Marking of Cultural Property

Art. 6. In accordance with the provisions of Article 16, cultural property may bear a distinctive emblem so as to facilitate its recognition.

Military Measures

Art. 7. 1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.

2. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.

CHAPTER II: SPECIAL PROTECTION

Granting of Special Protection

Art. 8. 1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

(b) are not used for military purposes.

2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

3. A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre.

4. The guarding of cultural property mentioned in paragraph I above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order, shall not be deemed to be used for military purposes.

5. If any cultural property mentioned in paragraph I of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace.

6. Special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection". This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention.

Immunity of Cultural Property under Special Protection

Art. 9. The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.

Identification and Control

Art. 10. During an armed conflict, cultural property under special protection shall be marked with the distinctive emblem described in Article 16, and shall be open to international control as provided for in the Regulations for the execution of the Convention.

Withdrawal of Immunity

Art. 11. 1. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9, the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time.

2. Apart from the case provided for in paragraph I of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.

3. The Party withdrawing immunity shall, as soon as possible, so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.

CHAPTER III: TRANSPORT OF CULTURAL PROPERTY

Transport under Special Protection

Art. 12. 1. Transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, may, at the request of the High Contracting Party

concerned, take place under special protection in accordance with the conditions specified in the Regulations for the execution of the Convention.

2. Transport under special protection shall take place under the international supervision provided for in the aforesaid Regulations and shall display the distinctive emblem described in Article 16.

3. The High Contracting Parties shall refrain from any act of hostility directed against transport under special protection.

Transport in Urgent Cases

Art. 13. 1. If a High Contracting Party considers that the safety of certain cultural property requires its transfer and that the matter is of such urgency that the procedure laid down in Article 12 cannot be followed, especially at the beginning of an armed conflict, the transport may display the distinctive emblem described in Article 16, provided that an application for immunity referred to in Article 12 has not already been made and refused. As far as possible, notification of transfer should be made to the opposing Parties. Nevertheless, transport conveying cultural property to the territory of another country may not display the distinctive emblem unless immunity has been expressly granted to it.

2. The High Contracting Parties shall take, so far as possible, the necessary precautions to avoid acts of hostility directed against the transport described in paragraph 1 of the present Article and displaying the distinctive emblem.

Immunity from Seizure, Capture and Prize

Art. 14. 1. Immunity from seizure, placing in prize, or capture shall be granted to:

(a) cultural property enjoying the protection provided for in Article 12 or that provided for in Article 13;

(b) the means of transport exclusively engaged in the transfer of such cultural property.

2. Nothing in the present Article shall limit the right of visit and search.

CHAPTER IV: PERSONNEL

Personnel

Art. 15. As far as is consistent with the interests of security, personnel engaged in the protection of cultural property shall, in the interests of such property, be respected and, if they fall into the hands of the opposing Party, shall be allowed to continue to carry out duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing Party.

CHAPTER V: THE DISTINCTIVE EMBLEM

Emblem of the Convention

Art. 16. 1. The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).

2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

Use of the Emblem

Art. 17. 1. The distinctive emblem repeated three times may be used only as a means of identification of:

(a) immovable cultural property under special protection;

(b) the transport of cultural property under the conditions provided for in Articles 12 and 13:

(c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.

2. The distinctive emblem may be used alone only as a means of identification of:

(a) cultural property not under special protection;

(b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;

(c) the personnel engaged in the protection of cultural property;

(d) the identity cards mentioned in the Regulations for the execution of the Convention.

3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party.

CHAPTER VI: SCOPE OF APPLICATION OF THE CONVENTION

Application of the Convention

Art. 18. 1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

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

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.

Conflicts Not of an International Character

Art. 19. 1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

2. The parties to the Conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict.

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

CHAPTER VII: EXECUTION OF THE CONVENTION [...]

Protecting Powers

Art. 21. The present Convention and the Regulations for its execution shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict.

Conciliation Procedure

Art. 22. 1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention or the Regulations for its execution. [...]

Assistance of UNESCO

Art. 23. 1. The High Contracting Parties may call upon the United Nations Educational, Scientific and Cultural Organization for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out of the application of the present Convention or the Regulations for its execution. The Organization shall accord such assistance within the limits fixed by its programme and by its resources.

2. The Organization is authorized to make, on its own initiative, proposals on this matter to the High Contracting Parties.

Special Agreements

Art. 24. 1. The High Contracting Parties may conclude special agreements for all matters concerning which they deem it suitable to make separate provision.

2. No special agreement may be concluded which would diminish the protection afforded by the present Convention to cultural property and to the personnel engaged in its protection.

Dissemination of the Convention

Art. 25. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property. [...]

Sanctions

Art. 28. The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

FINAL PROVISIONS [...]

Entry into Force [...]

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

[**Source:** Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954; available on http://www.icrc.org/ihl]

The High Contracting Parties are agreed as follows:

I

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954.

2. Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

4. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

II

5. Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came. [...]

C. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999

[**Source:** Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999; available on http://www.icrc.org/ihl]

The Parties, [...]

Considering that the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law;

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of this Protocol;

Have agreed as follows:

CHAPTER 1: INTRODUCTION

Article 1: Definitions

For the purposes of this Protocol:

(a) "Party" means a State Party to this Protocol;

(b) "cultural property" means cultural property as defined in Article 1 of the Convention;

(c) "Convention" means the Convention for the Protection of Cultural Property in the Event of Armed Conflict, [...]

(d) "High Contracting Party" means a State Party to the Convention;

(e) "enhanced protection" means the system of enhanced protection established by Articles 10 and 11;

(f) "military objective" means an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage;

(g) "illicit" means under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law.

(h) "List" means the International List of Cultural Property under Enhanced Protection established in accordance with Article 27, sub-paragraph 1(b);

(i) "Director-General" means the Director-General of UNESCO; [...]

(k) "First Protocol" means the Protocol for the Protection of Cultural Property in the Event of Armed Conflict done at The Hague on 14 May 1954;

Article 2: Relation to the Convention

This Protocol supplements the Convention in relations between the Parties.

Article 3: Scope of application

1. In addition to the provisions which shall apply in time of peace, this Protocol shall apply in situations referred to in Article 18 paragraphs 1 and 2 of the Convention and in Article 22 paragraph 1.

2. When one of the parties to an armed conflict is not bound by this Protocol, the Parties to this Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to a State party to the conflict which is not bound by it, if the latter accepts the provisions of this Protocol and so long as it applies them.

Article 4: Relationship between Chapter 3 and other provisions of the Convention and this Protocol

The application of the provisions of Chapter 3 of this Protocol is without prejudice to:

(a) the application of the provisions of Chapter I of the Convention and of Chapter 2 of this Protocol;

(b) the application of the provisions of Chapter 2 of the Convention save that, as between Parties to this Protocol or as between a Party and a State which accepts and applies this Protocol in accordance with Article 3 paragraph 2, where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection shall apply.

CHAPTER 2: GENERAL PROVISIONS REGARDING PROTECTION

Article 5: Safeguarding of cultural property

Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

Article 6: Respect for cultural property

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

(a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:

  (i) that cultural property has, by its function, been made into a military objective; and

  (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

(b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

(c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

(d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

Article 7: Precautions in attack

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

(a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;

(b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;

(c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and

(d) cancel or suspend an attack if it becomes apparent:

  (i) that the objective is cultural property protected under Article 4 of the Convention

  (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 8: Precautions against the effects of hostilities

The Parties to the conflict shall, to the maximum extent feasible:

(a) remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection;

(b) avoid locating military objectives near cultural property.

Article 9: Protection of cultural property in occupied territory

1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:
   (a) any illicit export, other removal or transfer of ownership of cultural property;
   (b) any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;
   (c) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.
2. Any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory.

CHAPTER 3: ENHANCED PROTECTION

Article 10: Enhanced protection

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

(a) it is cultural heritage of the greatest importance for humanity;

(b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;

(c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

Article 11: The granting of enhanced protection

1. Each Party should submit to the Committee a list of cultural property for which it intends to request the granting of enhanced protection.
2. The Party which has jurisdiction or control over the cultural property may request that it be included in the List to be established in accordance with Article 27 sub-paragraph 1(b). This request shall include all necessary information related to the criteria mentioned in Article 10. The Committee may invite a Party to request that cultural property be included in the List.
3. Other Parties, the International Committee of the Blue Shield and other non-governmental organisations with relevant expertise may recommend specific cultural property to the Committee. In such cases, the Committee may decide to invite a Party to request inclusion of that cultural property in the List.
4. Neither the request for inclusion of cultural property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, nor its inclusion, shall in any way prejudice the rights of the parties to the dispute.
5. Upon receipt of a request for inclusion in the List, the Committee shall inform all Parties of the request. Parties may submit representations regarding such a request

to the Committee within sixty days. These representations shall be made only on the basis of the criteria mentioned in Article 10. They shall be specific and related to facts. The Committee shall consider the representations, providing the Party requesting inclusion with a reasonable opportunity to respond before taking the decision. When such representations are before the Committee, decisions for inclusion in the List shall be taken, notwithstanding Article 26, by a majority of four-fifths of its members present and voting.

6. In deciding upon a request, the Committee should ask the advice of governmental and non-governmental organisations, as well as of individual experts.
7. A decision to grant or deny enhanced protection may only be made on the basis of the criteria mentioned in Article 10.
8. In exceptional cases, when the Committee has concluded that the Party requesting inclusion of cultural property in the List cannot fulfil the criteria of Article 10 sub-paragraph (b), the Committee may decide to grant enhanced protection, provided that the requesting Party submits a request for international assistance under Article 32.
9. Upon the outbreak of hostilities, a Party to the conflict may request, on an emergency basis, enhanced protection of cultural property under its jurisdiction or control by communicating this request to the Committee. The Committee shall transmit this request immediately to all Parties to the conflict. In such cases the Committee will consider representations from the Parties concerned on an expedited basis. The decision to grant provisional enhanced protection shall be taken as soon as possible and, notwithstanding Article 26, by a majority of four-fifths of its members present and voting. Provisional enhanced protection may be granted by the Committee pending the outcome of the regular procedure for the granting of enhanced protection, provided that the provisions of Article 10 sub-paragraphs (a) and (c) are met.
10. Enhanced protection shall be granted to cultural property by the Committee from the moment of its entry in the List.
11. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties notification of any decision of the Committee to include cultural property on the List.

Article 12: Immunity of cultural property under enhanced protection

The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack from any use of the property or its immediate surroundings in support of military action.

Article 13: Loss of enhanced protection

1. Cultural property under enhanced protection shall only lose such protection:
   (a) if such protection is suspended or cancelled in accordance with Article 14; or
   (b) if, and for as long as, the property has, by its use, become a military objective.
2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:
   (a) the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
   (b) all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;
   (c) unless circumstances do not permit, due to requirements of immediate self-defence:

(i) the attack is ordered at the highest operational level of command;

(ii) effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and

(iii) reasonable time is given to the opposing forces to redress the situation.

Article 14: Suspension and cancellation of enhanced protection

1. Where cultural property no longer meets any one of the criteria in Article 10 of this Protocol, the Committee may suspend its enhanced protection status or cancel that status by removing that cultural property from the List.
2. In the case of a serious violation of Article 12 in relation to cultural property under enhanced protection arising from its use in support of military action, the Committee may suspend its enhanced protection status. Where such violations are continuous, the Committee may exceptionally cancel the enhanced protection status by removing the cultural property from the List.
3. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties to this Protocol notification of any decision of the Committee to suspend or cancel the enhanced protection of cultural property.
4. Before taking such a decision, the Committee shall afford an opportunity to the Parties to make their views known.

CHAPTER 4: CRIMINAL RESPONSIBILITY AND JURISDICTION

Article 15: Serious violations of this Protocol

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
   (a) making cultural property under enhanced protection the object of attack;
   (b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
   (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
   (d) making cultural property protected under the Convention and this Protocol the object of attack;
   (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.
2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

Article 16: Jurisdiction

1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:

(a) when such an offence is committed in the territory of that State;

(b) when the alleged offender is a national of that State;

(c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:

(a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;

(b) Except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.

Article 17: Prosecution

1. The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

2. Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law.

Article 18: Extradition

1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.

2. When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).

3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.

4. If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

Article 19: Mutual legal assistance

1. Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.
2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, Parties shall afford one another assistance in accordance with their domestic law.

Article 20: Grounds for refusal

1. For the purpose of extradition, offences set forth in Article 15 sub-paragraphs 1 (a) to (c), and for the purpose of mutual legal assistance, offences set forth in Article 15 shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such offences may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.
2. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Article 15 sub-paragraphs 1 (a) to (c) or for mutual legal assistance with respect to offences set forth in Article 15 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 21: Measures regarding other violations

Without prejudice to Article 28 of the Convention, each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

(a) any use of cultural property in violation of the Convention or this Protocol;

(b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.

CHAPTER 5: THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICTS NOT OF AN INTERNATIONAL CHARACTER

Article 22: Armed conflicts not of an international character

1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.
3. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

4. Nothing in this Protocol shall prejudice the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15.
5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the Party in the territory of which that conflict occurs.
6. The application of this Protocol to the situation referred to in paragraph 1 shall not affect the legal status of the parties to the conflict.
7. UNESCO may offer its services to the parties to the conflict. [...]

CHAPTER 7: DISSEMINATION OF INFORMATION AND INTERNATIONAL ASSISTANCE

Article 30: Dissemination

1. The Parties shall endeavour by appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect for cultural property by their entire population.
2. The Parties shall disseminate this Protocol as widely as possible, both in time of peace and in time of armed conflict.
3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end the Parties shall, as appropriate:
   (a) incorporate guidelines and instructions on the protection of cultural property in their military regulations;
   (b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;
   (c) communicate to one another, through the Director-General, information on the laws, administrative provisions and measures taken under sub-paragraphs (a) and (b);
   (d) communicate to one another, as soon as possible, through the Director-General, the laws and administrative provisions which they may adopt to ensure the application of this Protocol. [...]

Document No. 4, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Geneva, October 10, 1980

[**Source:** Reprinted from Schindler, D. & Toman, J (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Leiden/Boston, Nijhoff Publishers, 4th ed., 2004, pp. 184-189.]

The High Contracting Parties,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

Further recalling the general principle of the protection of the civilian population against the effects of hostilities,

Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,

Also recalling that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,

Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience,

Desiring to contribute to international détente, the ending of the arms race and the building of confidence among States, and hence to the realization of the aspiration of all peoples to live in peace,

Recognizing the importance of pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control,

Reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict,

Wishing to prohibit or restrict further the use of certain conventional weapons and believing that the positive results achieved in this area may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons,

Emphasizing the desirability that all States become parties to this Convention and its annexed Protocols, especially the militarily significant States,

Bearing in mind that the General Assembly of the United Nations and the United Nations Disarmament Commission may decide to examine the question of a possible broadening of the scope of the prohibitions and restrictions contained in this Convention and its annexed Protocols,

Further bearing in mind that the Committee on Disarmament may decide to consider the question of adopting further measures to prohibit or restrict the use of certain conventional weapons,

Have agreed as follows:

Article 1: Scope of application

This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.

Article 2: Relations with other international agreements

Nothing in this Convention or its annexed Protocols shall be interpreted as detracting from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict.

Article 3: Signature

[...]

Article 4: Ratification, acceptance, approval or accession

1. This Convention is subject to ratification, acceptance or approval by the Signatories. Any State which has not signed this Convention may accede to it.

   [...]

3. Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, that State shall notify the Depositary of its consent to be bound by any two or more of these Protocols.

4. At any time after the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, a State may notify the Depositary of its consent to be bound by any annexed Protocol by which it is not already bound.

5. Any Protocol by which a High Contracting Party is bound shall for that Party form an integral part of this Convention.

Article 5: Entry into force

[...]

Article 6: Dissemination

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces.

Article 7: Treaty relations upon entry into force of this Convention

1. When one of the parties to a conflict is not bound by an annexed Protocol, the parties bound by this Convention and that annexed Protocol shall remain bound by them in their mutual relations.

2. Any High Contracting Party shall be bound by this Convention and any Protocol annexed thereto which is in force for it, in any situation contemplated by Article 1, in relation to any State which is not a party to this Convention or bound by the relevant annexed Protocol, if the latter accepts and applies this Convention or the relevant Protocol, and so notifies the Depositary.

3. The Depositary shall immediately inform the High Contracting Parties concerned of any notification received under paragraph 2 of this Article.

4. This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions of 12 August 1949 for the Protection of War Victims:

   (a) where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or

   (b) where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects:

      (i) the Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect;

      (ii) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and

      (iii) the Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict.

The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.

Article 8: Review and amendments

1. (a) At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound. Any proposal for an amendment shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties and shall seek their views on whether a conference should be convened to consider the proposal. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited. States not parties to this Convention shall be invited to the conference as observers.

   (b) Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties which are bound by that Protocol.

2. (a) At any time after the entry into force of this Convention any High Contracting Party may propose additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. Any such proposal for an additional protocol shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties in accordance with subparagraph 1 (a) of this Article. If a majority, that shall not be less than

eighteen of the High Contracting Parties so agree, the Depositary shall promptly convene a conference to which all States shall be invited.

(b) Such a conference may agree, with the full participation of all States represented at the conference, upon additional protocols which shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.

3. (a) If, after a period of ten years following the entry into force of this Convention, no conference has been convened in accordance with subparagraph 1 (a) or 2 (a) of this Article, any High Contracting Party may request the Depositary to convene a conference to which all High Contracting Parties shall be invited to review the scope and operation of this Convention and the Protocols annexed thereto and to consider any proposal for amendments of this Convention or of the existing Protocols. States not parties to this Convention shall be invited as observers to the conference. The conference may agree upon amendments which shall be adopted and enter into force in accordance with subparagraph 1 (b) above.

(b) At such conference consideration may also be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. All States represented at the conference may participate fully in such consideration. Any additional protocols shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.

(c) Such a conference may consider whether provision should be made for the convening of a further conference at the request of any High Contracting Party if, after a similar period to that referred to in subparagraph 3 (a) of this Article, no conference has been convened in accordance with subparagraph 1 (a) or 2 (a) of this Article.

Article 9: Denunciation

1. Any High Contracting Party may denounce this Convention or any of its annexed Protocols by so notifying the Depositary.

2. Any such denunciation shall only take effect one year after receipt by the Depositary of the notification of denunciation. If, however, on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the persons protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.

3. Any denunciation of this Convention shall be considered as also applying to all annexed Protocols by which the denouncing High Contracting Party is bound.

4. Any denunciation shall have effect only in respect of the denouncing High Contracting Party.

5. Any denunciation shall not affect the obligations already incurred, by reason of an armed conflict, under this Convention and its annexed Protocols by such denouncing High Contracting Party in respect of any act committed before this denunciation becomes effective.

Article 10: Depositary

1. The Secretary-General of the United Nations shall be the Depositary of this Convention and of its annexed Protocols. [...]

Document No. 5, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)

[**Source:** Reprinted from Schindler, D. & Toman, J (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Leiden/Boston, Nijhoff Publishers, 4th ed., 2004, p. 190.]

It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

Document No. 6, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)

[**Source:** Reprinted from Schindler, D. & Toman, J (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Leiden/Boston, Nijhoff Publishers, 4th ed., 2004, pp. 210-211.]

Article 1: Definitions

For the purpose of this Protocol:

1. "Incendiary weapon" means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.
   (a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.
   (b) Incendiary weapons do not include:
      (i) Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;
      (ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

2. "Concentration of civilians" means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.

3. "Military objective" means, as far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

4. "Civilian objects" are all objects which are not military objectives as defined in paragraph 3.

5. "Feasible precautions" are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Article 2: Protection of civilians and civilian objects

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.

2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.

3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

Document No. 7, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), October 13, 1995

[**Source:** United Nations CCW/CONF.I/7; available on http://www.icrc.org/ihl]

Article 1

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

Article 2

In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures.

Article 3

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.

Article 4

For the purpose of this Protocol "permanent blindness" means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured using both eyes.

Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention)

[**Source:** *ILM*, vol. 35 (5), 1996, pp. 1206-1217; available on http://www.icrc.org/ihl]

Article 1: Scope of application

1. This Protocol relates to the use on land of the mines, booby-traps and other devices, defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.

2. This Protocol shall apply, in addition to situations referred to in Article I of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol.

4. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Protocol to parties to a conflict, which are not High Contracting Parties that have accepted this Protocol, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

Article 2: Definitions

For the purpose of this Protocol:

1. "Mine" means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.

2. "Remotely-delivered mine" means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be "remotely delivered", provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.

3. "Anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.

4. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

5. "Other devices" means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.

6. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

7. "Civilian objects" are all objects which are not military objectives as defined in paragraph 6 of this Article.

8. "Minefield" is a defined area in which mines have been emplaced and "mined area" is an area which is dangerous due to the presence of mines. "Phoney minefield" means an area free of mines that simulates a minefield. The term "minefield" includes phoney minefields.

9. "Recording" means a physical, administrative and technical operation designed to obtain, for the purpose of registration in official records, all available information facilitating the location of minefields, mined areas, mines, booby-traps and other devices.

10. "Self-destruction mechanism" means an incorporated or externally attached automatically-functioning mechanism which secures the destruction of the munition into which it is incorporated or to which it is attached.

11. "Self-neutralization mechanism" means an incorporated automatically-functioning mechanism which renders inoperable the munition into which it is incorporated.

12. "Self-deactivating" means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example, a battery, that is essential to the operation of the munition.

13. "Remote control" means control by commands from a distance.

14. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine.

15. "Transfer" involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines.

Article 3

General restrictions on the use, of mines, booby-traps and other devices

1. This Article applies to:
   (a) mines;
   (b) booby-traps; and
   (c) other devices.
2. Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.
3. It is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering.
4. Weapons to which this Article applies shall strictly comply with the standards and limitations specified in the Technical Annex with respect to each particular category.
5. It is prohibited to use mines, booby-traps or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.
6. It is prohibited to use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.
7. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.
8. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:
   (a) which is not on, or directed against, a military objective. In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used; or
   (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
   (c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
9. Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective.

10. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to:

    (a) the short- and long-term effect of mines upon the local civilian population for the duration of the minefield;

    (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);

    (c) the availability and feasibility of using alternatives; and

    (d) the short- and long-term military requirements for a minefield.

11. Effective advance warning shall be given of any emplacement of mines, booby-traps and other devices which may affect the civilian population, unless circumstances do not permit.

Article 4: Restrictions on the use of anti-personnel mines

It is prohibited to use anti-personnel mines which are not detectable, as specified in paragraph 2 of the Technical Annex.

Article 5: Restrictions on the use of anti-personnel mines other than remotely-delivered mines

1. This Article applies to anti-personnel mines other than remotely-delivered mines.

2. It is prohibited to use weapons to which this Article applies which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex, unless:

    (a) such weapons are placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area; and

    (b) such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.

3. A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. If that party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.

4. If the forces of a party to a conflict gain control of an area in which weapons to which this Article applies have been laid, such forces shall, to the maximum extent feasible, maintain and, if necessary, establish the protections required by this Article until such weapons have been cleared.

5. All feasible measures shall be taken to prevent the unauthorized removal, defacement, destruction or concealment of any device, system or material used to establish the perimeter of a perimeter-marked area.

6. Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2 (a) of this Article for a maximum period of 72 hours, if:

   (a) they are located in immediate proximity to the military unit that emplaced them; and

   (b) the area is monitored by military personnel to ensure the effective exclusion of civilians.

Article 6: Restrictions on the use of remotely-delivered mines

1. It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I (b) of the Technical Annex.

2. It is prohibited to use remotely-delivered anti-personnel mines which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex.

3. It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.

4. Effective advance warning shall be given of any delivery or dropping of remotely-delivered mines which may affect the civilian population, unless circumstances do not permit.

Article 7: Prohibitions on the use of booby-traps and other devices

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with:

   (a) internationally recognized protective emblems, signs or signals;

   (b) sick, wounded or dead persons;

   (c) burial or cremation sites or graves;

   (d) medical facilities, medical equipment, medical supplies or medical transportation;

   (e) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;

   (f) food or drink;

   (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots;

   (h) objects clearly of a religious nature;

(i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or

(j) animals or their carcasses.

2. It is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.

3. Without prejudice to the provisions of Article 3, it is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

(a) they are placed on or in the close vicinity of a military objective; or

(b) measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.

Article 8: Transfers

1. In order to promote the purposes of this Protocol, each High Contracting Party:

(a) undertakes not to transfer any mine the use of which is prohibited by this Protocol;

(b) undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;

(c) undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and

(d) undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.

2. In the event that a High Contracting Party declares that it will defer compliance with specific provisions on the use of certain mines, as provided for in the Technical Annex, sub-paragraph I (a) of this Article shall however apply to such mines.

3. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph I (a) of this Article.

Article 9: Recording and use of information on minefields, mined areas, mines, booby-traps and other devices

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.

2. All such records shall be retained by the parties to a conflict, who shall, without delay after the cessation of active hostilities, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control. At the same time, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their

possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control; provided, however, subject to reciprocity, where the forces of a party to a conflict are in the territory of an adverse party, either party may withhold such information from the Secretary-General and the other party, to the extent that security interests require such withholding, until neither party is in the territory of the other. In the latter case, the information withheld shall be disclosed as soon as those security interests permit. Wherever possible, the parties to the conflict shall seek, by mutual agreement, to provide for the release of such information at the earliest possible time in a manner consistent with the security interests of each party.

3. This Article is without prejudice to the provisions of Articles 10 and 12 of this Protocol.

Article 10: Removal of minefields, mined areas, mines, booby-traps and other devices and international cooperation

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.

2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.

3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.

4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

Article 11: Technological cooperation and assistance

1. Each High Contracting Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Protocol and means of mine clearance. In particular, High Contracting Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

2. Each High Contracting Party undertakes to provide information to the database on mine clearance established within the United Nations System, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.

3. Each high Contracting Party in a position to do so shall provide assistance for mine clearance through the United Nations System, other international bodies or on a bilateral basis, or contribute to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance.

4. Requests by High Contracting Parties for assistance, substantiated by relevant information, may be submitted to the United Nations, to other appropriate bodies or to other States. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organizations.

5. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and, in cooperation with the requesting High Contracting Party, determine the appropriate provision of assistance in mine clearance or implementation of the Protocol. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required.

6. Without prejudice to their constitutional and other legal provisions, the High Contracting Parties undertake to cooperate and transfer technology to facilitate the implementation of the relevant prohibitions and restrictions set out in this Protocol.

7. Each High Contracting Party has the right to seek and receive technical assistance, where appropriate, from another High Contracting Party on specific relevant technology, other than weapons technology, as necessary and feasible, with a view to reducing any period of deferral for which provision is made in the Technical Annex.

Article 12: Protection from the effects of minefields, mined areas, mines, booby-traps and other devices

1. Application

   (a) With the exception of the forces and missions referred to in sub-paragraph 2(a)(i) of this Article, this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed.

   (b) The application of the provisions of this Article to parties to a conflict which are not High Contracting Parties shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

   (c) The provisions of this Article are without prejudice to existing international humanitarian law, or other international instruments as applicable, or decisions by the Security Council of the United Nations, which provide for a higher level of protection to personnel functioning in accordance with this Article.

2. Peace-keeping and certain other forces and missions

   (a) This paragraph applies to:

      (i) any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations;

      (ii) any mission established pursuant to Chapter VIII of the Charter of the United Nations and performing its functions in the area of a conflict.

   (b) Each High Contracting Party or party to a conflict, if so requested by the head of a force or mission to which this paragraph applies, shall:

(i) so far as it is able, take such measures as are necessary to protect the force or mission from the effects of mines, booby-traps and other devices in any area under its control;

(ii) if necessary in order effectively to protect such personnel, remove or render harmless, so far as it is able, all mines, booby-traps and other devices in that area; and

(iii) inform the head of the force or mission of the location of all known minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission is performing its functions and, so far as is feasible, make available to the head of the force or mission all information in its possession concerning such minefields, mined areas, mines, booby-traps and other devices.

3. Humanitarian and fact-finding missions of the United Nations System

(a) This paragraph applies to any humanitarian or fact-finding mission of the United Nations System.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:

(i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and

(ii) if access to or through any place under its control is necessary for the performance of the mission's functions and in order to provide the personnel of the mission with safe passage to or through that place:

(aa) unless on-going hostilities prevent, inform the head of the mission of a safe route to that place if such information is available; or

(bb) if information identifying a safe route is not provided in accordance with sub-paragraph (aa), so far as is necessary and feasible, clear a lane through minefields.

4. Missions of the International Committee of the Red Cross

(a) This paragraph applies to any mission of the International Committee of the Red Cross performing functions with the consent of the host State or States as provided for by the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:

(i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and

(ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.

5. Other humanitarian missions and missions of enquiry

(a) Insofar as paragraphs 2, 3 and 4 above do not apply to them, this paragraph applies to the following missions when they are performing functions in the area of a conflict or to assist the victims of a conflict:

(i) any humanitarian mission of a national Red Cross or Red Crescent Society or of their International Federation;

(ii) any mission of an impartial humanitarian organization, including any impartial humanitarian demining mission; and

(iii) any mission of enquiry established pursuant to the provisions of the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall, so far as is feasible:

(i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article, and

(ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.

6. Confidentiality

All information provided in confidence pursuant to this Article shall be treated by the recipient in strict confidence and shall not be released outside the force or mission concerned without the express authorization of the provider of the information.

7. Respect for laws and regulations

Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, personnel participating in the forces and missions referred to in this Article shall:

(a) respect the laws and regulations of the host State; and

(b) refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 13: Consultations of High Contracting Parties

1. The High Contracting Parties undertake to consult and cooperate with each other on all issues related to the operation of this Protocol. For this purpose, a conference of High Contracting Parties shall be held annually.

2. Participation in the annual conferences shall be determined by their agreed Rules of Procedure.

3. The work of the conference shall include:

(a) review of the operation and status of this Protocol;

(b) consideration of matters arising from reports by High Contracting Parties according to paragraph 4 of this Article;

(c) preparation for review conferences; and

(d) consideration of the development of technologies to protect civilians against indiscriminate effects of mines.

4. The High Contracting Parties shall provide annual reports to the Depositary, who shall circulate them to all High Contracting Parties in advance of the Conference, on any of the following matters:

(a) dissemination of information on this Protocol to their armed forces and to the civilian population;

(b) mine clearance and rehabilitation programmes;

(c) steps taken to meet technical requirements of this Protocol and any other relevant information pertaining thereto;

(d) legislation related to this Protocol;

(e) measures taken on international technical information exchange, on international cooperation on mine clearance, and on technical cooperation and assistance; and

(f) other relevant matters.

5. The cost of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the work of the Conference, in accordance with the United Nations scale of assessment adjusted appropriately.

Article 14: Compliance

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.

2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.

3. Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.

4. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

Technical Annex

1. Recording

(a) Recording of the location of mines other than remotely-delivered mines, minefields, mined areas, booby-traps and other devices shall be carried out in accordance with the following provisions:

(i) the location of the minefields, mined areas and areas of booby-traps and other devices shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points;

(ii) maps, diagrams or other records shall be made in such a way as to indicate the location of minefields, mined areas, booby-traps and other devices in relation to reference points, and these records shall also indicate their perimeters and extent;

(iii) for purposes of detection and clearance of mines, booby-traps and other devices, maps, diagrams or other records shall contain complete information on the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all these weapons laid. Whenever feasible the minefield record shall show the exact location of every mine, except in row minefields

where the row location is sufficient. The precise location and operating mechanism of each booby-trap laid shall be individually recorded.

(b) The estimated location and area of remotely-delivered mines shall be specified by coordinates of reference points (normally corner points) and shall be ascertained and when feasible marked on the ground at the earliest opportunity. The total number and types of mines laid, the date and time of laying and the self-destruction time periods shall also be recorded.

(c) Copies of records shall be held at a level of command sufficient to guarantee their safety as far as possible.

(d) The use of mines produced after the entry into force of this Protocol is prohibited unless they are marked in English or in the respective national language or languages with the following information:

(i) name of the country of origin;

(ii) month and year of production; and

(iii) serial number or lot number.

The marking should be visible, legible, durable and resistant to environmental effects, as far as possible.

2. Specifications on detectability

(a) With respect to anti-personnel mines produced after 1 January 1997, such mines shall incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(b) With respect to anti-personnel mines produced before 1 January 1997, such mines shall either incorporate in their construction, or have attached prior to their emplacement, in a manner not easily removable, a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraph (b), it may declare at the time of its notification of consent to be bound by this Protocol that it will defer compliance with sub-paragraph (b) for a period not to exceed 9 years from the entry into force of this Protocol. In the meantime it shall, to the extent feasible, minimize the use of anti-personnel mines that do not so comply.

3. Specifications on self-destruction and self-deactivation

(a) All remotely-delivered anti-personnel mines shall be designed and constructed so that no more than 10% of activated mines will fail to self-destruct within 30 days after emplacement, and each mine shall have a back-up self-deactivation feature designed and constructed so that, in combination with the self-destruction mechanism, no more than one in one thousand activated mines will function as a mine 120 days after emplacement.

(b) All non-remotely delivered anti-personnel mines, used outside marked areas, as defined in Article 5 of this Protocol, shall comply with the requirements for self-destruction and self-deactivation stated in sub-paragraph (a).

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraphs (a) and/or (b), it may declare at the time of its notification of consent to be bound by this Protocol, that it will, with respect to mines produced prior to the entry into force of this Protocol defer compliance with sub-paragraphs (a) and/or (b) for a period not to exceed 9 years from the entry into force of this Protocol.

During this period of deferral, the High Contracting Party shall:

(i) undertake to minimize, to the extent feasible, the use of anti-personnel mines that do not so comply, and

(ii) with respect to remotely-delivered anti-personnel mines, comply with either the requirements for self-destruction or the requirements for self-deactivation and, with respect to other anti-personnel mines comply with at least the requirements for self-deactivation.

4. International signs for minefields and mined areas

Signs similar to the example attached [1] and as specified below shall be utilized in the marking of minefields and mined areas to ensure their visibility and recognition by the civilian population:

(a) size and shape: a triangle or square no smaller than 28 centimetres (11 inches) by 20 centimetres (7.9 inches) for a triangle, and 15 centimetres (6 inches) per side for a square;

(b) colour: red or orange with a yellow reflecting border

Document No. 9, Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts

[**Source:** United Nations, CCW/CONF.II/2; available on http://www.icrc.org/ihl]

At the Second Review Conference, held from 11 to 21 December 2001, the States party to the Convention decided to amend article one of the Convention as follows, in order to extend its scope to non-international armed conflicts. This decision can be found in the final declaration of the Second Review conference, as reproduced in document CCW/CONF.II/2.

"Decide to modify article one of the Convention, so that it reads as follows:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.

2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

7. The provisions of Paragraphs 2-6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article."

[N.B.: This amendment has been ratified by 44 countries and entered into force.]

Document No. 10, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997

[**Source:** *ILM*, vol. 36 (6), 1997, pp. 1507-1519; available on http://www.icrc.org/ihl]

Preamble

The States Parties,

Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement,

Believing it necessary to do their utmost to contribute in an efficient and coordinated manner to face the challenge of removing anti-personnel mines placed throughout the world, and to assure their destruction,

Wishing to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims,

Recognizing that a total ban of anti-personnel mines would also be an important confidence-building measure,

Welcoming the adoption of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed

to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and calling for the early ratification of this Protocol by all States which have not yet done so,

Welcoming also United Nations General Assembly Resolution 51/45 S of 10 December 1996 urging all States to pursue vigorously an effective, legally-binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines,

Welcoming furthermore the measures taken over the past years, both unilaterally and multilaterally, aiming at prohibiting, restricting or suspending the use, stockpiling, production and transfer of anti-personnel mines,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world,

Recalling the Ottawa Declaration of 5 October 1996 and the Brussels Declaration of 27 June 1997 urging the international community to negotiate an international and legally binding agreement prohibiting the use, stockpiling, production and transfer of anti-personnel mines,

Emphasizing the desirability of attracting the adherence of all States to this Convention, and determined to work strenuously towards the promotion of its universalization in all relevant fora including, inter alia, the United Nations, the Conference on Disarmament, regional organizations, and groupings, and review conferences of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects,

Basing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants,

Have agreed as follows:

Article 1: General obligations

1. Each State Party undertakes never under any circumstances:
   a) To use anti-personnel mines;
   b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
   c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

Article 2: Definitions

1. "Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.

2. "Mine" means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.

3. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.

4. "Transfer" involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines.

5. "Mined area" means an area which is dangerous due to the presence or suspected presence of mines.

Article 3: Exceptions

1. Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.

2. The transfer of anti-personnel mines for the purpose of destruction is permitted.

Article 4: Destruction of stockpiled anti-personnel mines

Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party.

Article 5: Destruction of anti-personnel mines in mined areas

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.

4. Each request shall contain:

   (a) The duration of the proposed extension;

   (b) A detailed explanation of the reasons for the proposed extension, including:

      (i) The preparation and status of work conducted under national demining programs;

      (ii) The financial and technical means available to the State Party for the destruction of all the anti-personnel mines; and

      (iii) Circumstances which impede the ability of the State Party to destroy all the anti-personnel mines in mined areas;

   c) The humanitarian, social, economic, and environmental implications of the extension; and

   d) Any other information relevant to the request for the proposed extension.

5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

Article 6: International cooperation and assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.

2. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

3. Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.

4. Each State Party in a position to do so shall provide assistance for mine clearance and related activities. Such assistance may be provided, inter alia, through the United

Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis, or by contributing to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance, or other regional funds that deal with demining.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled anti-personnel mines.

6. Each State Party undertakes to provide information to the database on mine clearance established within the United Nations system, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.

7. States Parties may request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental fora to assist its authorities in the elaboration of a national demining program to determine, inter alia:

   a) The extent and scope of the anti-personnel mine problem;

   b) The financial, technological and human resources that are required for the implementation of the program;

   c) The estimated number of years necessary to destroy all anti-personnel mines in mined areas under the jurisdiction or control of the concerned State Party;

   d) Mine awareness activities to reduce the incidence of mine-related injuries or deaths;

   e) Assistance to mine victims;

   f) The relationship between the Government of the concerned State Party and the relevant governmental, inter-governmental or non-governmental entities that will work in the implementation of the program.

8. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

Article 7: Transparency measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:

   a) The national implementation measures referred to in Article 9;

   b) The total of all stockpiled anti-personnel mines owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type of anti-personnel mine stockpiled;

   c) To the extent possible, the location of all mined areas that contain, or are suspected to contain, anti-personnel mines under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of anti-personnel mine in each mined area and when they were emplaced;

   d) The types, quantities and, if possible, lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection, mine clearance or mine destruction techniques, or transferred for the purpose of

destruction, as well as the institutions authorized by a State Party to retain or transfer anti-personnel mines, in accordance with Article 3;

e) The status of programs for the conversion or de-commissioning of anti-personnel mine production facilities;

f) The status of programs for the destruction of anti-personnel mines in accordance with Articles 4 and 5, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;

g) The types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of anti-personnel mine destroyed, in accordance with Articles 4 and 5, respectively, along with, if possible, the lot numbers of each type of anti-personnel mine in the case of destruction in accordance with Article 4;

h) The technical characteristics of each type of anti-personnel mine produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of anti-personnel mines; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate mine clearance; and

i) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified under paragraph 2 of Article 5.

2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8: Facilitation and clarification of compliance

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

2. If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied

by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. The requesting State Party may propose through the Secretary-General of the United Nations the convening of a Special Meeting of the States Parties to consider the matter. The Secretary-General of the United Nations shall thereupon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter. In the event that within 14 days from the date of such communication, at least one-third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties.

6. The Meeting of the States Parties or the Special Meeting of the States Parties, as the case may be, shall first determine whether to consider the matter further, taking into account all information submitted by the States Parties concerned. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus. If despite all efforts to that end no agreement has been reached, it shall take this decision by a majority of States Parties present and voting.

7. All States Parties shall cooperate fully with the Meeting of the States Parties or the Special Meeting of the States Parties in the fulfilment of its review of the matter, including any fact-finding missions that are authorized in accordance with paragraph 8.

8. If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting. At any time the requested State Party may invite a fact-finding mission to its territory. Such a mission shall take place without a decision by a Meeting of the States Parties or a Special Meeting of the States Parties to authorize such a mission. The mission, consisting of up to 9 experts, designated and approved in accordance with paragraphs 9 and 10, may collect additional information on the spot or in other places directly related to the alleged compliance issue under the jurisdiction or control of the requested State Party.

9. The Secretary-General of the United Nations shall prepare and update a list of the names, nationalities and other relevant data of qualified experts provided by States Parties and communicate it to all States Parties. Any expert included on this list shall be regarded as designated for all fact-finding missions unless a State Party declares its non-acceptance in writing. In the event of non-acceptance, the expert shall not participate in fact-finding missions on the territory or any other place under the jurisdiction or control of the objecting State Party, if the non-acceptance was declared prior to the appointment of the expert to such missions.

10. Upon receiving a request from the Meeting of the States Parties or a Special Meeting of the States Parties, the Secretary-General of the United Nations shall, after consultations with the requested State Party, appoint the members of the mission, including its leader. Nationals of States Parties requesting the fact-finding mission or

directly affected by it shall not be appointed to the mission. The members of the fact-finding mission shall enjoy privileges and immunities under Article VI of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946.

11. Upon at least 72 hours notice, the members of the fact-finding mission shall arrive in the territory of the requested State Party at the earliest opportunity. The requested State Party shall take the necessary administrative measures to receive, transport and accommodate the mission, and shall be responsible for ensuring the security of the mission to the maximum extent possible while they are on territory under its control.

12. Without prejudice to the sovereignty of the requested State Party, the fact-finding mission may bring into the territory of the requested State Party the necessary equipment which shall be used exclusively for gathering information on the alleged compliance issue. Prior to its arrival, the mission will advise the requested State Party of the equipment that it intends to utilize in the course of its fact-finding mission.

13. The requested State Party shall make all efforts to ensure that the fact-finding mission is given the opportunity to speak with all relevant persons who may be able to provide information related to the alleged compliance issue.

14. The requested State Party shall grant access for the fact-finding mission to all areas and installations under its control where facts relevant to the compliance issue could be expected to be collected. This shall be subject to any arrangements that the requested State Party considers necessary for:

    a) The protection of sensitive equipment, information and areas;

    b) The protection of any constitutional obligations the requested State Party may have with regard to proprietary rights, searches and seizures, or other constitutional rights; or

    c) The physical protection and safety of the members of the fact-finding mission.

In the event that the requested State Party makes such arrangements, it shall make every reasonable effort to demonstrate through alternative means its compliance with this Convention.

15. The fact-finding mission may remain in the territory of the State Party concerned for no more than 14 days, and at any particular site no more than 7 days, unless otherwise agreed.

16. All information provided in confidence and not related to the subject matter of the fact-finding mission shall be treated on a confidential basis.

17. The fact-finding mission shall report, through the Secretary-General of the United Nations, to the Meeting of the States Parties or the Special Meeting of the States Parties the results of its findings.

18. The Meeting of the States Parties or the Special Meeting of the States Parties shall consider all relevant information, including the report submitted by the fact-finding mission, and may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.

19. The Meeting of the States Parties or the Special Meeting of the States Parties may suggest to the States Parties concerned ways and means to further clarify or resolve the matter

under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States Parties or the Special Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6.

20. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach its decisions referred to in paragraphs 18 and 19 by consensus, otherwise by a two-thirds majority of States Parties present and voting.

Article 9: National implementation measures

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 10: Settlement of disputes

1. The States Parties shall consult and cooperate with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention. Each State Party may bring any such dispute before the Meeting of the States Parties.
2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States parties to a dispute to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.
3. This Article is without prejudice to the provisions of this Convention on facilitation and clarification of compliance.

Article 11: Meetings of the States Parties

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:
   a) The operation and status of this Convention;
   b) Matters arising from the reports submitted under the provisions of this Convention;
   c) International cooperation and assistance in accordance with Article 6;
   d) The development of technologies to clear anti-personnel mines;
   e) Submissions of States Parties under Article 8; and
   f) Decisions relating to submissions of States Parties as provided for in Article 5.
2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.
3. Under the conditions set out in Article 8, the Secretary-General of the United Nations shall convene a Special Meeting of the States Parties.
4. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International

Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

Article 12: Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

   a) To review the operation and status of this Convention;

   b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;

   c) To take decisions on submissions of States Parties as provided for in Article 5; and

   d) To adopt, if necessary, in its final report conclusions related to the implementation of this Convention.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

Article 13: Amendments

1. At any time after the entry into force of this Convention any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14: Costs

1. The costs of the Meetings of the States Parties, the Special Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.
2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 and the costs of any fact-finding mission shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

Article 15: Signature

[...]

Article 16: Ratification, acceptance, approval or accession

[...]

Article 17: Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited.

   [...]

Article 18: Provisional application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

Article 19: Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20: Duration and withdrawal

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six- month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law. [...]

Document No. 11, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), November 28, 2003

[**Source:** Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003; available on http://www.icrc.org]

The High Contracting Parties,

Recognising the serious post-conflict humanitarian problems caused by explosive remnants of war,

Conscious of the need to conclude a Protocol on post-conflict remedial measures of a generic nature in order to minimise the risks and effects of explosive remnants of war,

And willing to address generic preventive measures, through voluntary best practices specified in a Technical Annex for improving the reliability of munitions, and therefore minimising the occurrence of explosive remnants of war,

Have agreed as follows:

Article 1: General provision and scope of application

[...]

1. This Protocol shall apply to explosive remnants of war on the land territory including internal waters of High Contracting Parties. [...]

Article 2: Definitions

For the purpose of this Protocol,

1. *Explosive ordnance* means conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996.

2. *Unexploded ordnance* means explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It may have been fired, dropped, launched or projected and should have exploded but failed to do so.

3. *Abandoned explosive ordnance* means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use.

4. *Explosive remnants of war* means unexploded ordnance and abandoned explosive ordnance.

5. *Existing explosive remnants of war* means unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of this Protocol for the High Contracting Party on whose territory it exists.

Article 3: Clearance, removal or destruction of explosive remnants of war

1. Each High Contracting Party and party to an armed conflict shall bear the responsibilities set out in this Article with respect to all explosive remnants of war in territory under its control. In cases where a user of explosive ordnance which has become explosive remnants of war, does not exercise control of the territory, the user shall, after the cessation of active hostilities, provide where feasible, inter alia technical, financial, material or human resources assistance, bilaterally or through a mutually agreed third party, including inter alia through the United Nations system or other relevant organisations, to facilitate the marking and clearance, removal or destruction of such explosive remnants of war.

2. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control. Areas affected by explosive remnants of war which are assessed pursuant to paragraph 3 of this Article as posing a serious humanitarian risk shall be accorded priority status for clearance, removal or destruction.

3. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall take the following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war:

   (a) survey and assess the threat posed by explosive remnants of war;

   (b) assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction;

   (c) mark and clear, remove or destroy explosive remnants of war;

   (d) take steps to mobilise resources to carry out these activities.

4. In conducting the above activities High Contracting Parties and parties to an armed conflict shall take into account international standards, including the International Mine Action Standards.

5. High Contracting Parties shall co-operate, where appropriate, both among themselves and with other states, relevant regional and international organisations and non-governmental organisations on the provision of inter alia technical, financial, material and human resources assistance including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil the provisions of this Article.

Article 4: Recording, retaining and transmission of information

1. High Contracting Parties and parties to an armed conflict shall to the maximum extent possible and as far as practicable record and retain information on the use of explosive ordnance or abandonment of explosive ordnance, to facilitate the rapid marking and clearance, removal or destruction of explosive remnants of war, risk education and the provision of relevant information to the party in control of the territory and to civilian populations in that territory.

2. High Contracting Parties and parties to an armed conflict which have used or abandoned explosive ordnance which may have become explosive remnants of war shall, without delay after the cessation of active hostilities and as far as practicable, subject to these parties' legitimate security interests, make available such information to the party or parties in control of the affected area, bilaterally or through a mutually agreed third party including *inter alia* the United Nations or, upon request, to other relevant organisations which the party providing the information is satisfied are or will be undertaking risk education and the marking and clearance, removal or destruction of explosive remnants of war in the affected area. [...]

Article 5: Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war

1. High Contracting Parties and parties to an armed conflict shall take all feasible precautions in the territory under their control affected by explosive remnants of war to protect the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war. Feasible precautions are those precautions which are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These precautions may include warnings, risk education to the civilian population, marking, fencing and monitoring of territory affected by explosive remnants of war, as set out in Part 2 of the Technical Annex.

Article 6: Provisions for the protection of humanitarian missions and organisations from the effects of explosive remnants of war

1. Each High Contracting Party and party to an armed conflict shall:

   (a) Protect, as far as feasible, from the effects of explosive remnants of war, humanitarian missions and organisations that are or will be operating in the area under the control of the High Contracting Party or party to an armed conflict and with that party's consent.

   (b) Upon request by such a humanitarian mission or organisation, provide, as far as feasible, information on the location of all explosive remnants of war that it is aware of in territory where the requesting humanitarian mission or organisation will operate or is operating.

2. The provisions of this Article are without prejudice to existing International Humanitarian Law or other international instruments as applicable or decisions by the Security Council of the United Nations which provide for a higher level of protection.

Article 7: Assistance with respect to existing explosive remnants of war

1. Each High Contracting Party has the right to seek and receive assistance, where appropriate, from other High Contracting Parties, from states non-party and relevant international organisations and institutions in dealing with the problems posed by existing explosive remnants of war.

2. Each High Contracting Party in a position to do so shall provide assistance in dealing with the problems posed by existing explosive remnants of war, as necessary and feasible. In so doing, High Contracting Parties shall also take into account the

humanitarian objectives of this Protocol, as well as international standards including the International Mine Action Standards.

Article 8: Co-operation and assistance

1. Each High Contracting Party in a position to do so shall provide assistance for the marking and clearance, removal or destruction of explosive remnants of war, and for risk education to civilian populations and related activities inter alia through the United Nations system, other relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.

2. Each High Contracting Party in a position to do so shall provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war. Such assistance may be provided inter alia through the United Nations system, relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.

3. Each High Contracting Party in a position to do so shall contribute to trust funds within the United Nations system, as well as other relevant trust funds, to facilitate the provision of assistance under this Protocol.

4. Each High Contracting Party shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information other than weapons related technology, necessary for the implementation of this Protocol. High Contracting Parties undertake to facilitate such exchanges in accordance with national legislation and shall not impose undue restrictions on the provision of clearance equipment and related technological information for humanitarian purposes.

5. Each High Contracting Party undertakes to provide information to the relevant databases on mine action established within the United Nations system, especially information concerning various means and technologies of clearance of explosive remnants of war, lists of experts, expert agencies or national points of contact on clearance of explosive remnants of war and, on a voluntary basis, technical information on relevant types of explosive ordnance.

6. High Contracting Parties may submit requests for assistance substantiated by relevant information to the United Nations, to other appropriate bodies or to other states. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organisations and non-governmental organisations.

7. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and in co-operation with the requesting High Contracting Party and other High Contracting Parties with responsibility as set out in Article 3 above, recommend the appropriate provision of assistance. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required, including possible contributions from the trust funds established within the United Nations system.

Article 9: Generic preventive measures

1. Bearing in mind the different situations and capacities, each High Contracting Party is encouraged to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war, [...]

2. Each High Contracting Party may, on a voluntary basis, exchange information related to efforts to promote and establish best practices in respect of paragraph 1 of this Article. [...]

Article 11: Compliance

1. Each High Contracting Party shall require that its armed forces and relevant agencies or departments issue appropriate instructions and operating procedures and that its personnel receive training consistent with the relevant provisions of this Protocol.

2. The High Contracting Parties undertake to consult each other and to co-operate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

Case No. 12, The Issue of Mercenaries

[*Also see* **Case No. 224,** Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea, p. 2362.]

THE CASE

A. Art. 47 of Protocol I

[**Source:** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; available on http://www.icrc.org/ihl]

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
   (a) is specially recruited locally or abroad in order to fight in an armed conflict;
   (b) does, in fact, take a direct part in the hostilities;
   (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
   (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
   (e) is not a member of the armed forces of a Party to the conflict; and
   (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

B. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989

[**Source:** United Nations, A/RES/44/34 (4 December 1989), available on http://www.icrc.org/ihl]

The States Parties to the present Convention, [...]

Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples,

Affirming that the recruitment, use, financing and training of mercenaries should be considered as offences of grave concern to all States and that any person committing any of these-offences should be either prosecuted or extradited [...],

Have agreed as follows:

Article 1: For the purposes of the present Convention,

1. A mercenary is any person who:
   (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
   (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
   (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
   (d) Is not a member of the armed forces of a party to the conflict; and
   (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
2. A mercenary is also any person who, in any other situation:
   (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violenceaimed at :
      (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
      (ii) Undermining the territorial integrity of a State;
   (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
   (c) Is neither a national nor a resident of the State against which such an act is directed;
   (d) Has not been sent by a State on official duty; and
   (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

Article 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention. [...]

Article 5

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.

2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.

3. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences. [...]

Article 9

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in the present Convention which are committed :

   (a) In its territory or on board a ship or aircraft registered in that State;

   (b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in that territory. [...]

Article 10

[...]

3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

   (a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, the State in whose territory he has his habitual residence;

   (b) To be visited by a representative of that State.

4. The provisions of paragraph 3 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 9, paragraph 1 (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender. [...]

Article 11

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the State in question. Applicable norms of international law should be taken into account. [...]

Article 16

The present Convention shall be applied without prejudice to:

(a) The rules relating to the international responsibility of States;

(b) The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war. [...]

[N.B.: On 1 March 2005, 26 States had ratified this convention, which entered into force on 20 October 2001]

C. UN Report submitted by M. E. Bernales Ballesteros, Special Rapporteur on the Question of the Use of Mercenaries

[**Source:** UN. E/CN.4/2004/15, 24 December 2003; available on http://www.unhchr.ch]

THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN DOMINATION OR FOREIGN OCCUPATION

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; report submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur

Executive summary

This is the final report submitted by Mr. Enrique Bernales Ballesteros as Special Rapporteur on the question of the use of mercenaries, after 16 years in the discharge of his mandate. The Special Rapporteur analyses the changes in mercenary activities, from activities against the exercise of the right of peoples to self-determination carried out by individual mercenaries or more or less informal groups of mercenaries, to their recruitment and use by extremist organizations, terrorist groups and organizations engaged in trafficking in people, migrants, arms and munitions, diamonds and precious stones, and drugs. In the context of these changes the Special Rapporteur considers the growth and expansion in the activities of private companies offering military assistance, consultancy and security services, which are now established on the five continents and some of which have recently obtained contracts worth tens of millions of United States dollars.

The Special Rapporteur analyses the use of mercenaries in the context of aggression against various African peoples and against national liberation movements by the South African apartheid regime, for covert operations in Central America, in attempts to overthrow the Government of Maldives, and to commit terrorist acts in Cuba, among others. He reviews his official missions since 1988, the difficulties encountered in efforts to eradicate mercenary activities, and, in particular, shortcomings in international legislation. To this end the report contains a proposal for a new legal definition of a mercenary formulated by the Special Rapporteur.

The report also analyses the progress made in Sierra Leone and the continuing difficulties in Côte d'Ivoire and Liberia with regard to the use of mercenaries in

West Africa. It contains information on the current status of ratifications of and accessions to the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The report ends with consideration of the difficulties and problems encountered by the Special Rapporteur in the discharge of his mandate and suggestions regarding the future of the mandate.

The Special Rapporteur concludes that the renewal of the mandate by the Commission on Human Rights is relevant to efforts to eradicate mercenary activities and to promote peace, international security and the protection of human rights. The new Special Rapporteur to be appointed in August 2004, should the mandate be extended, should continue to consider the question of the legal definition of a mercenary and should conduct the visits planned by the Special Rapporteur, as well as participate in various official missions sent by United Nations bodies. [...]

Introduction [...]

2. By resolution 2003/2 of 14 April 2003 the Commission [...] reaffirms [...] its condemnation of mercenary activities as a violation of the principle of self-determination to which all peoples have a right, pointing out that such activities constitute a danger to peace and security in developing countries, particularly in Africa and in small island States. [...]
3. The Commission, pursuant to the investigations conducted by the Special Rapporteur, recognized that armed conflicts, terrorism, arms trafficking and covert operations by third Powers, inter alia, encourage the demand on the global market for mercenaries. [...]
4. The Commission reaffirmed, inter alia, that the use of mercenaries and their recruitment, financing and training were causes for grave concern to all States and violated the purposes and principles enshrined in the Charter of the United Nations. It welcomed the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; it welcomed the cooperation extended by those countries that had received a visit from the Special Rapporteur and welcomed the adoption by some States of national legislation that restricted the recruitment, assembly, financing, training and transit of mercenaries.
5. The Commission also requested the Special Rapporteur to hold consultations on implementation of the resolution and to report, at its sixtieth session, with specific recommendations, his findings on the use of mercenaries. [...]
6. The Commission called upon all States to consider taking the necessary action to ratify or accede to the International Convention; it invited them to investigate the possibility of mercenary involvement whenever and wherever criminal acts occurred; and it urged them to cooperate fully with the Special Rapporteur in the fulfilment of his mandate. [...]

II. MERCENARY ACTIVITIES IN AFRICA [...]

21. The destabilizing activities undertaken under apartheid affected all southern Africa. In South Africa and outside South African territory, members of the

African National Congress (ANC) were persecuted and, in more than one case, murdered by mercenaries. During the 1990s South Africa freed itself from that regime, which was replaced by a multiracial democracy that respected its various ethnic communities and was firmly committed to the protection of human rights. In that new context the Special Rapporteur visited South Africa in 1997. Today South Africa has interesting legislation that, in particular, prohibits any kind of mercenary activity, the country having moved forward in the regulation and supervision of private companies that offer security services internationally so as to prevent them from employing mercenaries.

22. The situation in West Africa is of particular concern to the Special Rapporteur. The presence of mercenaries has been observed in the armed conflict that has affected Sierra Leone since the 1996 elections, particularly during the so-called "cleansing operation" in 1998 and the invasion of Freetown in January 1999. [...]

23. Sierra Leone is well on the way towards peace and an improved human rights situation. Nevertheless violent acts continue in some areas, particularly along the border with Liberia. In January 2003 a village in Kailahun district was attacked by irregular Liberian armed groups. The situation in the diamond-producing areas is also disquieting, in that it has not proven possible to consolidate State authority and the presence of mercenaries guarding installations has been observed. [...]

25. The Special Rapporteur was informed that at the end of August 2003 a group of mercenaries that was preparing to travel to Côte d'Ivoire was arrested by the French police at a Paris airport. The group had reportedly been recruited by Sergeant Major Ibrahim Coulibaly. [...]

III. DEVELOPMENT OF MERCENARY ACTIVITIES AND OF THE MANDATE

26. The mandate on the use of mercenaries was created in 1987 in a context in which it was necessary to reaffirm the right of peoples to self-determination, particularly as it was threatened by mercenary activities in Africa. However, the Special Rapporteur soon needed to concern himself with the presence of mercenaries in Central America, another centre of conflict at that time. Guatemala and El Salvador were experiencing internal armed conflict, and in Nicaragua the Sandinista National Liberation Front, which had succeeded in freeing the country from the bloody Somoza dictatorship, had to confront the Contras. The Iran-Contra scandal revealed the involvement of mercenaries in the conflict. The Special Rapporteur received numerous reports of this on his visits to the United States of America and Nicaragua in 1989 and investigated various covert operations.

27. In the early 1990s, the Special Rapporteur had to make a visit to Maldives, following an attempted coup d'état by mercenaries and young Sri Lankans belonging to the Tamil ethnic group. The Special Rapporteur was thus able to observe the particular risk to which small island developing States, facing the possibility of external aggression involving a mercenary element, are exposed. The Special Rapporteur also observed that any State, organiza-

tion, or rich political adventurer with territorial ambition or designs on power could relatively easily arm groups of mercenaries by recruiting inexperienced young men in exchange for payment.

28. The disappearance of bipolar tensions and the end of the cold war gave birth to the hope that more favourable conditions would arise for greater respect for the self-determination of peoples and for a gradual lessening of armed conflict. Regrettably this has not come to pass. On the contrary, new sources of tension, stoked by various dominant interests, have emerged. The use in practice of mercenaries has increased, as has their use in the commission of violations of human rights and of international humanitarian law. The disappearance of the Soviet Union generated friction between some of the sovereign, independent States that emerged on its former territory. In the former Yugoslavia the "weekend mercenaries" appeared, and in both Bosnia and Herzegovina and Afghanistan the presence of mujahedin, or Muslim combatants, fighting for a cause and not for money, has been observed. [...]

29. Subsequently, the Special Rapporteur was called upon to consider the new problem represented by the use, recruitment and training of mercenaries by private military security companies offering their services on the international market. He analysed the activities of Executive Outcomes in Angola and Sierra Leone and of Sandline International in Sierra Leone and Papua New Guinea. Today hundreds of new companies have emerged that have developed the model for the delivery of international military security services; they now operate on the five continents. The downsizing of a number of national armies has given rise to an abundant supply of well-trained military professionals, who suddenly lost their jobs.

30. Whether acting individually, or in the employ of contemporary multi-purpose security companies, the mercenary is generally present as a violator of human rights. On occasion he acts as a professional agent in terrorist operations; he takes part in illicit trafficking; he commits acts of sabotage, among others. The mercenary is an element in all kinds of covert operation. In comparison with the cost of mobilizing armed forces, the mercenary offers an inexpensive means of conducting operations, and is available to governments, transnational corporations, organizations, sects and groups, simply for payment. The mercenary is hired because he has no scruples in riding roughshod over the norms of international humanitarian law or even in committing serious crimes and human rights violations. The Special Rapporteur conducted an in-depth study of military security companies during a visit in January 1999, at the invitation of the British Government, to the United Kingdom of Great Britain and Northern Ireland.

31. At the Special Rapporteur's suggestion, the issue of military security companies was taken up at the two meetings of experts on mercenaries organized by the Office of the United Nations High Commissioner for Human Rights in 2001 and 2002. There are continued reports of crimes and offences committed by employees of these companies, including murders, rapes and kidnappings of children, which generally go completely unpunished. International law and domestic legislation in States must

regulate the activities of these companies and establish oversight and monitoring mechanisms that clearly differentiate military consultancy services from participation in armed conflicts and from anything that could be considered intervention in matters of public order and security that are the exclusive responsibility of the State. [...]

IV. TERRORISM AND MERCENARY ACTIVITIES

35. On several occasions the Special Rapporteur has requested the inclusion of the link between terrorism and mercenary activities in his mandate. The Special Rapporteur dealt with this issue in his report for 2000 (E/CN.4/2001/19, paras. 50-61). Nothing prevents mercenaries, for payment, from taking part in the commission of a terrorist act, understood as a criminal act committed for ideological reasons with claims of political legitimacy, and with the aim of promoting collective terror. The possibility of mercenary involvement should not be discarded in the investigation of any terrorist attack.

36. The terrorist act does not necessarily need to be carried out by a member of the clandestine organization. Such organizations may make use of mercenaries with sound experience in the military arts, piloting of aircraft, handling of sophisticated weapons, preparation of high explosives, etc. These relationships are not, however, organizational or ongoing. Yet those who plan terror do not always rely on fanatical devotees to the cause. This connection has been overlooked in the recent, extensive international counter-terrorism legislation. The involvement of mercenaries in the commission of terrorist acts must always be investigated. The impunity of mercenaries must not continue.

V. PROPOSAL FOR A NEW LEGAL DEFINITION OF A MERCENARY

37. In the course of his work, the Special Rapporteur has found that one of the greatest problems in combating mercenary activities is the absence of a clear, unambiguous and comprehensive legal definition of a mercenary.

38. Article 47 of Protocol I Additional to the Geneva Conventions of 1949 contains a definition of a mercenary intended to deny the mercenary the rights of a combatant or of a prisoner of war. Given its nature as an instrument of international humanitarian law, the Protocol does not legislate on mercenaries themselves, but on their possible involvement in an armed conflict. It restricts itself to regulation of a specific situation. It provides what is to be understood by mercenary for this purpose, stipulating a set of elements that must be present, cumulatively, to determine who is and who is not a mercenary. The loopholes and shortcomings in the international legislation are compounded by the fact that the domestic legislation of most States does not criminalize mercenary activity. A mercenary may become a social outcast, but the law can take no action against him.

39. In 1989, by its resolution 44/34, the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. However, the Convention entered into force only

in 2001. Some of its provisions could be considered progress towards eradicating mercenary activity, since the International Convention includes provisions that facilitate the prosecution of mercenaries and promote inter-State cooperation in that regard. But the Convention essentially maintains the concurrent elements required to define a mercenary. Article 1, paragraph 1, repeats almost word for word the definition of mercenary found in article 47 of Additional Protocol I, while article 1, paragraph 2, refers to the use of mercenaries in concerted acts of violence against the constitutional order or territorial integrity of a State.

40. International legislation contains a number of loopholes regarding the requirements relating to nationality, residence, changes in nationality to conceal identity as a mercenary, the participation of mercenaries in illicit trafficking or in organized crime, and, lastly their participation in terrorist acts. [...]

43. The Special Rapporteur has formulated a proposal for a new legal definition of a mercenary, with the following major elements:

(a) Empirical evidence shows that because international law does not deal thoroughly enough with mercenary activity, such activities have expanded. In cases in which mercenaries have been brought to trial for crimes such as aggravated homicide, the fact that they were mercenaries was never taken into account, even as an aggravating circumstance;

(b) Mercenary activities seriously violate one or more legal rights. The motivation for a mercenary's activities always threatens fundamental rights such as the right to life, physical integrity or freedom of individuals. Such activities also threaten peace, political stability, the legal order and the rational exploitation of natural resources;

(c) Mercenary activity must be considered a crime in and of itself and be internationally prosecutable, both because it violates human rights and because it affects the self determination of peoples. In this crime, the mercenary who participates directly in the commission of the crime must be considered a perpetrator with direct criminal responsibility. It must also be borne in mind that mercenary activity is a complex crime in which criminal responsibility falls upon those who recruited, employed, trained and financed the mercenary or mercenaries, and upon those who planned and ordered his criminal activity;

(d) Where mercenary activity is proved to have occurred because of a decision by a third Power which uses mercenaries to intervene in another State, that activity must be considered a covert crime. Hiring mercenaries in order to avoid acting directly cannot be considered a mitigating factor, as international law tolerates neither direct nor indirect intervention. States which use mercenaries to attack another State or to commit unlawful acts against persons must be punished;

(e) Mercenaries themselves use their professional know-how and sell it for the commission of a crime which involves a dual motivation: that of the purchaser, and that of the person who, for payment, sells himself;

(f) The term "mercenary" signifies, and applies to, persons with military training who offer paid professional services to take part in criminal activity. Mercenary activity has usually involved intervention in an armed conflict in a country other than the mercenary's own;

(g) The presence of mercenaries has been noted in such activities as arms and drug trafficking, illicit trafficking in general, terrorism, destabilization of legitimate governments, acts related to forcible control of valuable natural resources, selective assassination, abduction and other organized criminal activities. What is involved, therefore, is an activity that can take multiple forms, all of them criminal, where the highly skilled professionalism of the agent is what is prized and paid for;

(h) The new legal definition of a mercenary includes the use of mercenaries by private companies offering military assistance, consultancy and security services internationally, which generally employ them in countries experiencing internal armed conflict. Accordingly, there would need to be an international legal method of prohibiting these companies from hiring mercenaries and from engaging in any type of intervention that would mean their direct participation in military operations in the context of international or internal armed conflicts;

(i) [...] The principle that should be adopted in elaborating the new legal definition of mercenary is that the State is not authorized to recruit and employ mercenaries. International law and the constitutional law of each State assign the tasks of security, public order and defence to the regular military and police forces, by virtue of the concept of sovereignty;

(j) The proposal for a new legal definition of a mercenary should also take into account the fact that the current norms of international and customary law referring to mercenaries and their activities condemn mercenary acts in the broad sense of paid military services that are not subject to the humanitarian norms applicable in armed conflicts - services which usually lead to the commission of war crimes and human rights violations;

(k) The provisions in force include a requirement that a mercenary be a "foreigner" in the affected country, along with other requirements for defining a person involved in such acts asa mercenary. This requirement of being a foreigner should be reviewed, so that the definition rests mainly on the nature and purpose of the unlawful act to which an agent is linked by means of a payment. To the question of whether a national who attacks his own country and commits crimes can be defined as a mercenary, the reply would need to be affirmative if that national is linked to another State or to an organization of another State which has paid him to intervene and commit crimes against the country of which he is a national. Such a paid criminal act would be a mercenary act because of its nature and purpose.

44. First, the concept of a mercenary should be inclusive; that is, it should cover the participation of mercenaries in both international and internal armed

conflicts. Second, and going well beyond article 47 of Additional Protocol I, the definition should include both the mercenary as an individual agent and mercenarism as a concept related to the responsibility of the State and organizations concerned in the planning and execution of mercenary acts. Third, mercenary activity should be considered not only in relation to the self-determination of peoples but also as encompassing a broad range of actions, including the destabilization of constitutional governments, various kinds of illicit trafficking, terrorism and violations of fundamental rights. [...]

46. The proposal should affect neither the status nor the treatment of the obligations of mercenaries and of the parties to a conflict under international humanitarian law; in other words, the amendment should be debated and approved within the text of the Convention, without prejudice to article 47 of Additional Protocol I to the 1949 Geneva Conventions.

47. The Special Rapporteur has proposed the following amendments to the first three articles of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries:

"Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

   (a) Is specially recruited locally or abroad in order to participate in an armed conflict or in any of the crimes set forth in article 3 of this Convention;

   (b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;

   (c) Is motivated to participate in an armed conflict by profit or the desire for private gain;

   (d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

   (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

      (i) Overthrowing a government or otherwise undermining the constitutional, legal, economic or financial order or the valuable natural resources of a State; or

      (ii) Undermining the territorial integrity and basic territorial infrastructure of a State;

      (iii) Committing an attack against the life, integrity or security of persons or committing terrorist acts;

(iv) Denying self-determination or maintaining racist regimes or foreign occupation;

(b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;

(c) Is motivated to participate in an armed conflict by profit or the desire for private gain;

(d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

Article 3

1. A mercenary, as defined in article 1 of this Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an international crime for the purposes of the Convention. A mercenary who participates in the following acts also commits an internationally prosecutable offence: destabilization of legitimate governments, terrorism, trafficking in persons, drugs and arms and any other illicit trafficking, sabotage, selective assassination, transnational organized crime, forcible control of valuable natural resources and unlawful possession of nuclear or bacteriological materials.

2. Nothing in this article limits the scope of application of article 4 of this Convention.

3. Where a person is convicted of an offence under article 1 of the Convention, any dominant motive of the perpetrator should be taken into account when sentencing the offender."

VI. CURRENT STATUS OF THE INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES

48. The International Convention adopted by the General Assembly on 4 December 1989 entered into force on 20 October 2001 when the twenty-second instrument of ratification or accession was deposited with the Secretary-General of the United Nations. [...]

VII. COMMENTS ON CONTINUANCE OF THE MANDATE [...]

A. Difficulties and problems encountered in discharge of the mandate

52. Unlike other thematic mandates discharged within the established framework of an international legal instrument under which reality can be verified, the mandate on the use of mercenaries lacks a clear and precise legal framework. One chapter in this report analyses this question and formulates proposals thereon. The limitations of the definition of a mercenary contained in the 1997 Protocol I Additional to the General Conventions of 1949, the shortcomings in the International Convention and the general lack of national legislation on the subject and of precedent involving cases of mercenaries who have been tried and convicted constitute serious lacunae in the work of analysis and identification of situations that the mandate should cover.

53. The Special Rapporteur was called upon to make good this deficiency, by having recourse to international customary law, legal doctrine, and expert views, and by seeking the opinion of Governments, jurists, politicians in government posts and members of international and non-governmental organizations. Unfortunately the scientific literature on the matter is limited, and the available material comprises newspaper articles, television reports, fictional accounts, leaflets, and other materials that deal superficially with the topic of mercenaries. Popular imagination has been fed by the belief that the mercenary is a redeeming hero, a being who kills evil oppressors without let or hindrance and whose watchword is freedom. The criminal nature of mercenary activities is hidden. These widespread beliefs have had an impact on the work of the Special Rapporteur, particularly on some missions, where he has suffered from a lack of understanding and ideological attacks on his work.

54. In interviews that he conducted with young men held in prison on charges of being mercenaries, the Special Rapporteur noted the damage created by heroic propaganda extolling mercenaries, stoked by low quality literature in Western countries. These young men said that they felt like superheroes of freedom. Their awareness was generally clouded when they acted as criminal agents. They accepted that they had received money for the commission of their crimes, but not that they had acted as mercenaries.

55. In any event, the confessions of these young men indicated the existence of complex networks for recruitment, hiring and military and ideological training, and of links with paramilitary organizations, extremist groups and intelligence services. It is very difficult to disentangle these complex networks and connections. It is very difficult to gain access to this level, well protected as it is. The Special Rapporteur has had to work for the most part on the basis of confessions, reports by third parties, State investigations, circumstantial evidence and logical inferences.

56. The development in the modalities of mercenarism revealed by the study of international mercenary activities is a further complex issue broached by the Special Rapporteur. The Special Rapporteur began his work by studying mercenary aggression against the exercise of the right to self-determination

of peoples, particularly in countries in transition, countries consolidating their status as fully sovereign and independent States. These were criminal activities carried out against national liberation movements by mercenaries in the service of third Powers, mercenaries who promoted secession, conducted destabilizing activities and committed acts of terrorism. Soon the Special Rapporteur had to concern himself with new mercenary activities and the appearance of a type of mercenary that behaves as a criminal offering multiple services in multiple roles. The mercenary has become a functional element in the crime, hired by unscrupulous agents who make the crime or offence a means of attaining their objectives and combating those who oppose them.

57. Mercenaries are used by drug cartels, terrorist organizations, organized criminal gangs and organizations engaging in trafficking in persons, weapons, diamonds and precious stones, among other things. They are also used by legally constituted private companies offering military security and assistance services on the international market. The Special Rapporteur has noted the growth and diversification of these companies, which are today active on the five continents. Their publicity and propaganda services even go so far as to represent them as alternatives to regular armed forces, and the Special Rapporteur is aware of treatises that propose the replacement of government forces in international peacekeeping operations by such private companies. [...]

B. Suggestions as to the future of the mandate

60. On concluding his mandate after 16 years and in the light of the experience he has acquired, the Special Rapporteur believes that the mandate should be kept up and renewed by the Commission on Human Rights. Clearly, the mandate has grown over the years in terms of its analytical scope and its status as a thematic mandate of the Commission should reflect this broad perspective. [...]

VIII. CONCLUSIONS

63. At the conclusion of 16 years and in submitting his final report to the Commission on Human Rights, the Special Rapporteur notes that despite efforts by the United Nations and inter-State regional organizations to combat mercenary activities and curtail them as far as possible, such activities have not disappeared. On the one hand, the traditional type of mercenary intervention which impedes the exercise of the right of peoples to self-determination remains; on the other hand, there are the beginnings of a process of change, in which the mercenary becomes a multi-role, multi-purpose professional, recruited, hired and trained to commit criminal acts and violate human rights.

64. Mercenary activity contravenes international law and involves a transaction that can affect persons, people and countries in terms of their fundamental rights. Whatever the modality, the use of mercenaries and mercenary activities themselves must be prohibited. Such prohibition must include

effective sanctions against those who recruit, hire, train, finance and allow the gathering, assembly or transit of mercenaries.

65. Over his mandate the Special Rapporteur has observed that the international legal instruments are deficient or have lacunae that impede their application. For this reason the Special Rapporteur is of the view that there is a need for amendment of the international legislation in this area and has proposed a new, more precise legal definition of a mercenary. [...]

67. The Special Rapporteur suggests that private companies offering military assistance, consultancy and security services on the international market should be regulated and placed under international supervision. They should be warned that the recruitment of mercenaries constitutes a violation of international law. Accordingly the legal instruments that allow effective legal prosecution of both the mercenary agent and of the company that hires and employs him must be refined. A particular concern must be for the crimes and offences committed by employees of such companies not to go unpunished, as is usually the case.

68. In view of the persistent use of mercenaries for the commission of terrorist acts and various criminal activities, the mechanisms and procedures existing in various United Nations bodies and in regional organizations to combat the presence and use of mercenaries must be strengthened. This strengthening must include such aspects as the link between mercenaries and terrorism, and the participation of mercenaries in organized crime and illicit trafficking.

69. Maintenance and renewal of this thematic mandate is in the interest of peace, international security and respect for human rights. The Special Rapporteur trusts that in future the mandate will enjoy firm support and broad consensus among all member States.

IX. RECOMMENDATIONS

70. The Special Rapporteur recommends that the Commission on Human Rights, cognizant of the persistence of mercenarism and its expansion and spread, reaffirm its vigorous condemnation of the use, recruitment, financing, training, assembly and transit of mercenaries. There is an urgent need to regulate private military assistance, consultancy and security companies and establish criminal liability for members of such companies.

71. It is recommended that the Commission reaffirm its concern at the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The Commission should reaffirm that this subject falls clearly and unambiguously within its competence.

72. The Commission should reiterate its appeal to all States to take appropriate measures and to exercise the maximum vigilance against the threat posed by mercenary activities.

73. It is recommended that in renewing the mandate, should the Commission so decide, the questions currently under consideration should remain so, so

that outstanding issues, such as the proposal for a new legal definition of a mercenary and the pending visits, may be successfully concluded.

74. Consideration should be given to participation by the Special Rapporteur on the question of the use of mercenaries in United Nations working groups and missions, particularly to countries affected by problems of political instability, where the presence of mercenaries in their territory has been observed.

75. It is recommended that the Commission reiterate its appeal to all States to consider the possibility of taking the necessary steps to ratify or accede to the 1989 International Convention.

76. The Commission should support the decision to circulate among States the new proposal for a legal definition of a mercenary, formulated by the Special Rapporteur, with the suggestion that it be studied by States and that they formulate positions thereon.

77. The States parties to the Convention and any other State Member of the United Nations interested in understanding the nature and scope of the amendment to the legal definition of a mercenary proposed by the Special Rapporteur should maintain cooperation with the Special Rapporteur. The new Special Rapporteur should remain seized of this matter with a view to strengthening efforts to counter mercenary activities.

DISCUSSION

1. a. Which dangers arise from the phenomenon of mercenarism? For the exercise of the right to self-determination? How do the UN Convention, Art. 47 of Protocol I, and the UN Special Rapporteur address these dangers?

   b. Why should only foreigners come under the definition of mercenaries? Why only those motivated by profit?

   c. Why does the Special Rapporteur assume that mercenaries commit more war crimes and human rights violations than other participants in armed conflicts?

2. a. Is it conceivable that a mercenary, as defined in the UN Convention, fights in favour of self-determination of a people or a "legitimate government"? What would be the status of such a mercenary under Art. 47 of Protocol I? Under the UN Convention? What opinion would the UN Special Rapporteur have about such a mercenary? Would he tolerate mercenaries who defend a "legitimate government" or the "territorial integrity and basic territorial infrastructure of a State", or who fight against an "illegitimate government"?

   b. Does Art. 47 of Protocol I prohibit the use of mercenaries? Is it a violation of Art. 47 or any other rule of IHL to be a mercenary? What are the consequences of Art. 47 for a mercenary? Does Art. 47 (1) state the obvious, taking into account Art. 47 (2) (e)?

3. a. What do you think of the amended articles of the UN Convention suggested by the Rapporteur (*See* paras. 43 and 47 of the Report)? From the standpoint of IHL? From the perspective of fighting the phenomenon of mercenaries?

b. Are the suggested new Arts. 1 (2) and 3 dealing with a *ius in bello* or with a *ius ad bellum* issue?

c. Is suggested Art. 1 (2) applicable (only or equally) in armed conflicts? If it is (as the term "conflict" in letter (b) and "armed conflict" in letter (c) suggest), would it be admissible to deprive anyone from IHL protection because he or she is fighting for the aims mentioned in letter (a)?

d. May a person who has combatant status under IHL be prosecuted for some or all the crimes mentioned under the suggested Art. 3? May a person who is protected by IHL of non-international armed conflicts be prosecuted for such crimes?

4. a. Are those persons accused of being mercenaries and who fall into the hands of the enemy in an international armed conflict protected persons under IHL? Are they protected civilians or prisoners of war? "Should" the judicial guarantees provided for in international law "be taken into account" or must they be respected? (*Cf.* Art. 11 of the UN Convention.) Are they applicable? (*Cf.* Arts. 4, 5 (2) and 82-108 of Convention III, Arts. 4 (1) and (4) and 5 of Convention IV and Art. 47 of Protocol I.)

b. If individuals qualify as mercenaries and are detained by the enemy during an international armed conflict: are they protected civilians? May the ICRC visit them? (*Cf.* Arts. 4 (1) and (4), 5 and 143 of Convention IV and Art. 47 of Protocol I.)

5. Does the fact that Protocol I contains the definition of a mercenary reduce the possibilities of this provision's application, as only States Parties to Protocol I are bound to it? What is the status of a mercenary as defined in Art. 47 of Protocol I in the hands of a State not Party to Protocol I? (*Cf.* Arts. 4 of Conventions III and IV.)

6. Does the status of mercenary exist in non-international armed conflicts? Would it be useful to introduce a rule similar to Art. 47 into the law of non-international armed conflicts? Does the absence of such a rule make it more difficult to punish mercenaries?

7. What is the probability that a person falls under Art. 47 of Protocol I? Can a State avoid that anyone fighting for it falls under Art. 47?

8. a. Could an intervention by mercenaries in an armed conflict make that conflict an international armed conflict between the mercenaries' State of origin and the State in which the mercenaries are about to fight?

b. If mercenarism was to be radically prevented, what should be done? Should not the prohibition on mercenaries' activities have been based on a prohibition at the State level and not, or not solely, at the individual level? Why does IHL not have any provision on that?

9. Does the prohibition of mercenarism imply that the general trend to privatise the fulfilment of State tasks may not concern the defence and security sector? Which risks of privatisation of defence, security and police activities exist? How could these activities be privatised safeguarding the values of IHL and human rights?

Document No. 13, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, January 13, 1993

[**Source:** *ILM*, vol. 32 (3), 1993, pp. 800-873; available on http://www.icrc.org/ihl]

PREAMBLE

The State Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of massdestruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17June 1925 (the Geneva Protocol of 1925),

Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington, on 10 April 1972,

Bearing in mind the objective contained in Article IX of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

Considering that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

Desiring to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention inorder to enhance the economic and technological development of all States Parties,

Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

Have agreed as follows:

Article 1: General obligations

1. Each State Party to this Convention undertakes never under any circumstances:
   (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
   (b) To use chemical weapons;
   (c) To engage in any military preparations to use chemical weapons;
   (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.
4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
5. Each State Party undertakes not to use riot control agents as a method of warfare.

Article 2: Definitions and criteria

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:
   (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
   (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
   (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

2. "Toxic Chemical" means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

3. "Precursor" means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

4. "Key Component of Binary or Multicomponent Chemical Systems" (hereinafter referred to as "key component") means:
   The precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. "Old Chemical Weapons" means: [...]

6. "Abandoned Chemical Weapons" means: [...]

7. "Riot Control Agent" means:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

8. "Chemical Weapons Production Facility":
   (a) Means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:
      (i) As part of the stage in the production of chemicals ("final technological stage") where the material flows would contain, when the equipment is in operation:
         (1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or
         (2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under the jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes; or
      (ii) For filling chemical weapons, including, inter alia, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitar munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;
   (b) Does not mean:
      (i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;
      (ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 per cent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or
      (iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

9. "Purposes Not Prohibited Under this Convention" means:
   (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(d) Law enforcement including domestic riot control purposes. [...]

Article 3: Declarations

1. Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, the following declarations, in which it shall:

(a) With respect to chemical weapons:

(i) Declare whether it owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or control;

(ii) Specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, [...];

(iii) Report any chemical weapons on its territory that are owned and possessed by another State and located in any place under the jurisdiction or control of another State, [...];

(iv) Declare whether it has transferred or received, directly or indirectly, any chemical weapons since 1 January 1946 and specify the transfer or receipt of such weapons, [...];

(v) Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control, [...];

(b) With respect to old chemical weapons and abandoned chemical weapons:

(i) Declare whether it has on its territory old chemical weapons and provide all available information [...];

(ii) Declare whether there are abandoned chemical weapons on its territory and provide all available information [...];

(iii) Declare whether it has abandoned chemical weapons on the territory of other States and provide all available information [...];

(c) With respect to chemical weapons production facilities:

(i) Declare whether it has or has had any chemical weapons production facility under its ownership or possession, or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946;

(ii) Specify any chemical weapons production facility it has or has had under its ownership or possession or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946, [...];

(iii) Report any chemical weapons production facility on its territory that another State has or has had under its ownership and possession and that is or has been located in any place under the jurisdiction or control of another State at any time since 1 January 1946, [...];

(iv) Declare whether it has transferred or received, directly or indirectly, any equipment for the production of chemical weapons since 1 January 1946 and specify the transfer or receipt of such equipment, [...];

(v) Provide its general plan for destruction of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control [...];

(vi) Specify actions to be taken for closure of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, [...];

(vii) Provide its general plan for any temporary conversion of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, into chemical weapons destruction facility, [...];

(d) With respect to other facilities: Specify the precise location, nature and general scope of activities of any facility or establishment under its ownership or possession, or located in any place under its jurisdiction or control, and that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons. Such declaration shall include, inter alia, laboratories and test and evaluation sites;

(e) With respect to riot control agents: Specify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective.

2. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

Article 4: Chemical weapons

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments, in accordance with Part IV(A) of the Verification Annex.

4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.

5. Each State Party shall provide access to any chemical weapons destruction facilities and their storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.

6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate. [...]

16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7. [...]

Article 5: Chemical weapons production facilities

1. The provisions of this Article and the detailed procedures for its implementation shall apply to any and all chemical weapons production facilities owned or possessed by a State Party, or that are located in any place under its jurisdiction or control.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All chemical weapons production facilities specified in paragraph 1 shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V of the Verification Annex.

4. Each State Party shall cease immediately all activity at chemical weapons production facilities specified in paragraph 1, except activity required for closure.

5. No State Party shall construct any new chemical weapons production facilities or modify any existing facilities for the purpose of chemical weapons production or for any other activity prohibited under this Convention.

6. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (c), has been submitted, provide access to chemical weapons production facilities specified in paragraph 1, for the purpose of systematic verification of the declaration through on-site inspection.

7. Each State Party shall:

   (a) Close, not later than 90 days after this Convention enters into force for it, all chemical weapons production facilities specified in paragraph 1, in accordance with Part V of the Verification Annex, and give notice thereof; and

   (b) Provide access to chemical weapons production facilities specified in paragraph 1, subsequent to closure, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments in order to ensure that the facility remains closed and is subsequently destroyed.

8. Each State Party shall destroy all chemical weapons production facilities specified in paragraph 1 and related facilities and equipment, pursuant to the Verification Annex and in accordance with an agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than one

year after this Convention enters into force for it, and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such facilities at a faster rate.

9. Each State Party shall:

   (a) Submit detailed plans for destruction of chemical weapons production facilities specified in paragraph 1, not later than 180 days before the destruction of each facility begins;

   (b) Submit declarations annually regarding the implementation of its plans for the destruction of all chemical weapons production facilities specified in paragraph 1, not later than 90 days after the end of each annual destruction period; and

   (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons production facilities specified in paragraph 1 have been destroyed. [...]

14. The chemical weapons production facility shall be converted in such a manner that the converted facility is not more capable of being reconverted into a chemical weapons production facility than any other facility used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes not involving chemicals listed in Schedule 1.

15. All converted facilities shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V, Section D, of the Verification Annex. [...]

19. Each State Party shall meet the costs of destruction of chemical weapons production facilities it is obliged to destroy. It shall also meet the costs of verification under this Article unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 16, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

Article 6: Activities not prohibited under this convention

[...]

Article 7: National implementation measures

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

   (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

   (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other State Parties in this regard.

Relations between the State Party and the Organization

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. [...]

[...]

7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

Article 8: The Organization

A. General Provisions

1. The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

2. All States Parties to this Convention shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization.

3. The seat of the Headquarters of the Organization shall be The Hague, Kingdom of the Netherlands. [...]

B. The Conference of the States Parties

[...]

C. The Executive Council

[...]

D. The Technical Secretariat

[...]

Article 9: Consultations, cooperation and fact-finding

[...]

2. Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. A State Party which receives a request from another State Party for clarification of any matter which the requesting State Party believes causes such a doubt or concern shall provide the requesting State Party as soon as possible, but in any case not later than 10 days after the request, with information sufficient to answer the doubt or concern raised along with an explanation of how the information provided resolves the matter. [...]

Procedure for requesting clarification [...]

Procedures for challenge inspections

8. Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex. [...]

15. The Director-General shall transmit the inspection request to the inspected State Party not less than 12 hours before the planned arrival of the inspection team at the point of entry.

16. After having received the inspection request, the Executive Council shall take cognizance of the Director-General's actions on the request and shall keep the case under its consideration throughout the inspection procedure. However, its deliberations shall not delay the inspection process.

17. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in paragraph 8. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly. [...]

22. The Executive Council shall, in accordance with its powers and functions, review the final report of the inspection team as soon as it is presented, and address any concerns as to:

    (a) Whether any non-compliance has occurred;

    (b) Whether the request had been within the scope of this Convention; and

    (c) Whether the right to request a challenge inspection had been abused.

23. If the Executive Council reaches the conclusion, in keeping with its powers and functions, that further action may be necessary with regard to paragraph 22, it shall

take the appropriate measures to redress the situation and to ensure compliance with this Convention, including specific recommendations to the Conference. In the case of abuse, the Executive Council shall examine whether the requesting State Party should bear any of the financial implications of the challenge inspection. [...]

Article 10: Assistance and protection against chemical weapons

[...]

Article 11: Economic and technological development

[...]

Article 12: Measures to redress a situation and to ensure compliance, including sanctions

1. The Conference shall take the necessary measures, as set forth in paragraphs 2, 3 and 4, to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.
2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, inter alia, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention.
3. In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law.
4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.

Article 13: Relation to other international agreements

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.

Article 14: Settlement of disputes

[...]

Article 15: Amendments

[...]

Article 16: Duration and withdrawal

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

3. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.

Article 17: Status of the annexes

The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes. [...]

Article 21: Entry into force

1. This Convention shall enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature. [...]

Article 22: Reservations

The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose. [...]

Case No. 14, Convention on the Safety of UN Personnel

THE CASE

[**Source:** UN Doc. Annex to Resolution 49/59 (December 9, 1994).]

Convention on the Safety of United Nations and Associated Personnel

The States Parties to this Convention,

Deeply concerned over the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel,

Bearing in mind that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed, [...]

Acknowledging that the effectiveness and safety of United Nations operations are enhanced where such operations are conducted with the consent and cooperation of the host State, [...]

Have agreed as follows:

Article 1: Definitions

For the purposes of this Convention:

(a) "United Nations personnel" means:

(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;

(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

(b) "Associated personnel" means:

(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;

(ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;

(iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfilment of the mandate of a United Nations operation;

(c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:

(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or

(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;

(d) "Host State" means a State in whose territory a United Nations operation is conducted; [...]

Article 2: Scope of application

1. This Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in article 1.

2. This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies. [...]

Article 6: Respect for laws and regulations

1. Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, United Nations and associated personnel shall:
   (a) Respect the laws and regulations of the host State and the transit State; and
   (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.
2. The Secretary-General of the United Nations shall take all appropriate measures to ensure the observance of these obligations.

Article 7: Duty to ensure the safety and security of United Nations and associated personnel

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.
3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures.

Article 8: Duty to release or return United Nations and associated personnel captured or detained

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

Article 9: Crimes against United Nations and associated personnel

1. The intentional commission of:
   (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
   (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
   (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
   (d) An attempt to commit any such attack; and
   (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.

2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

Article 10: Establishment of jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases: [...]

Article 13: Measures to ensure prosecution or extradition

1. Where the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its national law to ensure that person's presence for the purpose of prosecution or extradition. [...]

Article 14: Prosecution of alleged offenders

[...]

Article 15: Extradition of alleged offenders

[...]

Article 16: Mutual assistance in criminal matters

[...]

Article 17: Fair treatment

1. Any person regarding whom investigations or proceedings are being carried out in connection with any of the crimes set out in article 9 shall be guaranteed fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.
2. Any alleged offender shall be entitled:
   (a) To communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights; and
   (b) To be visited by a representative of that State or those States. [...]

Article 19: Dissemination

The States Parties undertake to disseminate this Convention as widely as possible and, in particular, to include the study thereof, as well as relevant provisions of international humanitarian law, in their programmes of military instruction.

Article 20: Savings clauses

Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards;

(b) The rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories;

(c) The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operation;

(d) The right of States which voluntarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or

(e) The entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to peace-keeping service by persons voluntarily contributed by States to United Nations operations.

Article 21: Right of self-defence

Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence. [...]

DISCUSSION

1. Is this Convention an instrument of IHL? Is it rather a treaty of *ius ad bellum*? Or of International Criminal Law?

2. When is this Convention applicable? When is IHL applicable? Can both apply? On which issues do this Convention and IHL contradict each other?

3. Does Article 2 (2) of this Convention mean that the Convention is not applicable as soon as UN forces are acting under Chapter VII of the UN Charter and fight against organized armed forces (and recall that in that case IHL of international armed conflict applies) or does it mean that the Convention only does not apply when IHL of international armed conflicts applies (because UN forces conduct an international armed conflict against a State)?

4. a. In which circumstances does IHL apply to UN forces? To what kind of UN forces?

   b. Is the UN a Party to the Conventions and Protocols? Can the UN conceivably be a Party to an international armed conflict in the sense of Art. 2 common to the Conventions?

   c. Which rules of IHL can the UN, not being a State, not having legislation, and not having a territory, by definition not respect?

   d. What do you think about the argument that IHL cannot formally apply to UN operations, because they are not armed conflicts between equal partners but law enforcement actions by the international community authorized by the Security Council representing international legality and their aim is not to make war but to enforce peace?

   e. What do you think of the practical arguments that UN forces do not have the means to respect IHL, *e.g.*, that their medical personnel has a size designated to care for UN forces only and cannot possibly collect and care for the wounded or sick of other armed forces encountered in the area of operations (as they should under Arts. 3 (2) and (12) of Convention I)?

   f. Can the UN forces be considered for the purposes of the applicability of IHL as armed forces of the contributing States (which are Parties to the Conventions), and can any hostilities be considered an armed conflict between those States and the party responsible for the opposing forces?

g. To what extent does IHL apply to UN forces? When does IHL of international armed conflicts apply to UN forces? When does IHL of non-international armed conflicts apply?

h. Can you imagine why the UN and its Member States do not want to recognize the *de iure* applicability of IHL to UN operations nor establish precisely which "principles and spirit" (*Cf.* Art. 8) of IHL they recognize to be applicable to UN operations?

5. a. Does UN military personnel captured in a hostile encounter by armed forces of a State have prisoner-of-war status? Do members of the armed forces of a State captured in a hostile encounter by UN military forces have prisoner-of-war status? Is it conceivable that the answers to these two questions differ? (*Cf.* Arts. 2 and 4 of Convention III.)

b. Which provisions of this Convention are incompatible with prisoner-of-war status and the treatment Convention III prescribes for prisoners of war? Why does Art. 8 refer to the principles and spirit of the Conventions and not to the Conventions themselves?

c. If you were a military member of UN forces captured during a hostile armed encounter by armed forces of the country where the UN operation is deployed, would you prefer to be treated as a prisoner of war under Convention III or protected under this Convention? What are the advantages and disadvantages of both options from the point of view of your treatment, repatriation, and the chances that your status is accepted and respected by the enemy?

6. a. Are the crimes mentioned in Art. 9 of this Convention grave breaches of IHL? Do they always violate IHL? (*Cf.* Arts. 2, 4, 21, 118 and 130 of Convention III, Arts. 2, 4, 42, 78 and 147 of Convention IV, and Art. 85 (3) (a) and (e) and (4) (b) of Protocol I.)

b. Is it compatible with IHL to punish members of armed forces of a State for attacking, in conformity with the will of the authorities of that State, UN military forces? Does such an attack fall under Art. 9 of this Convention? (*Cf.* Preamble para. 5 and Art. 43 (2) of Protocol I.)

c. Does a soldier forcefully resisting a UN use of force aimed, *e.g.*, at responding to bombardments against safe areas, commit a crime under Art. 9 of this Convention? Is punishment for such a crime compatible with IHL? (*Cf.* Preamble para. 5 and Art. 43 (2) of Protocol I.)

7. Does this Convention protect ICRC delegates as associated personnel?

8. What mechanisms of implementation are foreseen by this Convention?

Case No. 15, The International Criminal Court

[*See also* **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* B, Resolution 1593 (2005)] p. 1467]

THE CASE

A. The Statute

[**Source:** A/CONF.183/9, July 17, 1998 and also reprinted in ILM, vol. 37, 1998, pp. 1002-1069, available on http://www.icrc.org]

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

[adopted by the Diplomatic Conference of the plenipotentiaries to the United Nations on the creation of an International Criminal Court, 17 July 1998]

[as corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002]

PREAMBLE

[...] *Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship

with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1: The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2: Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf. [...]

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5: Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
   (a) The crime of genocide;
   (b) Crimes against humanity;
   (c) War crimes;
   (d) The crime of aggression. [...]

Article 6: Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 7: Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

   (a) Murder;

   (b) Extermination;

   (c) Enslavement;

   (d) Deportation or forcible transfer of population;

   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

   (f) Torture;

   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

   (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

   (i) Enforced disappearance of persons;

   (j) The crime of apartheid;

   (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

   (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

   (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

   (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

   (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

   (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

   (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or

carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8: War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

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

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping

mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering

or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

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

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9: Elements of Crimes

[The final draft of the project on Elements of Crime was published in 1 November 2000 (PNICC/2000/1/Add.2) and is available on http://www.un.org/law/icc/index.html]

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11: Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12: Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

   (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13: Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14: Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15: Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16: Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17: Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18: Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

   (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

   (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

   (c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

   (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

   (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

   (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20: *Ne bis in idem*

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21: Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22: *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23: *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24: Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25: Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      (ii) Be made in the knowledge of the intention of the group to commit the crime;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26: Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27: Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member

of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29: Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30: Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31: Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32: Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33: Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

   (b) The person did not know that the order was unlawful; and

   (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful. [...]

Article 98: Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. [...]

Article 124: Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. [...]

B. United States, American Service-members' Protection Act of 2002 (ASPA)

[**Source:** "Title II-American Service members' Protection Act", in *2002 Supplemental Appropriations Act for Further Recovery From and Response To Terrorist Attacks on the United States*, HR 4775, signed by President G. W. Bush on 2 August 2002; available on http://thomas.loc.gov]

HR 4775

2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States [...]

TITLE II – AMERICAN SERVICE-MEMBERS' PROTECTION ACT

SEC. 2001. SHORT TITLE

This title may be cited as the 'American Servicemembers' Protection Act of 2002'.

SEC. 2002. FINDINGS

Congress makes the following findings:

(1) On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, meeting in Rome, Italy, adopted the 'Rome Statute of the International Criminal Court'. [...]

(5) Ambassador Scheffer went on to tell the Congress that: 'Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.'

(6) Notwithstanding these concerns, President Clinton directed that the United States sign the Rome Statute on December 31, 2000. In a statement issued that day, he stated that in view of the unremedied deficiencies of the Rome Statute, 'I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied'. [...]

(8) Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.

(9) In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States. [...]

(11) It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not

be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.

SEC. 2003. WAIVER AND TERMINATION OF PROHIBITIONS OF THIS TITLE [...]

(c) AUTHORITY TO WAIVE SECTIONS 4 AND 6 WITH RESPECT TO AN INVESTIGATION OR PROSECUTION OF A NAMED INDIVIDUAL - The President is authorized to waive the prohibitions and requirements of sections 2004 and 2006 to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority [...]

(2) determines and reports to the appropriate congressional committees that [...]

(b) there is reason to believe that the named individual committed the crime or crimes that are the subject of the International Criminal Court's investigation or prosecution;

(c) it is in the national interest of the United States for the International Criminal Court's investigation or prosecution of the named individual to proceed; and

(d) in investigating events related to actions by the named individual, none of the following persons will be investigated, arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court with respect to actions undertaken by them in an official capacity:

(i) Covered United States persons. [under the present law]

(ii) Covered allied persons.

(iii) Individuals who were covered United States persons or covered allied persons. [...]

SEC. 2004. PROHIBITION ON COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

(a) APPLICATION - The provisions of this section -

(1) apply only to cooperation with the International Criminal Court and shall not apply to cooperation with an *ad hoc* international criminal tribunal established by the United Nations Security Council [...].

(2) shall not prohibit -

(a) any action permitted under section 2008; [...]

(b) PROHIBITION ON RESPONDING TO REQUESTS FOR COOPERATION- Notwithstanding section 1782 of title 28, United States Code [Cf. http://uscode.house.gov], or any other provision of law, no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.

(c) PROHIBITION ON TRANSMITTAL OF LETTERS ROGATORY FROM THE INTERNATIONAL CRIMINAL COURT [...]

(d) PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT [...]

(e) PROHIBITION ON PROVISION OF SUPPORT TO THE INTERNATIONAL CRIMINAL COURT [...]

(f) PROHIBITION ON USE OF APPROPRIATED FUNDS TO ASSIST THE INTERNATIONAL CRIMINAL COURT [...]

(g) RESTRICTION ON ASSISTANCE PURSUANT TO MUTUAL LEGAL ASSISTANCE TREATIES - The United States shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.

(h) PROHIBITION ON INVESTIGATIVE ACTIVITIES OF AGENTS - No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.

SEC. 2005. RESTRICTION ON UNITED STATES PARTICIPATION IN CERTAIN UNITED NATIONS PEACEKEEPING OPERATIONS

(a) POLICY - Effective beginning on the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

(b) RESTRICTION - Members of the Armed Forces of the United States may not participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the Rome Statute, unless the President has submitted to the appropriate congressional committees a certification described in subsection (c) with respect to such operation.

(c) CERTIFICATION - The certification referred to in subsection (b) is a certification by the President that -

(1) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court [...] or

(3) the national interests of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation.

SEC. 2006. PROHIBITION ON DIRECT OR INDIRECT TRANSFER OF CLASSIFIED NATIONAL SECURITY INFORMATION AND LAW ENFORCEMENT INFORMATION TO THE INTERNATIONAL CRIMINAL COURT

(a) IN GENERAL - Not later than the date on which the Rome Statute enters into force, the President shall ensure that appropriate procedures are in place to prevent the transfer of classified national security information and law enforcement information to the International Criminal Court for the purpose of facilitating an investigation, apprehension, or prosecution. [...]

SEC. 2007. PROHIBITION OF UNITED STATES MILITARY ASSISTANCE TO PARTIES TO THE INTERNATIONAL CRIMINAL COURT

(a) PROHIBITION OF MILITARY ASSISTANCE - Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

(b) NATIONAL INTEREST WAIVER - The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.

(c) ARTICLE 98 WAIVER - The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.

(d) EXEMPTION - The prohibition of subsection (a) shall not apply to the government of

(1) a NATO member country;

(2) a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or

(3) Taiwan.

SEC. 2008. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR IMPRISONED BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT

(a) AUTHORITY - The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

(b) PERSONS AUTHORIZED TO BE FREED – The authority of subsection (a) shall extend to the following persons:

(1) Covered United States persons.

(2) Covered allied persons.

(3) Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government. [...]

SEC. 2013. DEFINITIONS [...]

(3) COVERED ALLIED PERSONS – The term 'covered allied persons' means military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan, for so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the International Criminal Court.

(4) COVERED UNITED STATES PERSONS – The term 'covered United States persons' means members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court. [...]

(12) SUPPORT – The term 'support' means assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals. [...]

C. Amnesty International, "No double standards on international justice"

[**Source:** Amnesty International, Security Council: No double standards on international justice, Press Release IOR 40/013/2002, 1 July 2002; available on http://www.amnesty.org]

AI INDEX: IOR 40/013/2002 1 July 2002

Security Council: No double standards on international justice

Amnesty International believes that there should be no double standards in international justice and no immunity for anyone, under any circumstances, for crimes such as genocide, war crimes and crimes against humanity. The organization today called on the USA to reconsider its position seeking immunity for its own personnel from the jurisdiction of the International Criminal Court (ICC). The Rome Statute of the ICC enters into force today.

At the Security Council on 30 June, the USA vetoed the extension of the United Nations Mission in Bosnia and Herzegovina (UNMBIH) as it did not get support for such immunity. It then agreed to a 72-hour extension of UNMBIH's mandate to allow for further discussion.

"We welcome the fact that the other members of the Security Council have stood firm. We call on them and on all other countries committed to the struggle against impunity for the worst possible crimes to continue to give full support to the ICC," Amnesty International said.

"The US position threatens the integrity of the international system of justice as a whole and challenges the universal applicability of one of its most fundamental principles: no immunity for crimes such as genocide, war crimes and crimes against humanity," Amnesty International said as it stressed that the issue goes beyond the fate of UNMIBH or even beyond the ICC.

The 1949 Geneva Conventions already require any country to search for perpetrators of the most serious war crimes, regardless of their rank or nationality, and allow states to bring them to justice before their own courts. These Conventions have long enjoyed nearly universal ratification, including by the USA. The 1948 Convention on Genocide also provides no immunity for suspects of such a crime. Amnesty International believes that the same principle applies to crimes against humanity.

"The concerns expressed by the USA are utterly misplaced," Amnesty International stated.

The Rome Statute of the ICC has strong safeguards against politically-motivated, unfounded prosecutions. These include an independent Prosecutor elected by the state parties. The Prosecutor will need authorization from a panel of judges before starting an investigation. The Security Council has the authority to defer of any investigation. The ICC will only act if national courts are unable or unwilling to take action. [...]

So far 74 countries - including Bosnia and Herzegovina - have ratified the Rome Statute, and further ratifications are expected in the coming days. Countries that have ratified the Rome Statute will elect the first Prosecutor and 18 judges of the court.

D. United Nations, Security Council Resolution 1487 (2003)

[**Source:** United Nations, S/RES/1487 (2003), 12 June 2003; available on http://www.un.org]

Resolution 1487 (2003)

Adopted by the Security Council at its 4772nd meeting, on 12 June 2003

The Security Council,

Taking note of the entry into force on 1 July 2002, of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),

Emphasizing the importance to international peace and security of United Nations operations,

Noting that not all States are parties to the Rome Statute,

Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes,

Determining that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security,

Determining further that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council,

Acting under Chapter VII of the Charter of the United Nations,

1. *Requests,* consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12 month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary; [Note: No such renewal was adopted in 2004]

3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;

4. *Decides* to remain seized of the matter.

DISCUSSION

1. *(Art. 7 of the Statute)*
   a. What are the innovative elements introduced in the Statute concerning crimes against humanity?
   b. Can crimes against humanity be perpetrated in peacetime?
   c. The Nuremberg trials established the necessity of a nexus between the accused and a State engaged in an armed conflict to be accused of crimes against humanity; does this nexus still exist under the ICC Statute? Can a non-State actor be punished and prosecuted under the Statute for crimes against humanity? Can a rebel group who controls part of a territory be punished for crimes against humanity if inhumane acts were committed? Have the drafters of the ICC Statute relied on the ICTY and ICTR judgements to come to the solution they chose?

d. Does the definition of crimes against humanity of the Statute of the Court encompass new elements? Which ones? Could one argue that the expansion of list of inhumane acts provide further clarification of the definition of crimes against humanity? Does this list have to be interpreted as an exhaustive one or only illustrative of elements of crimes against humanity?

e. Concerning one specific element, when do rape and forced pregnancy constitute crimes against humanity? Is this a new rule?

2. *(Art. 8 of the Statute)*

a. Is the Court competent for all war crimes? For all grave breaches of IHL? (*Cf.* Arts. 50/51/130/147 respectively of the four Conventions and Arts. 11 (4) and 85 of Protocol I.)

b. Does the Statute clarify for which grave breaches of IHL the Court is competent? Is Art. 8 (1) of the Statute compatible with the principle of *nullum crimen sine lege*?

c. Does the definition of war crimes correspond to the detailed provisions of the Hague and Geneva Conventions? Does the definition of war crimes of the Statute add innovative elements? Which ones?

d. Does the Statute of the Court foresee war crimes in non-international armed conflicts? Are they the same as those foreseen in international armed conflicts? Are the differences in the threshold of applicability between the crimes defined in Art. 8 (2) (c) and those defined in Art. 8 (2) (e) necessary under IHL? Are those differences reasonable? Does the threshold of applicability of war crimes in non-international armed conflicts listed in Art. 8 (2) (e) correspond to that of Protocol II? Do you think that this threshold of applicability is too high? Among the twelve war crimes listed under this provision starvation of the civilian population is not mentioned, why? Are any of the twelve crimes listed not prohibited by Protocol I?

e. Could one argue that the elements of war crimes as defined in the Statute are customary international law? For which crimes do you have doubts? Must the Statute codify customary law in the definition of crimes to respect the principle of *nullum crimen sine lege*? Or may the Statute add new crimes? May it add new war crimes to the list of the Conventions and Protocols even though they may not be customary law?

f. May the Court try a person for a crime which falls under the formulation of a crime under Art. 8 of the Statute but not under the formulation of that same crime by Protocol I even though Protocol I was applicable to the crime? In view of Art. 21 (1) (b), may the Court conversely try a person for a crime falling under the formulation of Protocol I, but not under the Statute? At least if the crime has become a crime under customary law?

g. Does Art. 10 bar an accused from arguing that a provision of Art. 8 has been abrogated by a new rule of customary law?

3. *(Art. 9 of the Statute)*

a. Are the elements of crimes to be defined under Art. 9 binding for the Court? At least in the sense that the Court may not sentence a person who does not fulfil them? Why did State want to define such elements?

b. Is the definition of elements of crime according to Art. 9 useful? Will it develop IHL? May it criminalize additional behaviour?

4. *(Arts. 11-19 of the Statute)*

a. Who may trigger the jurisdiction of the court concerning a specific crime? A State? An individual? The Prosecutor? The Security Council of the United Nations?

b. Who decides that an alleged crime needs to be investigated? The Prosecutor? The Court? The Security Council? What are the powers of each bodies in investigating a specific crime?

c. Concerning the role of the Prosecutor, would you qualify his powers as being too broad? May the Prosecutor initiate an investigation independently of the Security Council? Does the Prosecutor need the formal approval of the pre-trial chamber to proceed with an investigation?

d. What are the checks and balances of his powers? What are the exact modalities in that regard? Do you consider that Art. 16 of the Statute is a check on the powers of the Prosecutor? Can you imagine what are the concerns that some States have expressed in that regard? What could be the cause for Art. 16? Is it justifiable? Is Resolution 1487 (2003) an example of the application of Art. 16 (*See* also question 19)? Is the Court independent in spite of Art. 16? If a person who has allegedly committed a grave breach of IHL is captured by a state, while the Security Council under Art. 16 adopts a resolution releasing the alleged offender, may or must the State bring him or her before its own courts? Could a resolution adopted by the Security Council under Chapter VII of the UN Charter also oblige or allow a State Party to the Conventions not to prosecute an alleged author of a grave breach? (*Cf.* Arts. 49 (2)/50 (2)/129 (2)/146 (2) respectively of the four Conventions and Art. 103 of the UN Charter; *see* http://www.un.org)

e. Concerning the issue of admissibility, to what extent may the Court investigate an individual who has committed a crime which has already been investigated and tried by a State? Does Art. 17 (1) (b) of the Statute provide a safeguard against "mock trials"?

f. Can an accused expect a trial without undue delay under Arts. 67 (1) (c), and this in spite of Arts. 15-19?

5. a. Is the non-retroactivity of the jurisdiction of the court over crimes committed before the ratification of the Statute necessary under international law? Is it a consequence of the principle of *nullum crimen sine lege*? Could it be a *sine qua non* condition for certain states to ratify the statute?

b. Is the "opting-out clause" in Art. 124 of the Statute acceptable under IHL? For which reasons could it have been introduced? May a national of a State who opted-out be tried by the Court if the State on the territory of which he or she has committed the crime has not opted-out? What are the obligations of States Parties to the Conventions when a grave breach has been committed on the territory of a State or by a national of a State who opted-out? (*Cf.* Arts. 49 (2)/ 50 (2)/129 (2)/146 (2) respectively of the four Conventions.)

6. a. Is Art. 12 (2) of the Statute compatible with IHL? Is the agreement of the State on the territory of which the crime has been committed or the State of which the accused is a national, necessary under IHL? Or under other rules of international law? May or must a national court prosecute a person accused of grave breaches of IHL even if both the State on the territory of which the accused has acted and also the State of which he is national objects? (*Cf.* Arts. 49 (2)/50 (2)/129 (2)/146 (2) respectively of the four Conventions.) What is the consequence of this limitation for war crimes committed in non-international armed conflicts?

   b. Is the fact that even a national of a State non-party or a crime committed on the territory of a State non-party may be brought before the court (if the other concerned State is a party), compatible with international law? Is it a violation of the principle that only States Parties are bound by a treaty? Is a State not Party to the treaty bound by it if one of its nationals committed a crime on the territory of a State Party and is prosecuted by the Court? Do the Geneva Conventions bind a national from a non-Party State when he acts on the territory of a State Party? May (must) the latter start a procedure for grave violations according it its own penal procedures? May it extradite the individual to a third State in regards to an extradition treaty between the two States, but non-binding on the State of origin of the remand prisoner?

   c. Has a State a right or a legitimate interest that its soldiers are not brought before international or foreign courts for war crimes? When is this interest legitimate? Does the Statute take this interest into account? Has an accused a human right to be brought before the Court competent under national or international law for his or her crime at the time of the crime?

7. What is the exact progression of a case through the system, from the moment that information appears that a war crime has been committed to judgement at trial? Please try to draw a flow chart.

8. *(Arts. 27 and 98 of the Statute)*

   a. Does the Statute of the Court provide immunity to heads of States from prosecution? Can the Court prosecute a head of State still in power? Can it obtain its transfer from a third State? Even without the agreement of the State of which he or she is the head? May the Security Council overrule Art. 98?

   b. If a non-party State concludes with a State Party to the Statute, a treaty providing immunity for its nationals acting on the latter's territory, has it achieved immunity for its nationals before the Court, despite Art. 12 (2) of its Statute, for crimes committed on the territory of the State Party? Even if the treaty was agreed to after the ratification of the Courts Statute? Do all "Agreements on the Status of Forces" concluded with a country for the deployment of international forces have this effect?

9. Do Arts. 22-25 and 30-32 reflect the general principles of criminal law? Should a person accused of war crimes before a national court benefit from the same guarantees? Would those principles also apply before the courts of your country? (*Cf.* Arts. 49 (4)/50 (4)/129 (4)/146 (4) respectively of the four Conventions.)

10. Does Art. 28 of the Statute correspond to the rules of Arts. 86 and 87 of Protocol I? Can its application by the Court ever be incompatible with Protocol I? May the Court in that case apply Art. 28?

11. a. Could the grounds for excluding criminal responsibility listed in Art. 31 also be applied by a national court without violating the obligation to prosecute authors of grave breaches of IHL? Do all those grounds exist in the national legislation of your country?

    b. Does the ground for excluding responsibility formulated in Art. 31 (1) (c), despite the last sentence of the paragraph, permit to invoke *ius ad bellum* arguments? Or is this defence only available against a use of force unlawful under IHL? May a soldier commit a war crime to defend his life? To defend the lives of comrades? To defend the lives of civilians? May a soldier violate IHL in response to a violation of IHL threatening him or another person? Is there a difference between this defence and the IHL prohibition of reprisals? (*Cf.* Art. 46 of Convention I, Art. 47 of Convention II, Art. 43 of Convention III, Art. 33 of Convention IV and Art. 51 (6) of Protocol I.)

    c. Is the ground for excluding responsibility formulated in Art. 31 (1) (d) implying that a state of necessity may justify war crimes? That a soldier may commit war crimes if this is necessary to save the life of fellow citizens? That an interrogator may torture a suspect having information about an imminent attack?

12. Does Art. 33 fairly codify the rules of IHL on superior orders?

13. Has the Statute changed or developed substantive IHL? Has it added a mechanism of implementation? Is the prosecution of war crimes before an international court foreseen in IHL? Is it compatible with IHL? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions and Art. 88 of Protocol I.)

14. Why is the establishment of the Court important for IHL? Will the Court replace the necessity to try war crimes before national courts? When should a case be brought before the Court? Is your answer in line with Art. 17 of the Statute?

15. What is your overall assessment of the Statute from the point of view of IHL?

16. a. Why did the United States of America adopt a law ("ASPA"), which protects their personnel from possible penal action by the court?

    b. As the United States are not a Party to the Rome Statute, may the Court still be seized with cases concerning their nationals, and more specifically soldiers? Is this possibility changed by the United States' position as a permanent member of the Security Council? Is the situation different for US nationals that are members of UN forces?

    c. Is the law only applicable to US nationals and allies engaged in operations decided or authorised by the Security Council?

    d. May the United States, under international law "protect" Egyptian, Israeli or Taiwanese allied nationals (which are just some examples of allied nationals of States non-party to the Statute) who allegedly committed war crimes on the territory of a State Party?

17. Is the authority of the President of the United States granted under Section 2008 of the ASPA, to order, if necessary, a military intervention to set free US nationals held in the Netherlands following an indictment or a sentence by the Court, compatible with international law?

18. In which conditions are soldiers of UN forces and nationals of a State non-party to the Rome Statute liable to be prosecuted by the Court?

19. a. What do you think of Security Council resolution 1487 in light of general international law? In light of the United Nations Charter (*Cf.* http://www.un.org)? In light of the Court's Statute, specifically of Art. 16?

b. Did Resolution 1487 cover the members of forces which are not under UN command and control, but for which the use of force was authorised by the Security Council (such as the coalition forces during the 1990-91 Golf war)? The members of the KFOR in Kosovo (*See* **Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia, number 33, p. 1732.)?

c. How do you explain that resolution 1487 was adopted by the Security Council acting under Chapter VII of the United Nations Charter, as stipulated by Article 16 of the Rome Statute, when that Chapter applies to cases of "threats to the peace, breaches of the peace, and acts of aggression"?

Document No. 16, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000

[**Source:** Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, available on http://www.cicr.org/ihl]

The States Parties to the present Protocol,

[...]

Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development,

Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that generally have a significant presence of children, such as schools and hospitals,

Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts,

Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict,

Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the

age of 18 years unless, under the law applicable to the child, majority is attained earlier,

Convinced that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children,

Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, inter alia, that parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in hostilities, [...]

Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard,

Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law,

Stressing that the present Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law, [...]

Have agreed as follows:

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3

1. States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.

3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

   (a) Such recruitment is genuinely voluntary;

   (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service. [...]

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article shall not affect the legal status of any party to an armed conflict.

Article 5

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.

Article 6 [...]

3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration. [...]

Article 10 [...]

[N.B.: In conformity with this article, the Protocol "enter[ed] into force three months after the deposit of the tenth instrument of ratification or accession," i.e. on 12 of February 2002.]

II. Other International Agreements

Document No. 17, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

[**Source:** *Collection of International Instruments Concerning Refugees*, Geneva, UNHCR, 1990, pp. 194-195.]

OAU CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 September 1969)

Entry into force: 20 June 1974 in accordance with Article XI

Text: United Nations Treaty Series No. 14 691 [...]

Article I: Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

[...]

4. This Convention shall cease to apply to any refugee if [...]

   (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, [...]

5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

   (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; [...]

6. For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee. [...]

Document No. 18, Agreement Between the ICRC and Switzerland

[**Source:** "Agreement between the International Committee of the Red Cross and the Swiss Federal Council" in *International Review of the Red Cross*, No. 293, 1993, pp. 152-160.]

AGREEMENT BETWEEN THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE SWISS FEDERAL COUNCIL

to determine the legal status of the Committee in Switzerland

The International Committee of the Red Cross, on the one hand,

and

the Swiss Federal Council, on the other,

wishing to determine the legal status of the Committee in Switzerland and, to that end, to regulate their relations in a headquarters agreement,

have agreed on the following provisions:

I. STATUS, PRIVILEGES AND IMMUNITIES OF THE ICRC

Article 1: Personality

The Federal Council recognizes the international juridical personality and the legal capacity in Switzerland of the International Committee of the Red Cross (hereinafter referred to as the Committee or the ICRC), whose functions are laid down in the Geneva Conventions of 1949 and the Additional Protocols of 1977 and in the Statutes of the International Red Cross and Red Crescent Movement.

Article 2: Freedom of action of the ICRC

The Swiss Federal Council guarantees the ICRC independence and freedom of action.

Article 3: Inviolability of premises

The buildings or parts of buildings and the adjoining ground used for the purposes of the ICRC, by whomsoever they may be owned, shall be inviolable. No agent of the Swiss public authority may enter them without the express consent of the Committee. Only the President or his duly authorized representative shall be competent to waive this right of inviolability.

Article 4: Inviolability of archives

The archives of the ICRC and, in general, all documents and data media belonging to it or in its possession shall be inviolable at all times, wherever they may be.

Article 5: Immunity from legal process and execution

1. In the conduct of its business, the ICRC shall enjoy immunity from legal process and execution, except:
   a) in so far as this immunity is formally waived, in a specific case, by the President of the ICRC or his duly authorized representative;
   b) in respect of civil liability proceedings brought against the ICRC for damage caused by any vehicle belonging to it or circulating on its behalf;

c) in respect of a dispute, on relations of service, between the Committee and its staff, former staff or their rightful claimants;

d) in respect of seizure, by court order, of salaries, wages and other emoluments owed by the ICRC to a member of its staff;

e) in respect of a dispute between the ICRC and the pension fund or provident fund referred to in Article 10, paragraph 1, of the present agreement;

f) in respect of a counter-claim directly related to principal proceedings brought by the ICRC; and

g) in respect of execution of a settlement by arbitration pursuant to Article 22 of the present agreement.

2. The buildings or parts of buildings, the adjoining ground and the assets owned by the ICRC or used by it for its purposes, wherever they may be and by whomsoever they may be held, shall be immune from any measure of execution, expropriation or requisition.

Article 6: Fiscal position

1. The ICRC, its assets, income and other property shall be exempt from direct federal, cantonal and communal taxation. With regard to immovable property, however, such exemption shall apply only to that which is owned by the Committee and which is occupied by its services, and to income derived therefrom.

2. The ICRC shall be exempt from indirect federal, cantonal and communal taxation. Exemption from federal purchase tax shall be granted only for purchases intended for the official use of the Committee, and in so far as the amount invoiced for one same and single purchase exceeds five hundred Swiss francs.

3. The ICRC shall be exempt from all federal, cantonal and communal charges which do not represent charges for specific services rendered.

4. If necessary, the exemptions mentioned above may be applied by way of reimbursement at the request of the ICRC and in accordance with a procedure to be determined by the ICRC and the competent Swiss authorities.

Article 7: Customs position

The customs clearance of articles intended for the official use of the ICRC shall be governed by the Ordinance of 13 November 1985 on the customs privileges of international organizations, of the States in their relation with such organizations and of special Missions of foreign States.

Article 8: Free disposal of funds

The Committee may receive, hold, convert and transfer funds of any kind, gold, any currency, specie and other securities, and may dispose of them freely both within Switzerland and in its relations with other countries.

Article 9: Communications

1. The ICRC shall enjoy for its official communications treatment not less favourable than that accorded to the international organizations in Switzerland, to the extent compatible with the International Telecommunication Convention of 6 November 1982.

2. The ICRC shall have the right to dispatch and receive its correspondence, including data media, by duly identified courier or bags which shall have the same privileges and immunities as diplomatic couriers and bags.

3. No censorship shall be applied to the duly authenticated official correspondence and other official communications of the ICRC.

4. Operation of telecommunication installations must be coordinated from the technical standpoint with the Swiss PTT. *[Telecommunication Administration.]*

Article 10: Pension fund

1. Any pension fund or provident fund established by the ICRC and officially operating on behalf of the President, the members of the Committee or ICRC staff shall, with or without separate legal status, be accorded the same exemptions, privileges and immunities as the ICRC itself with regard to its movable property.

2. Funds and foundations, with or without separate legal status, administered under the auspices of the ICRC and devoted to its official purposes, shall be given the benefit of the same exemptions, privileges and immunities as the ICRC itself with regard to their movable property. Funds set up after the entry into force of the present agreement shall enjoy the same privileges and immunities, subject to the agreement of the competent Federal authorities.

II. PRIVILEGES AND IMMUNITIES GRANTED TO PERSONS SERVING THE ICRC IN AN OFFICIAL CAPACITY

Article 11: Privileges and immunities granted to the President and the members of the Committee and to ICRC staff and experts

The President and the members of the Committee, and ICRC staff and experts, irrespective of nationality, shall enjoy the following privileges and immunities:

a) immunity from legal process, even when they are no longer in office, in respect of words spoken or written and acts performed in the exercise of their functions;

b) inviolability for all papers and documents.

Article 12: Privileges and immunities granted to staff not of Swiss nationality

In addition to the privileges and immunities mentioned in Article 11, ICRC staff who are not of Swiss nationality shall:

a) be exempt from national service obligations in Switzerland;

b) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and aliens registration;

c) be accorded the same privileges in respect of exchange and transfer facilities for their assets in Switzerland and in other countries as are accorded to officials of the other international organizations;

d) be given, together with their relatives dependent on them and their domestic staff, the same repatriation facilities as are accorded to officials of the international organizations;

e) remain subject to the law on old-age and survivors insurance and continue to pay AVS/AI/APG *[Social Security]* contributions and unemployment and accident insurance contributions.

Article 13: Exceptions to immunity from legal process and execution

The persons referred to in Article 11 of the present agreement shall not enjoy immunity from legal process in the event of civil liability proceedings brought against them for damage caused by any vehicle belonging to them or driven by them or in the event of offences under federal road traffic regulations punishable by fine.

Article 14: Military service of Swiss staff

1. In a limited number of cases, leave of absence from military service (leave for foreign countries) may be granted to Swiss staff holding executive office at ICRC headquarters; persons granted such leave shall be dispensed from compulsory training service, inspections and shooting practice.

2. For the other Swiss staff of the ICRC, applications for dispensation from or rescheduling of training service, providing all due reasons and counter-signed by the staff member concerned, may be submitted by the ICRC to the Federal Department of Foreign Affairs for transmission to the Federal Military Department, which will give them favourable consideration.

3. Finally, a limited number of dispensations from active service will be granted to ICRC staff in order to enable the institution to continue its work even during a period of mobilization.

Article 15: Object of immunities

1. The privileges and immunities provided for in the present agreement are not designed to confer any personal benefits on those concerned. They are established solely to ensure, at all times, the free functioning of the ICRC and the complete independence of the persons concerned in discharging their duties.

2. The President of the ICRC must waive the immunity of any staff member or expert in any case where he considers that such immunity would impede the course of justice and could be waived without prejudice to the interests of the ICRC. The Assembly of the Committee shall have the power to waive the immunity of the President or of the Committee members.

Article 16: Entry, stay and departure

The Swiss authorities shall take all necessary measures to facilitate the entry into, the stay in, and the departure from Swiss territory of all persons, irrespective of their nationality, serving the ICRC in an official capacity.

Article 17: Identity cards

1. The Federal Department of Foreign Affairs shall give the ICRC, for the President, each member of the Committee and each staff member, an identity card bearing the photograph of the holder. This card, authenticated by the Federal Department of Foreign Affairs and the ICRC, shall serve to identify the holder vis--vis all federal, cantonal and communal authorities.

2. The ICRC shall transmit regularly to the Federal Department of Foreign Affairs a list of the members of the Committee and staff of the ICRC who are assigned to the organizations headquarters on a lasting basis, indicating for each person the date of birth, nationality, residence in Switzerland or in another country, and the post held.

Article 18: Prevention of abuses

The ICRC and the Swiss authorities shall cooperate at all times to facilitate the proper administration of justice, secure the observance of police regulations and prevent any abuse in connection with the privileges and immunities provided for in this agreement.

Article 19: Disputes of a private nature

The ICRC shall make provision for appropritate modes of settlement of:

a) disputes arising out of contracts to which the ICRC is or becomes a party and other disputes of a private law character;

b) disputes involving any ICRC staff member who by reason of his or her official position enjoys immunity, if such immunity has not been waived under the provisions of Article 15.

III. NON RESPONSIBILITY OF SWTZERLAND

Article 20: Non-responsibility of Switzerland

Switzerland shall not incur, by reason of the activity of the ICRC on its territory, any international responsibility for acts or omissions of the ICRC or its staff.

IV. FINAL PROVISIONS

Article 21: Execution

The Federal Department of Foreign Affairs is the Swiss authority which is entrusted with the execution of this agreement.

Article 22: Settlement of disputes

1. Any divergence of opinion concerning the application of interpretation of this agreement which has not been settled by direct negociations between the parties may be submitted by either party to an arbitral tribunal composed of three members, including the chairman thereof.

2. The Swiss Federal Council and the ICRC shall each appoint one member of the tribunal.

3. The members so appointed shall choose their chairman.

4. In the event of disagreement between the members on the choice of chairman , the chairman shall be chosen, at the request of the members of the tribunal, by the President of the International Court of Justice or, if the latter is unavailable, by the Vice-President, or if he in turn is unavailable, by the longest-serving member of the court.

5. The tribunal shall be seized of a dispute by either party by petition.

6. The tribunal shall lay down its own procedure.

7. The arbitration award shall be binding on the parties to the dispute.

Article 23: Revision

1. *The present agreement may be revised at the request of either party,*

2. In this event, the two parties shall consult each other concerning the amendments to be made to its provisions.

Article 24: Denunciation

The present agreement may be denounced by either party, giving two years' notice in writing.

Article 25: Entry into force

The present agreement enters into force on the date of its signature.

Done at Berne, on 19 March 1993, in two copies in French.

For the International Committee of the Red Cross:
The President
Cornelio Sommaruga

For the Swiss Federal Council:
The Head of the Federal Department of Foreign Affairs:
René Felber

Document No. 19, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal

[**Source:** *International Review of the Red Cross*, No. 311, 1996, pp. 238-242.]

Letter from Antonio Cassese, President of the International Criminal Tribunal for the former Yugoslavia, to Cornelio Sommaruga, President of the International Committee of the Red Cross, of 28 April 1995

Dear President,

I have the honour to refer to resolution 827 (1993) of 25 May 1993 by which the Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the "Tribunal").

I also have the honour to refer to the Rules of Procedure and Evidence adopted by the Judges of the Tribunal in February 1994, as subsequently amended, and in particular to Rule 24 (v) which provides that the Judges of the Tribunal shall determine or supervise the conditions of detention.

I further have the honour to refer to the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (the "Rules of Detention"). Rule 6 of the Rules of Detention provides for regular and unannounced inspections of the detention unit by qualified and experienced inspectors appointed by the Tribunal, to examine the manner in which detainees are treated.

With reference to these legal provisions and to our previous discussions, I propose that the International Committee of the Red Cross (the "ICRC"), being an independent and impartial humanitarian organization of long-standing experience in inspecting conditions of detention in all kinds of armed conflicts and

internal strife throughout the world, undertake, in accordance with the modalities set out below, the inspection of conditions of detention and the treatment of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal in the Penitentiary Complex or in the holding cells located at the premises of the Tribunal (the "Detention Unit").

1. The role of the ICRC shall be to inspect and report upon all aspects of conditions of detention, including the treatment of persons held at the Detention Unit, to ensure their compliance with internationally accepted standards of human rights or humanitarian law.
2. The Tribunal shall provide the ICRC with the following facilities to carry out its inspections:
   a. full information on the operation and practice of the Detention Unit:
   b. unlimited access to the Detention Unit including the right to move inside the Detention Unit without restriction and
   c. other information which is available to the Tribunal and necessary for the ICRC to carry out its inspections, in particular the notification of the detention of persons.
3. Each detainee may freely communicate with the ICRC. During an inspection of the Detention Unit, the detainee shall have the opportunity to talk to members of the ICRC delegation out of the sight and hearing of the staff of the Detention Unit.
4. The ICRC may communicate freely with any person whom it believes can supply relevant information.
5. The inspections shall take place on a periodic basis. The frequency with which visits will occur will be determined by the ICRC.
6. Inspections of the Detention Unit shall be unannounced. Copies of this Exchange of Letters and a specific written request to allow inspections without notice at any time will be provided by the Tribunal to the Dutch prison authorities and United Nations security personnel.
7. All costs associated with an inspection visit will be borne by the ICRC. The provision of inspections is to be considered a donation to the Tribunal by the ICRC.
8. After each visit, the ICRC shall draw up a confidential report on the facts found during the visit, taking account of any observations which may have been submitted by the Registrar or the President. The report, containing any recommendations which the ICRC considers necessary, shall be transmitted to the Tribunal.
9. The ICRC may, if it deems necessary, communicate its observations to the Commanding Officer (as defined in the Rules of Detention) and the Registrar of the Tribunal immediately after the visit. The Registrar shall immediately pass along any such communication to the President.
10. The information gathered by the ICRC in relating to an inspection visit and the ICRC's consultations with the Tribunal shall be confidential.
11. The Tribunal may, after securing the ICRC's agreement, have the report, together with the comments of the Tribunal, made public. In no event shall personal data relating to the detainees be published without the express written consent of the person concerned.

12. The Registrar of the Tribunal shall be the authority competent to receive communications from the ICRC. The Registrar shall inform the ICRC of the name of the liaison officer for the Detention Unit when such a person is appointed by the Tribunal.
13. The President of the ICRC shall be the authority competent to receive communications from the Tribunal.

If the above provisions meet with your approval, I would propose that this letter and your reply thereto constitute an Agreement between the Tribunal and the ICRC on inspection of conditions of detention of persons held in the Detention Unit, with immediate effect.

Accept, Sir, the assurance of my highest consideration.

(signature)

Letter from Cornelio Sommaruga, President of the International Committee of the Red Cross, to Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, May 5, 1995

Dear President,

I have to honour to refer to your letter of 28 April 1995 regarding visits of the International Committee of the Red Cross (the "ICRC") to detainees held under the authority of the International Criminal Tribunal for the Former Yugoslavia ("the Tribunal").

It is indeed within the mandate of the ICRC to visit persons detained in relation to armed conflicts and internal strife. Therefore, the ICRC is ready to carry out visits to detainees held under the authority of the Tribunal in its Detention Unit in accordance with the conditions outlined in your letter of 28 April 1995. Those conditions correspond to the traditional modalities under which the ICRC assesses the conditions of detention and the treatment of detainees, in particular by interviewing them in private, and makes the appropriate recommendations to the authorities concerned.

As you proposed, our respective letters shall constitute with immediate effect an agreement between the Tribunal and the ICRC on the inspection of the conditions of detention and treatment of persons held in the Detention Unit. I noted that the ICRC will be provided with the necessary facilities, including the notification of the detention of persons.

Our detention division will contact the Commanding Officer and the Registrar of the Tribunal to arrange details of the visits.

On behalf of the ICRC, I thank you for your support for the humanitarian activities of the ICRC.

Trusting in the success of the Tribunal's endeavour to play an essential role to improve respect for international humanitarian law, I remain,

Yours very respectfully,

(signature)

III. ICRC AND INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

Document No. 20, Statutes of the International Red Cross and Red Crescent Movement

[**Source:** *International Review of the Red Cross*, No. 256, 1987, pp. 25-59. available on http://www.icrc.org]

PREAMBLE

The International Conference of the Red Cross and Red Crescent,

Proclaims that the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the League of Red Cross and Red Crescent Societies (see endnote [1]) together constitute a worldwide humanitarian movement, whose mission is to prevent and alleviate human suffering wherever it may be found, to protect life and health and ensure respect for the human being, in particular in times of armed conflict and other emergencies, to work for the prevention of disease and for the promotion of health and social welfare, to encourage voluntary service and a constant readiness to give help by the members of the Movement, and a universal sense of solidarity towards all those in need of its protection and assistance.

Reaffirms that, in pursuing its mission, the Movement shall be guided by its Fundamental Principles, which are:

Humanity The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.

Impartiality It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endea-vours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

Neutrality In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

Voluntary Service It is a voluntary relief movement not prompted in any manner by desire for gain.

Unity There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

Recalls that the mottoes of the Movement, *Inter arma caritas and Per humanitatem ad pacem*, together express its ideals.

Declares that, by its humanitarian work and the dissemination of its ideals, the Movement promotes a lasting peace, which is not simply the absence of war, but is a dynamic process of co-operation among all States and peoples, co-operation founded on respect for freedom, independence, national sovereignty, equality, human rights, as well as on a fair and equitable distribution of resources to meet the needs of peoples.

SECTION I: GENERAL PROVISIONS

Article 1: Definition

1. The International Red Cross and Red Crescent Movement [2] (hereinafter called "the Movement") is composed of the National Red Cross and Red Crescent Societies recognized in accordance with Article 4 [3] (hereinafter called "National Societies"), of the International Committee of the Red Cross (hereinafter called "the International Committee") and of the League of Red Cross and Red Crescent Societies (hereinafter called "the League").

2. The components of the Movement, while maintaining their independence within the limits of the present Statutes, act at all times in accordance with the Fundamental Principles and co-operate with each other in carrying out their respective tasks in pursuance of their common mission.

3. The components of the Movement meet at the International Conference of the Red Cross and Red Crescent (hereinafter called "the International Conference") with the States Parties to the Geneva Conventions of 27 July 1929 or of 12 August 1949.

Article 2: States Parties to the Geneva Conventions

1. The States Parties to the Geneva Conventions [4] co-operate with the components of the Movement in accordance with these Conventions, the present Statutes and the resolutions of the International Conference.

2. Each State shall promote the establishment on its territory of a National Society and encourage its development.

3. The States, in particular those which have recognized the National Society constituted on their territory, support, whenever possible, the work of the components of the Movement. The same components, in their turn and in accordance with their respective statutes, support as far as possible the humanitarian activities of the States.

4. The States shall at all times respect the adherence by all the components of the Movement to the Fundamental Principles.

5. The implementation of the present Statutes by the components of the Movement shall not affect the sovereignty of States, with due respect for the provisions of international humanitarian law.

SECTION II: COMPONENTS OF THE MOVEMENT

Article 3: National Red Cross and Red Crescent Societies

1. The National Societies form the basic units and constitute a vital force of the Movement. They carry out their humanitarian activities in conformity with their own statutes and national legislation, in pursuance of the mission of the Movement, and in accordance with the Fundamental Principles. The National Societies support the public authorities in their humanitarian tasks, according to the needs of the people of their respective countries.

2. Within their own countries, National Societies are autonomous national organizations providing an indispensable framework for the activities of their voluntary members and their staff. They co-operate with the public authorities in the prevention of disease, the promotion of health and the mitigation of human suffering by their own programmes in such fields as education, health and social welfare, for the benefit of the community.
They organize, in liaison with the public authorities, emergency relief operations and other services to assist the victims of armed conflicts as provided in the Geneva Conventions, and the victims of natural disasters and other emergencies for whom help is needed.
They disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect. They disseminate the principles and ideals of the Movement and assist those governments which also disseminate them. They also co-operate with their governments to ensure respect for international humanitarian law and to protect the red cross and red crescent emblems.

3. Internationally, National Societies, each within the limits of its resources, give assistance for victims of armed conflicts, as provided in the Geneva Conventions, and for victims of natural disasters and other emergencies. Such assistance, in the form of services and personnel, of material, financial and moral support, shall be given through the National Societies concerned, the International Committee or the League.
They contribute, as far as they are able, to the development of other National Societies which require such assistance, in order to strengthen the Movement as a whole.
International assistance between the components of the Movement shall be co-ordinated as provided in Article 5 or Article 6. A National Society which is to receive such assistance may however undertake the co-ordination within its own country, subject to the concurrence of the International Committee or the League, as the case may be.

4. In order to carry out these tasks, the National Societies recruit, train and assign such personnel as are necessary for the discharge of their responsibilities.
They encourage everyone, and in particular young people, to participate in the work of the Society.

5. National Societies have a duty to support the League in terms of its Constitution. Whenever possible, they give their voluntary support to the International Committee in its humanitarian actions.

Article 4: Conditions for recognition of National Societies

In order to be recognized in terms of Article 5, paragraph 2 b) as a National Society, the Society shall meet the following conditions:

1. Be constituted on the territory of an independent State where the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field is in force.
2. Be the only National Red Cross or Red Crescent Society of the said State and be directed by a central body which shall alone be competent to represent it in its dealings with other components of the Movement.
3. Be duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field.
4. Have an autonomous status which allows it to operate in conformity with the Fundamental Principles of the Movement.
5. Use the name and emblem of the Red Cross or Red Crescent in conformity with the Geneva Conventions.
6. Be so organized as to be able to fulfil the tasks defined in its own statutes, including the preparation in peace time for its statutory tasks in case of armed conflict.
7. Extend its activities to the entire territory of the State.
8. Recruit its voluntary members and its staff without consideration of race, sex, class, religion or political opinions.
9. Adhere to the present Statutes, share in the fellowship which unites the components of the Movement and co-operate with them.
10. Respect the Fundamental Principles of the Movement and be guided in its work by the principles of international humanitarian law.

Article 5: The International Committee of the Red Cross

1. The International Committee, founded in Geneva in 1863 and formally recognized in the Geneva Conventions and by International Conferences of the Red Cross, is an independent humanitarian organization having a status of its own. It co-opts its members from among Swiss citizens.
2. The role of the International Committee, in accordance with its Statutes, is in particular:
   a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;
   b) to recognize any newly established or reconstituted National Society, which fulfils the conditions for recognition set out in Article 4, and to notify other National Societies of such recognition;
   c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
   d) to endeavour at all times as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;
   e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;

f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in co-operation with the National Societies, the military and civilian medical services and other competent authorities;

g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;

h) to carry out mandates entrusted to it by the International Conference.

3. The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.

4. a) It shall maintain close contact with National Societies. In agreement with them, it shall co-operate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law.

b) In situations foreseen in paragraph 2 d) of this Article and requiring co-ordinated assistance from National Societies of other countries, the International Committee, in co-operation with the National Society of the country or countries concerned, shall co-ordinate such assistance in accordance with the agreements concluded with the League.

5. Within the framework of the present Statutes and subject to the provisions of Articles, 3, 6 and 7, the International Committee shall maintain close contact with the League and co-operate with it in matters of common concern.

6. It shall also maintain relations with governmental authorities and any national or international institution whose assistance it considers useful.

Article 6: The League of Red Cross and Red Crescent Societies

1. The League is the international Federation of the National Red Cross and Red Crescent Societies. It acts under its own Constitution with all rights and obligations of a corporate body with a legal personality.

2. The League is an independent humanitarian organization which is not governmental, political, racial or sectarian in character.

3. The general object of the League is to inspire, encourage, facilitate and promote at all times all forms of humanitarian activities by the National Societies, with a view to preventing and alleviating human suffering and thereby contributing to the maintenance and the promotion of peace in the world.

4. To achieve the general object as defined in paragraph 3 and in the context of the Fundamental Principles of the Movement, of the resolutions of the International Conference and within the framework of the present Statutes and subject to the provisions of Article 3, 5 and 7, the functions of the League, in accordance with its Constitution, are inter alia the following:

a) to act as the permanent body of liaison, co-ordination and study between the National Societies and to give them any assistance they might request;

b) to encourage and promote in every country the establishment and development of an independent and duly recognized National Society;

c) to bring relief by all available means to all disaster victims;

d) to assist the National Societies in their disaster relief preparedness, in the organization of their relief actions and in the relief operations themselves;

e) to organize, co-ordinate and direct international relief actions in accordance with the Principles and Rules adopted by the International Conference;

f) to encourage and co-ordinate the participation of the National Societies in activities for safeguarding public health and the promotion of social welfare in co-operation with their appropriate national authorities;

g) to encourage and co-ordinate between National Societies the exchange of ideas for the education of children and young people in humanitarian ideals and for the development of friendly relations between young people of all countries;

h) to assist National Societies to recruit members from the population as a whole and inculcate the principles and ideals of the Movement;

i) to bring help to victims of armed conflicts in accordance with the agreements concluded with the International Committee;

j) to assist the International Committee in the promotion and development of international humanitarian law and collaborate with it in the dissemination of this law and of the Fundamental Principles of the Movement among the National Societies;

k) to be the official representative of the member Societies in the international field, inter alia for dealing with decisions and recommendations adopted by its Assembly and to be the guardian of their integrity and the protector of their interests;

l) to carry out the mandates entrusted to it by the International Conference.

5. In each country the League shall act through or in agreement with the National Society and in conformity with the laws of that country.

Article 7: Co-operation

1. The components of the Movement shall co-operate with each other in accordance with their respective statutes and with Articles 1, 3, 5 and 6 of the present Statutes.

2. In particular the International Committee and the League shall maintain frequent regular contact with each other at all appropriate levels so as to co-ordinate their activities in the best interest of those who require their protection and assistance.

3. Within the framework of the present Statutes and their respective statutes, the International Committee and the League shall conclude with each other any agreements required to harmonize the conduct of their respective activities. Should, for any reason, such agreements not exist, Article 5, paragraph 4 b) and Article 6, paragraph 4 i) shall not apply and the International Committee and the League shall refer to the other provisions of the present Statutes to settle matters relative to their respective fields of activities.

4. Co-operation between the components of the Movement on a regional basis shall be undertaken in the spirit of their common mission and the Fundamental Principles, within the limits of their respective statutes.

5. The components of the Movement, while maintaining their independence and identity, co-operate whenever necessary with other organizations which are active in the

humanitarian field, provided such organizations are pursuing a purpose similar to that of the Movement and are prepared to respect the adherence by the components to the Fundamental Principles.

SECTION III: STATUTORY BODIES

The International Conference of the Red Cross and Red Crescent

Article 8: Definition

The International Conference is the supreme deliberative body for the Movement. At the International Conference, representatives of the components of the Movement meet with representatives of the States Parties to the Geneva Conventions, the latter in exercise of their responsibilities under those Conventions and in support of the overall work of the Movement in terms of Article 2. Together they examine and decide upon humanitarian matters of common interest and any other related matter.

Article 9: Composition

1. The members of the International Conference shall be the delegations from the National Societies, from the International Committee, from the League and from the States Parties to the Geneva Conventions.
2. Each of these delegations shall have equal rights expressed by a single vote.
3. A delegate shall belong to only one delegation.
4. A delegation shall not be represented by another delegation or by a member of another delegation.

Article 10: Functions

1. The International Conference contributes to the unity of the Movement and to the achievement of its mission in full respect of the Fundamental Principles.
2. The International Conference contributes to the respect for and development of international humanitarian law and other international conventions of particular interest to the Movement.
3. The International Conference shall have the sole competence:
   a) to amend the present Statutes and the Rules of Procedure of the International Red Cross and Red Crescent Movement (hereinafter called "Rules of Procedure");
   b) to take, at the request of any of its members, the final decision on any difference of opinion as to the interpretation and application of these Statutes and Rules;
   c) to decide on any question, referred to in Article 18, paragraph 2 b), which may be submitted to it by the Standing Commission, the International Committee or the League.
4. The International Conference shall elect in a personal capacity those members of the Standing Commission mentioned in Article 17, paragraph 1 a) of the present Statutes, taking into account personal qualities and the principle of fair geographical distribution.
5. Within the limits of the present Statutes and of the Rules of Procedure, the International Conference shall adopt its decisions, recommendations or declarations in the form of resolutions.

6. The International Conference may assign mandates to the International Committee and to the League within the limits of their statutes and of the present Statutes.
7. The International Conference may enact, when necessary and by a two-thirds majority of its members present and voting, regulations relating to matters such as procedure and the award of medals.
8. The International Conference may establish for the duration of the Conference subsidiary bodies in accordance with the Rules of Procedure.

Article 11: Procedure

1. The International Conference shall meet every four years, unless it decides otherwise. It shall be convened by the central body of a National Society, by the International Committee or by the League, under the mandate conferred for that purpose either by the previous International Conference or by the Standing Commission as provided in Article 18, paragraph 1 a). As a general rule, favourable consideration shall be given to any offer made during an International Conference by a National Society, the International Committee or the League to act as host to the next Conference.
2. Should exceptional circumstances so require, the place and date of the International Conference may be changed by the Standing Commission. The Standing Commission may act on its own initiative or on a proposal by the International Committee, the League or at least one third of the National Societies.
3. The International Conference shall elect the Chairman, Vice-Chair-men, Secretary General, Assistant Secretaries General and other officers of the Conference.
4. All participants in the International Conference shall respect the Fundamental Principles and all documents presented shall conform with these Principles. In order that the debates of the International Conference shall command the confidence of all, the Chairman and any elected officer responsible for the conduct of business shall ensure that none of the speakers at any time engages in controversies of a political, racial, religious or ideological nature. The Bureau of the International Conference, as defined in the Rules of Procedure, shall apply the same standard to documents before authorizing their circulation.
5. In addition to the members entitled to take part in the International Conference, observers, referred to in Article 18, paragraph 1 d), may attend the meetings of the Conference, unless the Conference decides otherwise.
6. The International Conference shall not modify either the Statutes of the International Committee or the Constitution of the League nor take decisions contrary to such statutes. The International Committee and the League shall take no decision contrary to the present Statutes or to the resolutions of the International Conference.
7. The International Conference shall endeavour to adopt its resolutions by consensus as provided in the Rules of Procedure. If no consensus is reached, a vote shall be taken in accordance with these Rules.
8. Subject to the provisions of the present Statutes, the International Conference shall be governed by the Rules of Procedure.

The Council of Delegates of the International Red Cross and Red Crescent Movement

Article 12: Definition

The Council of Delegates of the International Red Cross and Red Crescent Movement (hereinafter called "the Council") is the body where the representatives of all the components of the Movement meet to discuss matters which concern the Movement as a whole.

Article 13: Composition

1. The members of the Council shall be the delegations from the National Societies, from the International Committee and from the League.
2. Each of these delegations shall have equal rights expressed by a single vote.

Article 14: Functions

1. Within the limits of the present Statutes, the Council shall give an opinion and where necessary take decisions on all matters concerning the Movement which may be referred to it by the International Conference, the Standing Commission, the National Societies, the International Committee or the League.
2. When meeting prior to the opening of the International Conference, the Council shall:
   a) propose to the Conference the persons to fill the posts mentioned in Article 11, paragraph 3;
   b) adopt the provisional agenda of the Conference.
3. Within the limits of the present Statutes, the Council shall adopt its decisions, recommendations or declarations in the form of resolutions.
4. Notwithstanding the general provision contained in Article 10, paragraph 7, the Council may amend, by a two-thirds majority of its members present and voting, the regulations for the Henry Dunant Medal.
5. The Council may refer any matter to the International Conference.
6. The Council may refer a matter to any of the components of the Movement for consideration.
7. The Council may establish by a two-thirds majority of its members present and voting such subsidiary bodies as may be necessary, specifying their mandate, duration and membership.
8. The Council shall take no final decision on any matter which, according to the present Statutes, is within the sole competence of the International Conference, nor any decision contrary to the resolutions of the latter, or concerning any matter already settled by the Conference or reserved by it for the agenda of a forthcoming Conference.

Article 15: Procedure

1. The Council shall meet on the occasion of each International Conference, prior to the opening of the Conference, and whenever one third of the National Societies, the International Committee, the League or the Standing Commission so request. In

principle, it shall meet on the occasion of each session of the General Assembly of the League. The Council may also meet on its own initiative.

2. The Council shall elect its Chairman and Vice-Chairman. The Council and the General Assembly of the League, as well as the International Conference when it is convened, shall be chaired by different persons.

3. All participants in the Council shall respect the Fundamental Principles and all documents presented shall conform with these Principles. In order that the debates of the Council shall command the confidence of all, the Chairman and any elected officer responsible for the conduct of business shall ensure". that none of the speakers at any time engages in controversies of a political, racial, religious or ideological nature.

4. In addition to the members entitled to take part in the Council, observers, referred to in Article 18, paragraph 4 c), from those "National Societies in the process of recognition" which appear likely to be recognized in the foreseeable future may attend the meetings of the Council, unless the Council decides otherwise.

5. The Council shall endeavour to adopt its resolutions by consensus. as provided in the Rules of Procedure. If no consensus is reached, a vote shall be taken in accordance with the Rules of Procedure.

6. The Council shall be subject to the Rules of Procedure. It may supplement them when necessary by a two-thirds majority of its members present and voting, unless the International Conference decides otherwise.

The Standing Commission of the Red Cross and Red Crescent

Article 16: Definition

The Standing Commission of the Red Cross and Red Crescent (called "the Standing Commission" in the present Statutes) is the trustee of the International Conference between two Conferences, carrying out the functions laid down in Article 18.

Article 17: Composition

1. The Standing Commission shall comprise nine members, namely:

   a) five who are members of different National Societies, each elected in a personal capacity by the International Conference according to Article 10, paragraph 4 and holding office until the close of the following International Conference or until the next Standing Commission has been formally constituted, whichever is the later;

   b) two who are representatives of the International Committee, one of whom shall be the President;

   c) two who are representatives of the League, one of whom shall be the President.

2. Should any member referred to in paragraph 1 b) or c) be unable to attend a meeting of the Standing Commission, he may appoint a substitute for that meeting, provided that the substitute is not a member of the Commission. Should any vacancy occur among the members referred to in paragraph 1 a), the Standing Commission itself shall appoint as a member the candidate who, at the previous election, obtained the greatest number of votes without being elected, provided that the person concerned is not a member of the same National Society as an existing elected member. In case of a tie, the principle of fair geographical distribution shall be the deciding factor.

3. The Standing Commission shall invite to its meetings, in an advisory capacity and at least one year before the International Conference is to meet, a representative of the host organization of the next International Conference.

Article 18: Functions

1. The Standing Commission shall make arrangements for the next International Conference by:
   a) selecting the place and fixing the date thereof, should this not have been decided by the previous Conference, or should exceptional circumstances so require in terms of Article 11, paragraph 2;
   b) establishing the programme for the Conference;
   c) preparing the provisional agenda of the Conference for submission to the Council;
   d) establishing by consensus the list of the observers referred to in Article 11, paragraph 5;
   e) promoting the Conference and securing optimum attendance.
2. The Standing Commission shall settle, in the interval between International Conferences, and subject to any final decision by the Conference:
   a) any difference of opinion which may arise as to the interpretation and application of the present Statutes and of the Rules of Procedure;
   b) any question which may be submitted to it by the International Committee or the League in connection with any difference which may arise between them.
3. The Standing Commission shall:
   a) promote harmony in the work of the Movement and, in this connection, co-ordination among its components;
   b) encourage and further the implementation of resolutions of the International Conference;
   c) examine, with these objects in view, matters which concern the Movement as a whole.
4. The Standing Commission shall make arrangements for the next Council by:
   a) selecting the place and fixing the date thereof;
   b) preparing the provisional agenda of the Council;
   c) establishing by consensus the list of the observers referred to in Article 15, paragraph 4.
5. The Standing Commission shall administer the award of the Henry Dunant Medal.
6. The Standing Commission may refer to the Council any question concerning the Movement.
7. The Standing Commission may establish by consensus such ad hoc bodies as necessary and nominate the members of these bodies.
8. In carrying out its functions and subject to any final decision by the International Conference, the Standing Commission shall take any measures which circumstances demand, provided always that the independence and initiative of each of the components of the Movement, as defined in the present Statutes, are strictly safeguarded.

Article 19: Procedure

1. The Standing Commission shall hold an ordinary meeting at least twice yearly. It shall hold an extraordinary meeting when convened by its Chairman, either acting on his own initiative or at the request of three of its members.
2. The Standing Commission shall have its headquarters in Geneva. It may meet in another place selected by its Chairman and approved by the majority of its members.
3. The Standing Commission shall also meet at the same place and at the same time as the International Conference.
4. All decisions shall be taken by a majority vote of the members present, unless otherwise specified in the present Statutes or in the Rules of Procedure.
5. The Standing Commission shall elect a Chairman and a Vice-Chairman from among its members.
6. Within the limits of the present Statutes and of the Rules of Procedure, the Standing Commission shall establish its own rules of procedure.

SECTION IV: FINAL PROVISIONS

Article 20: Amendments

Any proposal to amend the present Statutes and the Rules of Procedure must be placed on the agenda of the International Conference and its text sent to all members of the Conference at least six months in advance. To be adopted, any amendment shall require a two-thirds majority of those members of the International Conference present and voting, after the views of the International Committee and the League have been presented to the Conference.

Article 21: Entry into force

1. The present Statutes shall replace the Statutes adopted in 1952 by the Eighteenth International Conference. Any earlier provisions which conflict with the present Statutes are repealed.
2. The present Statutes shall enter into force on 8 November 1986.

Notes:

1) At its VIIIth Session (Budapest, 1991) the League General Assembly decided to change the institution's name to "International Federation of Red Cross and Red Crescent Societies", effective 28 November 1991.

2) Also known as the International Red Cross

3) Any National Society recognized at the date of entry into force of the present Statutes shall be considered as recognized in terms of Article 4.

4) In the present Statutes the expression "Geneva Conventions" also covers their Additional Protocols for the States Parties to these Protocols.

Document No. 21, ICRC, Tracing Service

[**Source:** *Restoration of Family Links: Waiting for News*, Geneva, International Committee of the Red Cross.]

Population in flight, children lost, families dispersed, displaced, forced to become refugees...

Soldiers wounded, taken prisoner, missing or killed in battle...

Houses destroyed, front lines impassable. communications disrupted...

(...) The activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives. (Protocol of 1977, Article 32).

Of all the suffering caused by war, perhaps the most bitter anguish is not knowing what has happened to a son or brother gone off to fight, a wife or grandfather left behind in a village, a child separated from its relatives.

Ever since its origins, the Red Cross has placed this mental suffering at the centre of its concerns. To alleviate it the International Committee of the Red Cross (ICRC) takes the action described in this brochure.

[1.] Writing a Red Cross messages is an expression of hope that relatives will be found

In time of conflict, postal and telephone communications are often disrupted and direct contacts may be impossible. In these circumstances, anyone who wishes to do so may send news of a strictly personal nature to his or her family and receive such news by means of a Red Cross message. This is a standard form with space for about 30 lines of text and the addresses of the sender and the recipient. Red Cross and Red Crescent staff collect, forward and distribute the messages by various means:

- door-to-door delivery;
- contacting neighbours, village elders or clan chiefs;
- posting lists in Red Cross and Red Crescent offices, refugee camps and public places where the people sought are likely to go;
- publicizing addressees' names in the press, on radio programmes or on public communication networks. In the former Yugoslavia and in Rwanda the BBC, in cooperation with the ICRC, broadcasts the names of people being sought by their relatives, and in Zaire "*Reporters sans frontières*" broadcasts a similar programme on "Radio Agatashya".

Exchange of correspondence through the Red Cross continues until normal means of communication are restored.

[2.] Unaccompanied children a tragic phenomenon

Just like adults children flee from fighting and take the road to exile, but in the general panic they all too often lose their way, become separated from their parents and end up in a refugee camp with no one to take care of them. Also too often, they become orphans and prey to unofficial adoption or trafficking.

Children shall be provided, with the care and aid they require, and (...) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated. Protocol II of 1977, Article 4, para 3(b)

In order to preserve the family unit and to reunite children with their parents, the ICRC:

registers and follows up all unaccompanied children, wherever they may be;

records the identity of each child (name and age, parents' names, previous and present addresses);

photographs, in most cases, each child (a photo is often the only identity document that can be placed in the file of a baby or a very small child);

sets in motion a mechanism for tracing the parents, which includes:

- posting the names of the relatives sought in refugee camps and much frequented public places;
- broadcasting the names on local or international radio networks;
- launching appeals to parents who are looking for their children, urging them to contact the nearest Red Cross or Red Crescent office;
- sending Red Cross messages written by children to their parents' former addresses;
- visits to and enquiries in the children's villages of original by volunteers of the Red Cross and Red Crescent and other humanitarian organizations;
- approaches to authorities which may be able to supply useful information.

All these efforts often culminate in their immense joy of being together again.

In the Cambodian conflict, 4,167 unaccompanied children were registered between 1979 and 1982.

[3.] The long road to family reunification...

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts (...). (Protocol I of 1977, Article 74)

Reuniting members of families split up by war often entails lengthy administrative procedures. Before organizing a family reunification, ICRC delegates must make sure that such a move will improve the situation of everyone involved, particularly in conflict areas. The agreement of each person concerned must be obtained and the family relationship verified. In addition, the ICRC must obtain the necessary authorizations and visas from the warring parties and the countries involved, including countries of transit.

Delegates give priority to people requiring special protection, such as unaccompanied children, elderly people living alone and released detainees, and the next of kin.

... or back home

In the chaos of conflict many people lose their identity papers and have no means of obtaining new ones. Such cases were particularly common at the end of the Second World War, and that was why, in 1945, the ICRC used its right of initiative to establish an internationally recognized temporary travel document.

This is issued to refugees and displaced or stateless people who do not have or no longer have any identity papers and consequently can neither return to their country of origin or residence nor enter a host country. The document is not a substitute for a passport or for any other identity papers, and is valid only for the duration of the journey.

A worldwide network

To restore family links between people affected by war, the ICRC cooperates with National Red Cross and Red Crescent Societies all over the world.

In areas affected by conflict and in neighbouring countries, the ICRC works with staff and volunteers of the Red Cross and Red Crescent Societies of the countries concerned.

Over 160 National Red Cross and Red Crescent Societies throughout the world make up the global network for restoration of family ties, which collects and forwards messages then delivers them, often after considerable time and effort have been spent tracing the addressees.

Humanitarian cooperation in action

Other humanitarian organizations are becoming involved with increasing frequency in activities for restoring family links. The Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), for example, are regular partners of the ICRC in nearly all conflict situations. Other agencies, such as UNICEF, and non-governmental organizations like the Save the Children Fund cooperate with ICRC delegates in dealing with certain specific issues, including that of unaccompanied children in Rwanda.

Computer technology for the restoration of family links

All the information on war victims collected by the ICRC is managed in databases which are capable of processing millions of entries and are compiled in delegations throughout the world.

The information is made available as needed to other humanitarian organizations cooperating with the ICRC, on condition that the protection of personal data is guaranteed.

The ICRC has over 60 databases, the main ones concerning Rwanda (details on 270,000 individuals); the Gulf war (120,000); Israel, the occupied territories and the autonomous territories (101,000); the former Yugoslavia (92,000); Sri Lanka (58,000); Somalia (25,000); and Peru (20,000). In Nairobi, Kenya, in 1996, two years after the conflict in Rwanda, seven ICRC delegates and 80 other employees were still processing thousands of data every day in connection with the individual files of 270,000 victims of those events. The items were entered in a database on 50 interconnected computers.

[4.] Deprived of their freedom

Prisoners of war must al all times be humanely treated. (The Third Geneva Convention of 1949, Article 13)

Soldiers captured on the battlefield, civilians arrested when a town is taken, interned for security reasons, detained by an occupying power or because they do not belong to the same ethnic group, do not practise the same religion, or hold different political opinions ... all these categories of people deprived of their freedom are visited by ICRC delegates the world over.

During the Second World War, the ICRC delegate in Berlin took the initiative of using capture cards filled in by the prisoners themselves to draw up lists of names and thus to facilitate family contacts. All the details were kept at the ICRC's s Central Agency for prisoners of War in Geneva; without them the list of the missing would have been very much longer.

This method has since been extended to all conflicts. Thus during the ten years of war between Iran and Iraq, ICRC delegates recorded the identity of over 90,000 prisoners of war. The purpose of ICRC visits to POW camps is to ascertain that the prisoners are properly treated, in accordance with the requirements of the Third Geneva Convention of 1949 and the Additional Protocols of 1977.

In order to combat disappearances, torture and ill-treatment, and to improve the material and psychological conditions in which detainees are held, the ICRC delegates endeavour to:

- determine and record the identity of all persons deprived of their freedom;
- follow up each prisoner individually so as to monitor his or her treatment by the authorities throughout the period of captivity;
- restore contacts with relatives by informing the prisoner's family of his or her capture.

The ICRC expresses no opinion on the reasons that prompt the authorities to make arrests and never interferes in decisions to release captives. It requests release only for vulnerable categories of people, on humanitarian or medical grounds (children, pregnant women, the elderly, the seriously ill and the seriously wounded). At the end of the hostilities, the ICRC calls for the release of all detainees.

Maintaining family contacts

Thanks to Red Cross messages, persons deprived of their freedom can inform their families of their situation and keep in touch with them throughout the period of their detention.

Family visits to places of detention may be organized by the Red Cross, since prisons are often very far away from the family home and travel is expensive, or there may be front lines to cross. The ICRC facilitates such family visits in cooperation with the National Red Cross or Red Crescent Society concerned and the prison authorities. This is the case in the Philippines and Indonesia, where the National Societies arrange for the transport of families to prisons which may be more than a thousand kilometres away from their homes.

Guaranteeing release

The ICRC is responsible for organizing the return of released prisoners to their countries or regions of origin at the end of hostilities, or sometimes even earlier. Its delegates interview the prisoners individually to ascertain whether they wish to be repatriated or transferred to the other side of the front line, or whether they prefer to remain in the place where they are released.

The ICRC tries to ensure that all prisoners are repatriated at the end of hostilities. During the conflict it encourages the simultaneous release of all captives in the hands of the belligerents, in order to avoid bargaining in human lives, or the making of arrests for the sole purpose of increasing the number of people to be released to match that of the adverse party, or for purposes of "ethnic cleansing".

[5.] Assistance to families

Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.(...) Parties to the conflict shall prepare and forward to each other, [...] certificates of death or duly authenticated lists of the dead. (First Geneva Convention of 1949, Article 16)

Certifying captivity

In conflict situations, the ICRC draws up, where necessary, documents certifying that each detainee has been followed up by its delegates throughout the period of detention. Thousands of such certificates are issued every year by ICRC delegations all over the world. These documents often enable former captives or their families to receive compensation or State pensions under national legislation.

Certifying death

In accordance with its mandate, the ICRC tries to obtain notification of persons who have died during a conflict, in order to ensure that their families have been duly informed.

Setting minds at rest

One of the most distressing effects of war is uncertainty about the fate of close relatives: have they been taken prisoner, are they wounded, or dead ? If the family link cannot be restored by means of Red Cross messages and no information can be obtained about the capture or death of the person sought, the ICRC approaches the authorities concerned, submitting lists of persons unaccounted for whose fate the authorities might help to elucidate using information at their disposal.

After certain conflicts (Cyprus in 1974, the Gulf war in 1991, the former Yugoslavia in 1991-1995), special commissions were set up under ICRC auspices to help the former belligerents carry out the necessary searches.

Document No. 22, ICRC, Model Law Concerning the Emblem

[**Source:** *International Review of the Red Cross*, No. 313, 1996, pp. 486-495.]

Model law concerning the use and protection of the emblem of the Red Cross or Red Crescent

I. GENERAL RULES

Article 1: Scope of protection

Having regard to:

- The Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977[1] including Annex I to Additional Protocol I as regards the rules on identification of medical units and transports;[2]
- The Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies, as adopted by the 20th International Conference of the Red Cross and Red Crescent, and subsequent amendments;[3]
- The law (decree, or other instrument) of ... (date) recognizing the Red Cross (Red Crescent) of .... .[4]

The following are protected by the present law:

- The emblem of the red cross or red crescent on a white ground;[5]
- The designation "Red Cross" or "Red Crescent";[6]
- The distinctive signals for identifying medical units and transports.

Article 2: Protective use and indicative use

In time of armed conflict, the emblem used as a protective device is the visible sign of the protection conferred by the Geneva Conventions and their Additional Protocols on medical personnel and medical units and transports. The dimensions of the emblem shall therefore be as large as possible.

The emblem used as an indicative device shows that a person or an object is linked to a Red Cross or Red Crescent institution. The emblem shall be of a small size.

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1. To make it easier to find these treaties, it is advisable to indicate their precise location in the official compendium of laws and treaties. Their text is also reproduced in the Treaty Series of the United Nations: Vol. 75 (1950), pp. 31-417, and Vol. 1125 (1979), pp. 3-699.
2. This Annex was revised on 30 November 1993 and its amended version came into force on 1 March 1994. It was reproduced in the *IRRC*, No. 298, 1994, pp. 29-41.
3. The current Regulations were adopted by the 20th International Conference of the Red Cross in 165 and revised by the Council of Delegates in 1991, then submitted to the States party to the Geneva Conventions before coming into force on 31 July 1992. The Regulations are reproduced in the *IRRC*, No. 289, 1992, pp. 339-362.
4. As a voluntary relief society, auxiliary to the public authorities in the humanitarian sphere. Wherever the present law refers to the "Red Cross (Red Crescent) of ...", "Red Cross of ..." or "Red Crescent of ..." should be specified. The official name as it appears in the law or instrument of recognition should be used.
5. It is important that national legislation in all cases protect both the emblem of the red cross and that of the red crescent, as well as the names "Red Cross" or "Red Crescent" with initial capitals is reserved for Red Cross or Red Crescent institutions. This rule helps to avoid confusion.
6. When reference is made to the emblem, the term "red cross" or "'red crescent" is generally in lower case while the designation "Red Cross" or "Red Crescent" with initial capitals is reserved for Red Cross or Red Crescent institutions. This rule helps to avoid confusion.

II. RULES ON THE USE OF THE EMBLEM

A. Protective use of the emblem[7]

Article 3: Use by the Medical Service of the armed forces

Under the control of the Ministry of Defence, the Medical Service of the armed forces of ... (name of the State) shall, both in peacetime and in time of armed conflict, use the emblem of the red cross (red crescent)[8] to mark its medical personnel, medical units and transports on the ground, at sea and in the air.

Medical personnel shall wear armlets and carry identity cards displaying the emblem. These armlets and identity cards shall be issued by ... (Ministry of Defence).[9]

Religious personnel attached to the armed forces shall be afforded the same protection as medical personnel and shall be identified in the same way.

Article 4: Use by hospitals and other civilian medical units

With the express authorization of the Ministry of Health[10] and under its control, civilian medical personnel, hospitals and other civilian medical units, as well as civilian medical transports, assigned in particular to the transport and treatment of the wounded, sick and shipwrecked, shall be marked by the emblem, used as a protective device, in time of armed conflict.[11]

Civilian medical personnel shall wear armlets and carry identity cards displaying the emblem. These armlets and identity cards shall be issued by ... (Ministry of Health).[12]

Civilian religious personnel attached to hospitals and other medical units shall be identified in the same way.

Article 5: Use by the Red Cross (Red Crescent) of ...[13]

The Red Cross (Red Crescent) of ... is authorized to place medical personnel and medical units and transports at the disposal of the Medical Service of the armed forces. Such personnel, units and transports shall be subject to military laws and regulations and may

7. In order to confer optimum protection, the dimensions of the emblem used to mark medical units and transports shall be as large as possible. The distinctive signals provided for in Annex I to Protocol I shall also be used.
8. The emblem to be used should be indicated here.
9. Pursuant to Article 40 of the First Geneva Convention, armlets are to be worn on the left arm and shall be water-resistant the identity card shall bear the holder's photograph. States can model the identity card on the example attached to this Convention. The authority within the Ministry of Defence which is to issue armlets and identity cards must be clearly specified.
10. It is very important to indicate clearly the authority which is competent to grant such authorization and monitor the use of the emblem. This authority shall work together with the Ministry of Defence, which may, if necessary, give advice and assistance.
11. See Articles 18 to 22 of the Fourth Geneva Convention, and Articles 8 and 18 of Protocol I. Article 8 in particular defines the expressions "medical personnel", "medical units" and "medical transports". Hospitals and other civilian medical units should be marked by the emblem only during times of armed conflict. Marking them in peacetime risks causing confusion with property belonging to the National Society.
12. As regards armlets and identity cards for civilian medical personnel, Article 20 of the Fourth Geneva Convention and Article 18, para. 3, of Protocol I provide for their use in occupied territory and in areas where fighting is taking place or is likely to take place. It is, however, recommended that armlets and identity cards be widely distributed during times of armed conflict. A model of an identity card for civilian medical and religious personnel is given in Annex I to Protocol I. The authority which is to issue the armlets and identity cards should be specified (for example a Department of the Ministry of Health).
13. Pursuant to Article 27 of the First Geneva Convention, a National Society of a neutral country may also place its medical personnel and medical units and transports at the disposal of the Medical Service of the armed forces of a State which is party to an armed conflict. (...)

be authorized by the Ministry of Defence to display the emblem of the red cross (red crescent)[14] as a protective device.

Such personnel shall wear armlets and carry identity cards, in accordance with Article 3, para. 2, of the present law.

The National Society may be authorized to use the emblem as a protective device for its medical personnel and medical units in accordance with Article 4 of the present law.

B. Indicative use of the emblem[15]

Article 6: Use by the Red Cross (Red Crescent) of ...

The Red Cross (Red Crescent) of ... is authorized to use the emblem as an indicative device in order to show that a person or an object is linked to the National Society. The dimensions of the emblem shall be small, so as to avoid any confusion with the emblem employed as a protective device.[16]

The Red Cross (Red Crescent) of ... shall apply the "Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies".[17]

National Red Cross or Red Crescent Societies of other countries, present on the territory of ... (name of the State) with the consent of the Red Cross (Red Crescent) of ..., shall use the emblem under the same conditions.

C. International Red Cross and Red Crescent organizations

Article 7: Use by the international organizations of the International Red Cross and Red Crescent Movement

The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies may make use of the emblem at any time and for all their activities.[18]

III. CONTROL AND PENALTIES

Article 8: Control measures

The authorities of ... (name of the State) shall at all times ensure strict compliance with the rules governing the use of the emblem of the red cross or red crescent, the name "Red

14. I.e., always the same emblem as that used by the Medical Service of the armed forces (see Article 26 of the First Geneva Convention). With the consent of the competent authority, the National Society may, in time of peace, use the emblem to mark units and transports whose assignment to medical purposes in the event of armed conflict has already been decided (Article 13 of the Regulations on the Use of the Emblem).
15. Pursuant to Article 44, para. 4, of the First Geneva Convention, the emblem may be used, as an exceptional measure and in peacetime only, as an indicative device for marking vehicles, used as ambulances by third parties (not forming part of the International Red Cross and Red Crescent Movement), and aid stations exclusively assigned to the purpose of giving treatment free of charge to the wounded or sick. Express consent for displaying the emblem must, however, be given by the National Society, which shall control the use thereof. Such use is not recommended, however, because it increases the risk of confusion and might lead to misuse. The term "aid station" by analogy also covers boxes and kits containing first-aid supplies and used, for example, in shops or factories. (...)
16. The emblem may not, for example, be placed on an armlet or the roof of a building. In peacetime, and as an exceptional measure, the emblem may be of large dimensions, in particular during events where it is important for the National Society's first-aid workers to be identified quickly.
17. These Regulations enable the National Society to give consent, in a highly restrictive manner, for third parties to use the name of the Red Cross or the Red Crescent and the emblem within the context of its fundraising activities (Article 23, "sponsorship").
18. Article 44, para. 3, of the First Geneva Convention.

Cross" or "Red Crescent" and the distinctive signals. They shall exercise strict control over the persons authorized to use the said emblem, name and signals.[19]

They shall take every appropriate step to prevent misuse, in particular by disseminating the rules in question as widely as possible among the armed forces,[20] the police forces, the authorities and the civilian population.[21]

Article 9: Role of the Red Cross (Red Crescent) of ...

The Red Cross (Red Crescent) of ... shall cooperate with the authorities in their efforts to prevent and repress any misuse.[22] It shall be entitled to inform ... (competent authority) of such misuse and to participate in the relevant criminal, civil or administrative proceedings.

Article 10: Misuse of the emblem[23]

Anyone who, wilfully and without entitlement, has made use of the emblem of the red cross or red crescent, the words "Red Cross" or "Red Crescent", a distinctive signal or any other sign, designation or signal which constitutes an imitation thereof or which might lead to confusion, irrespective of the aim of such use;

anyone who, in particular, has displayed the said emblem or words on signs, posters, announcements, leaflets or commercial documents, or has affixed them to goods or packaging, or has sold, offered for sale or placed in circulation goods thus marked;

shall be punished by imprisonment for a period of ... (days or months) and/or by payment of a fine of ... (amount in local currency).[24]

If the offence is committed in the management of a corporate body (commercial firm, association, etc.), the punishment shall apply to the persons who committed the offence or ordered the offence to be committed.

Article 11: Misuse of the emblem used as protective device in wartime[25]

Anyone who has wilfully committed, or has given the order to commit, acts resulting in the death of, or causing serious injury to the body or health of an adversary by making

19. It is recommended that responsibilities be clearly set down, either in the present law or in an implementing regulation or decree.
20. Within the context of the dissemination of international humanitarian law.
21. In particular among members of the medical and paramedical professions, and among non-governmental organizations, which must be encouraged to use other distinctive signs.
22. The National Societies have a very important role to play in this regard. The Statutes of the International Red Cross and Red Crescent Movement stipulate expressly that the National Societies shall "also cooperate with their government to ensure respect for international humanitarian law and to protect the red cross and red crescent emblems" (Article 3, para. 2).
23. This type of misuse should be repressed both in peacetime and in time of armed conflict. Even though violations of the emblem used as an indicative device are less serious than those described in Article 11 below, they must be taken seriously and rigorously repressed. Indeed, the emblem will be better respected during an armed conflict if it has been protected effectively in peacetime. Such effectiveness derives in particular from the severity of any penalties imposed. Consequently, it is recommended that the punishment imposed should be imprisonment and/or a heavy fine, likely to serve as a deterrent.
24. In order to maintain the deterrent effect of the fine, it is essential to review the amounts periodically so as to take account of the depreciation of the local currency. This remark also applies to Articles 11 and 12. It could therefore be considered whether it might not be appropriate to set the amounts of the fines by means other than the present law, for example in an implementing regulation. A National Committee for the implementation of international humanitarian law could then review the amounts as required.
25. This is the most serious type of misuse, for in this case the emblem is of large dimensions and is employed for its primary purpose, which is to protect persons and objects in time of war. This Article should be brought into line with penal legislation (for example the Military Penal Code), which generally provides for the prosecution of violations of international humanitarian law, and in particular the Geneva Conventions and their Additional Protocols.

perfidious use of the red cross or red crescent emblem or a distinctive signal, has committed a war crime and shall be punished by imprisonment for a period of ... years.[26]

Perfidious use means appealing to the good faith of the adversary, with the intention to deceive him and make him believe that he was entitled to receive or was obliged to confer the protection provided for by the rules of international humanitarian law.

Anyone who, wilfully and without entitlement, has used the red cross or red crescent emblem or a distinctive signal, or any other sign or signal which constitutes an imitation thereof or which might lead to confusion, shall be punished by imprisonment for a period of ... (months or years).

Article 12: Misuse of the white cross on a red ground

Owing to the confusion which may arise between the arms of Switzerland and the emblem of the red cross, the use of the white cross on a red ground or of any other sign constituting an imitation thereof, whether as a trademark or commercial mark or as a component of such marks, or for a purpose contrary to fair trade, or in circumstances likely to wound Swiss national sentiment, is likewise prohibited at all times; offenders shall be punished by payment of a fine of ... (amount in local currency).

Article 13: Interim measures

The authorities of ... (name of the State)[27] shall take the necessary interim measures. They may in particular order the seizure of objects and material marked in violation of the present law, demand the removal of the emblem of the red cross or red crescent and of the words "Red Cross" or "Red Crescent" at the cost of the instigator of the offence, and order the destruction of the instruments used for their reproduction.

Article 14: Registration of associations, trade names and trademarks

The registration of associations and trade names, and the filing of trademarks, commercial marks and industrial models and designs making use of the emblem of the red cross or red crescent or the designation "Red Cross" or "Red Crescent" in violation of the present law shall be refused.

IV. APPLICATION AND ENTRY INTO FORCE

Article 15: Application of the present law

The ... (Ministry of Defence, Ministry of Health) is responsible for the application of the present law.[28]

Article 16: Entry into force

The present law shall enter into force on ... (date of promulgation, etc.).

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26. By virtue of Article 85, para. 3, subparagraph f), of Protocol I, perfidious use of the emblem is a grave breach of this Protocol and is regarded as a war crime (Article 85, para. 5). Such misuse is therefore particularly serious and must be subject to very severe penalties.
27. Indicate the competent authority (courts, administrative authorities, etc.).
28. It is particularly important to specify precisely which authority has ultimate responsibility for applying this law. Close cooperation between the Ministries directly concerned, generally the Ministries of Defence and Health, would be advisable. A National Committee for the implementation of international humanitarian law could play a useful role in this respect.

Document No. 23, ICRC, Advisory Services on International Humanitarian Law

[**Source:** *Advisory Services on International Humanitarian Law,* ICRC, Geneva, April 2001; *see also* http://www.icrc.org/ihl]

WHY PROMOTE INTERNATIONAL HUMANITARIAN LAW?

Currently, dozens of conflicts are raging throughout the world. Each day brings news of yet another atrocity perpetrated in the name of war: massacres, tortures, summary executions, rape, deportation of civilians, children taking a direct part in hostilities... the list is endless.

Some may argue that these are just some of war's necessary evils. They are not. They are illegal. They are outright violations of a universally recognized body of law known as international humanitarian law (IHL).

As part of its humanitarian mission to protect the lives and dignity of victims of armed conflict, the International Committee of the Red Cross (ICRC) strives to promote respect for the rules of IHL. Universal ratification of IHL instruments and effective implementation of the obligations they contain are promoted to ensure maximum protection for the victims of armed conflict. [...]

How can IHL be implemented by States?

Adherence to IHL treaties is just the first step. The following measures must be taken before States can comply with their obligations arising from the Geneva Conventions of 1949, their Additional Protocols of 1977, the 1954 Convention for the Protection of Cultural Property and its two Protocols, other treaties relating to the prohibition and use of certain weapons, as well as the Rome Statute of the International Criminal Court:

- translation of IHL treaties into national languages
- adoption of criminal legislation punishing war crimes and other violations of IHL
- adoption of measures to prevent and punish misuse of the red cross and red crescent emblems and other signals and emblems recognized by the treaties
- definition and guarantee of the status of protected persons
- protection of fundamental and procedural guarantees in the event of armed conflict
- establishment and/or regulation of National Societies, organization of civil defence and National Information Bureaux
- dissemination of IHL
- appointment of legal advisers for armed forces
- identification and marking of protected people, places and property
- observance of IHL in the location of military sites, and in the development and adoption of weapons and military tactics

How can the ICRC help?

The ICRC set up its Advisory Service in 1996 to step up its support to States committed to implementing IHL.

Aims:

- encourage all States to ratify IHL treaties
- encourage States to fulfil their obligations under these treaties at the national level

Structure:

- a unit attached to the ICRC's Legal Division in Geneva, i.e. one supervisor plus three legal advisers, one specialized in civil law, one in common law and on[e] in the Advisory Service's database
- a team of legal experts based in each continent [Budapest, Moscow, Guatemala City, Cairo, Abidjan, Pretoria, New Delhi, Kuala Lumpur]

What can the Advisory Service offer?

The Advisory Service works closely with governments, taking into account their specific needs and their respective political and legal systems. It also works with the following:

- National Red Cross and Red Crescent Societies
- academic institutions
- international and regional organizations

Specifically, the Advisory Service:

Organizes meetings of experts

Arranges national and regional seminars on the implementation of IHL and meetings of experts on selected topics; takes part in international fora

Offers legal and technical assistance in incorporating IHL into national law

Translates IHL treaties; carries out studies on the compatibility of national law with the obligations arising from these treaties; provides legal advice

Encourages States to set up national IHL committees and assists them in their work

Supports the work of advisory bodies to governments with respect to implementing, developing and disseminating IHL

Promotes the exchange of information

Manages a collection of texts on legislation, case law, national studies and manual for the armed forces; a database on the implementation of IHL accessible on the ICRC's website (www.icrc.org) and on the ICRC's CD-ROM on IHL

Publishes specialist documents

Produces factsheets on the main IHL treaties and topics relating to implementation; kits for ratifying treaties; guidelines on implementation measures; regular reports on national implementation worldwide; reports on seminars and meetings of experts.

Case No. 24, Protection of Journalists

THE CASE

[**Source:** "Protection des journalistes et des médias en période de conflit armé," ALEXANDRE BALGUY-GALLOIS, IRRC March 2004 Vol. 86 No. 853, pp. 37-68; available on http://www.icrc.org; original in French; unofficial translation. Footnotes omitted.]

The number of journalists killed in the world in 2003 - 42 - is the highest since 1995. This figure can be largely explained by the recent military campaign in Iraq, which inflicted a proportionally higher number of casualties on journalists than on members of the coalition's armed forces: 14 journalists and media personnel lost their lives, two went missing and a dozen or so were wounded while covering the conflict and its aftermath. In recent years, one might also mention the deliberate targeting of journalists in the occupied Palestinian territories, the bombing of the Serbian State radio and television (*Radio Televisija Srbije* - RTS) building in Belgrade by NATO forces in 1999 and the bombing, by US forces, of the Kabul and Baghdad offices of the Qatar-based Al-Jazeera television network.

The general trend is towards the deterioration of the working conditions of journalists in periods of armed conflict. "...Covering a war is becoming more and more dangerous for journalists. Added to the traditional dangers of war are the unpredictable hazards of bomb attacks, the use of more sophisticated weapons - against which even the training and protection of journalists is ineffective - and belligerents who care more about winning the war of images than respecting the safety of media staff. So many factors that increase the risks of war reporting..."

This particularly worrying situation prompted Reporters Without Borders to issue a "Declaration on the safety of journalists and media personnel in situations involving armed conflict," which was opened for signing on 20 January 2003 and revised on 8 January 2004 in light of the events in Iraq. The purpose of the declaration is to remind belligerents of the principles and rules of international humanitarian law that protect journalists and media personnel in periods of armed conflict and to improve the law by adapting it to present needs. In this regard, it would seem necessary to reaffirm the illegality of attacks on journalists and news media and to remind the authorities of their obligation to take precautions when preparing attacks that might affect them.

Illegality of attacks on journalists and news media

The illegality of attacks on journalists and news media derives from the protection granted to civilians and civilian objects under international

humanitarian law, and from the fact that the media, even when used for propaganda purposes, cannot be considered as military objectives except in special cases. In other words, while no specific status exists for journalists and the equipment they use, both journalists and their equipment benefit from the general protection enjoyed by civilians and civilian objects unless they make an effective contribution to military action.

Protection of journalists as civilians

Without providing a precise definition of them, humanitarian law distinguishes between two categories of journalists working in conflict zones: war correspondents accredited to the armed forces and "independent" journalists. According to the *Dictionnaire de droit international public*, the former category comprises all "specialized journalists who, with the authorization and under the protection of a belligerent's armed forces, are present on the theatre of operations with a view to providing information on events related to the hostilities." This definition reflects a practice followed during the Second World War and the Korean War, when war correspondents wore uniforms, enjoyed officers' privileges and were placed under the authority of the head of the military unit in which they were incorporated. As for the term "journalist," it designates, according to a 1975 draft UN convention, "...any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation..."

Protection of war correspondents

War correspondents fall into the ill-defined category of "persons who accompany the armed forces without actually being members thereof." Since they are not part of the armed forces, they enjoy civilian status and the protection derived from that status. Moreover, since they are, in a manner of speaking, associated with the war effort, they are entitled to prisoner-of-war status when they fall into the hands of the enemy, provided they have been duly authorized to accompany the armed forces.

Protection of journalists engaged in dangerous professional missions

The participants in the Diplomatic Conference held in Geneva from 1974 to 1977 felt that in order to better respond to the needs of their time it would be advisable to include a special provision on "measures of protection for journalists" in Protocol I to supplement Article 4 (A) (4) of the Third Geneva Convention. The resulting provision - Article 79 - does not change the regime applicable to war correspondents. [...]

Article 79 formally states that journalists engaged in dangerous professional missions in zones of armed conflict are civilians within the meaning of Article 50 (1). As such, they enjoy the full scope of protection granted to civilians under international humanitarian law. Journalists are thus protected both against the effects of hostilities and against arbitrary measures taken by a party to the conflict when they fall into that party's hands, either by being captured or being arrested. The framers of Protocol I did not wish to create a special status for journalists, since "... any increase in the number of persons with a special status, necessarily

accompanied by an increase in protective signs, tends to weaken the protective value of each protected status already accepted..." The identity card mentioned in Article 79 (3) does not create a status for its holder, but merely "...attests to his status as a journalist." It is therefore unnecessary to own such a card in order to enjoy the status of civilian. Moreover, while it is true that protection measures for journalists are only codified in the case of international conflicts (Protocol I), journalists also enjoy the protection granted civilians in non-international armed conflicts. [...]

Protection of "embedded" journalists

Some ambiguity surrounds the status of "embedded" journalists, that is to say those who accompany military troops in wartime. Embedment is not a new phenomenon; what is new is the sheer scale on which it has been practiced since the 2003 conflict in Iraq. The fact that journalists were assigned to American and British combat units and agreed to conditions of incorporation that obliged them to stick with these units, which ensured their protection, would liken them to the war correspondents mentioned in the Third Geneva Convention. And indeed, the guidelines issued by the British Ministry of Defence regarding the media grant the status of prisoners of war to embedded journalists who are taken prisoner. According to unofficial sources, however, it would seem that the French military authorities consider "embeds" as "unilaterals" who are only entitled to civilian status, as stipulated in Article 79 of Protocol I. A clarification on this point would seem essential. [...]

The way in which "unilateral" journalists surround themselves with armed bodyguards can have dangerous consequences for all journalists. On 13 April 2003, the private security escort of a CNN crew on its way to Tikrit (northern Iraq) responded with an automatic weapon after the convoy came under fire at the entrance to the town. Some journalists are concerned by this new type of behaviour, which is contrary to all the rules of the profession: "Such a practice sets a dangerous precedent that could jeopardise all other journalists covering this war as well as others in the future," said Reporters Without Borders secretary-general Robert Ménard. "There is a real risk that combatants will henceforth assume that all press vehicles are armed. Journalists can and must try to protect themselves by such methods as travelling in bulletproof vehicles and wearing bulletproof vests, but employing private security firms that do not hesitate to use their firearms just increases the confusion between reporters and combatants."

Loss of protection

Under Articles 79.2 and 51.3 of Protocol I, journalists enjoy the protection afforded by international humanitarian law provided that they do not take a direct part in the hostilities. [...] According to the Commentary of Article 51.3, "direct participation in the hostilities" means "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces." The fact that a journalist engages in propaganda cannot be considered as direct participation (see below). It is only when a journalist takes a direct part in the hostilities that he loses his immunity and becomes a legitimate target. Once he ceases to do so, he recovers his right to protection against the effects of the hostilities. [...]

Protection of media facilities as civilian objects

Radio and television facilities are civilian objects and as such enjoy general protection. The prohibition on attacking civilian objects has been firmly established in international humanitarian law since the beginning of the twentieth century and was reaffirmed in 1977 Protocol I and in the Statute of the International Criminal Court.

In particular, it follows from the twofold obligation mentioned in Article 48 of Protocol I - namely, at all times to distinguish between civilian objects and military objectives and, accordingly, to direct operations only against the latter - that civilian objects, along with the civilian population, enjoy the general protection set out in Article 52. While Article 85 of the same Protocol makes it a war crime to attack civilians, no similar provision exists for civilian objects. It is, nonetheless, a war crime to attack certain objects to which special protection is afforded, namely works and installations containing dangerous forces, non-defended localities, demilitarized zones, historic monuments, works of art and places of worship. Protocol II grants no general protection to civilian objects; only certain objects, of particular importance to civilians, are entitled to specific protection under its provisions, that is to say medical units and transports, objects indispensable to the survival of the civilian population and cultural objects. [...]

Obligation to presume that civilian objects are being used for civilian purposes

In case of doubt, objects normally dedicated to civilian purposes, such as radio and television facilties, are to be presumed as being used for such purposes, as stipulated in Article 52.3 of Protocol I. [...]

Loss of protection for civilian objects

It clearly follows from the above-mentioned instruments of international humanitarian law that the immunity enjoyed by civilian objects and protected objects is not absolute and that such immunity is lost if these objects are used for hostile purposes. Civilian objects (ships, aircraft, vehicles and buildings) that contain military personnel, equipment or supplies or that in any way make a major contribution to the war effort, incompatible with their status, constitute legitimate targets. [...] For example, if the facilities of the RTS building in Belgrade were really being used as radio relay stations and transmitters by the military and special police forces of the Federal Republic of Yugoslavia, the review committee set up by the International Criminal Tribunal for the Former Yugoslavia (ICTY) was right in concluding that they constituted legitimate military targets for NATO. [*See* **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention, p. 2077.]

Can media facilities constitute legitimate military objectives?

International humanitarian law requires attacks to be strictly limited to "military objectives." Although the doctrine of "limited war" has now replaced the doctrine of "total war," greatly reducing the category of "military objectives," the objects that can be considered as such are still extremely numerous. According to the ICRC, the above-mentioned doctrine and the 1954 Hague Convention for the

Protection of Cultural Property in the Event of Armed Conflict, radio and television facilities may, under certain conditions, be included among them. [...]

Dual civilian and military use of media equipment and facilities

In today's highly technological society, dual civilian and military use is often made of goods and resources and this is not without consequences in terms of protection. Civilian objects (roads, schools, railways, etc.) that are temporarily put to military use or used both for civilian and for military purposes constitute legitimate targets. On 27 March 2003 coalition forces twice bombed the Ministry of Information building in Baghdad although it was known to shelter offices of the international media. On 8 April 2003, after a US tank fired on the Palestine Hotel, a gathering spot for the foreign press in Baghdad, a spokesman for the American Defense Department claimed that the hotel was a legitimate target since Iraqi officials had held meetings there 48 hours earlier. During NATO's air campaign in Yugoslavia, NATO representatives justified the bombing of the RTS building in terms of the dual use that had been made of it: in addition to their civilian use, RTS facilities were incorporated into the C3 (command, control and communications) network of the Serbian army. In its final report, the ICTY review committee stated that in so far as these facilities were used as transmitters by the armed forces, they constituted a military objective [*See* **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention, p. 2077.]. This conclusion seems to reflect both the spirit and letter of Protocol I: it is lawful to attack objects that are being put to dual use when the conditions of Article 5 (2) of Protocol I are met. Likewise, if, as a US spokesman claimed to justify the bombing of 12 November 2002, the building of the Arab Al-Jazeera television network in Kabul really sheltered offices belonging to Taliban forces and Al Qaeda operatives, then it was a legitimate target. Whatever the case may be, the obligations that belligerents have to take precautions are greater when the object is used for dual purposes.

Does the use of media facilities for propaganda purposes make legitimate targets of them?

During the 2003 military campaign in Iraq, the British media were attacked by certain ministers and members of Parliament who accused them of playing into the hands of the Iraqi propaganda machine. Four years earlier, various NATO representatives publicly justified the bombing of the RTS building in Belgrade in terms of the wish to neutralize a propaganda tool. While there is no doubt that the RTS was used for propaganda purposes, Article 52 of Protocol I cannot reasonably be interpreted as meaning that this, in itself, could justify the military attack.

The ICTY commission adopted a firm and clear position in this regard. It its report, the commission states that the media cannot be considered as a "legitimate target" merely because they are disseminating propaganda, even though such an activity supports the war effort. It also specifies that civilian morale as such is not a "legitimate military objective." The British Defence Doctrine, published in 1996, makes the same assertion, as does the report presented by Volker Kröning to the NATO Parliamentary Assembly in November 1999. This constitutes a break with the doctrine of "total war" - first described, with lucidity, by the Prussian general von Clausewitz in his treaty *On*

War - according to which, to quote the famous words of Winston Churchill, "enemy morale is also a military objective." If psychological harassment of the population were recognized as a legitimate war aim, no limits would be placed on violence, as was the case during the Second World War. That is why the following statement by Amnesty International can only meet with approval:

"Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of "effective contribution to military action" and "definite military advantage" [Article 52(2) of Protocol I] beyond the acceptable bounds of interpretation."

Not all forms of propaganda are authorized, however. Propaganda that incites war crimes, acts of genocide or acts of violence is forbidden, and news media that disseminate such propaganda can become legitimate targets. "Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target..." It is not clearly established whether or not media that incite genocide, as Radio-Télévision Libre des Mille Collines and the newspaper *Kangura* did in Rwanda in 1994, constitute a legitimate target. A positive reply to this question may no doubt be found in an interpretation of Article 52 (2) of Protocol I or of the principle whereby protection is lost in the event of participation in the hostilities. The ICTY commission itself replies as follows: "If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. It may also be argued that "hate media" constitute legitimate targets by virtue of the obligation to repress breaches of the Geneva Conventions (Articles 49/50/129/146 respectivily of the four Geneva Conventions) and Protocol I (Article 85). Indeed, under common Article 1 of the Geneva Conventions and Protocol I, States Parties undertake to respect and "ensure respect" for these instruments.

Obligation to take precautionary measures when launching attacks that could effect journalists and news media

The lawfulness of an attack depends not only on the nature of the target - which must be a military objective - but also on whether the required precautions have been taken, in particular as regards respect for the principle of proportionality and the obligation to give warning. In this regard, journalists and news media do not enjoy a particular status but benefit from the general protection against the effects of hostilities that Protocol I grants to civilians and civilian objects.

The principle of proportionality: a curb on immunity for journalists and media

[...] It was only in 1977 that [the principle of proportionality] was enshrined in a convention, namely in Articles 51 (5) (b) and 57 (2) (a) (iii) of Protocol I. This principle represents an attempt to reduce as much as possible the "collateral damage" caused by military operations. It provides the criterion that makes it possible to determine to what degree such damage can be justified under international humanitarian law: there must be a reasonable correlation between legitimate destruction and undesirable collateral effects. According to the principle of proportionality as set out in the above-mentioned articles, the

accidental collateral effects of the attack, that is to say the incidental harmful effects on protected persons and property, must not be excessive in relation to the anticipated military advantage. [...]

Obligation to give advance warning of an attack

Although NATO contended that it had "made every possible effort to avoid civilian casualties and collateral damage" when bombing the RTS building, doubts were expressed about whether it had met its obligation to warn the civilian population in advance of the attack, as provided for under Article 57 (2) (c) of Protocol I ("effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit"). When the United States bombed the Baghdad offices of the Al-Jazeera and Abu Dhabi television networks on 8 April 2003, killing one journalist and wounding another, it would also seem that no advance warning of the attacks had been given to the journalists. [...]

Obligation to give "effective advance warning"

Protocol I requires that "effective advance warning" be given. According to Doswald-Beck, "common sense must be used in deciding whether and how to give warning, and the safety of the attacker will inevitably be taken into account." The rule set out in Article 57 (2) (c) most certainly does not require that warning be given to the authorities concerned; a direct warning to the population - by means of air-dropped leaflets, radio or loudspeaker messages, etc., requesting civilians to remain at home or stay away from certain military objectives - must be considered as sufficiently effective. [...]

In 1987, lieutenant colonel Burrus M. Carnaham, of the US Joint Chiefs of Staff and Michael J. Matheson, deputy legal adviser to the US Department of State, expressed the opinion that the obligation to give warning was customary in character. This *opinio juris* is confirmed by the practice of a considerable number of States in international and internal armed conflicts. [...]

Adequacy of means

In a message to Amnesty International dated 17 May, NATO contended that it had made "every possible effort to avoid civilian casualties and collateral damage... "during the attack on RTS, in accordance with the prescriptions of Article 57 ("Precautions in attack") of Protocol I. Beyond the specific cases of RTS in Yugoslavia, Al-Jazeera in Afghanistan or Baghdad and the Palestinian radio-television offices in Ramallah, it may more generally be asked whether the bombing of radio-television facilities is the most adequate means to the sought end. According to Article 52.2 of Protocol I, the destruction of a military objective is not the only possible solution: it may be enough to capture or neutralize the objective. These other solutions may be justified from a military point of view in terms of economy and concentration of means, since the destruction of a military objective implies the destruction of materials and ammunition. But these solutions are justified above all from a humanitarian point of view, by making it possible to "minimize loss of civilian life" (Article 57.2 (a) (ii) of Protocol I).

For all these reasons, would it not be preferable to use other means than bombing whenever possible? [...]

Conclusion

It follows from the above that journalists and their equipment enjoy immunity, the former as civilians, the latter as a result of the general protection that international humanitarian law grants to civilian objects. However, this immunity is not absolute. Journalists are protected only as long as they do not take a direct part in the hostilities. News media, even when used for propaganda purposes, enjoy immunity from attacks, except when they are used for military purposes or to incite war crimes, genocide or acts of violence. However, even when an attack on news media may be justified for such reasons, every feasible precaution must be taken to avoid, or at least limit, loss of human life, injury to civilians and damage to civilian objects. [...]

DISCUSSION

1. Would you consider that journalists on dangerous mission were adequately protected before the special provision of Art. 79 of Protocol I?

2. Before the enactment of Art. 79 concerning journalists, what was the situation in that regard? (*Cf.* Art. 13 of the Hague Convention IV, Art. 81 of the 1929 Geneva Convention and Art. 4 (A) 4 of Convention III.)

3. Does Art. 79 of Protocol I introduce any obligation on the parties to the conflict? Or does it introduce a right for journalists which would not exist without this provision? What is the benefit of that provision for journalists? Does it clarify the fact that they cannot be considered as spies? Does it protect their professional activities, namely their search for news? (*Cf.* Art. 4 of Convention IV, Arts. 46, 51 and 79 of Protocol I.)

4. What is the difference under IHL between war correspondents accompanying the armed forces and other journalists? Belonging to one category or the other, does IHL provide the individual the same rights under IHL? Do only "freelance journalists" fall under the second category? Or also permanent correspondents of the media?

5. What are the rights of war correspondents accompanying the armed forces under IHL? What are the criteria they have to fulfil to be qualified as a war correspondent? What would happen if they do not fulfil those criteria? Is the ID card a necessary criterion for a journalist to be entitled to POW status? Is that card still relevant under Art. 79 of Protocol I? Do you think that by making an explicit distinction between journalists engaged in dangerous missions and war correspondents IHL broadens the protection of journalists? Or does it undermine their protection?

6. During the "travaux préparatoires" of Art. 79 of Protocol I the idea of a special protection of journalists was put forward; why was this idea rejected? Do you think that considering journalists as a special category of protected persons or

providing them with a distinctive sign would provide them better protection? Does Art. 79 of Protocol I clarify Art. 4 (A) (4) of Convention III? What are the main rights of a journalist, other than a war correspondent covered by Convention III, detained during an international armed conflict? Do these rights differ from those of war correspondents covered by Convention III? Do you think that one category is more subjected to ill-treatment upon capture than the other?

7. In the event that a journalist follows an army and is being shot at by the enemy forces, would you consider this as a breach of IHL? Do the enemy forces have to pay special attention in a conflict to distinguish between combatants and journalists? Can military necessity justify the killing of a journalist?

8. Are journalists adequately protected in non-international armed conflicts? Are they civilians? Does the rule of Art. 79 of Protocol I stating that journalists in dangerous missions are considered at all times as civilians and therefore enjoy the same protection also apply in non-international armed conflicts?

9. Has the 2003 war in Iraq and the unclear status of the "embedded" journalists made a clarification of the protection of journalists necessary? What could be the consequences of the use of armed guards for the status of journalists?

10. Should propaganda media be considered a legitimate target? Is the deliberate targeting of these facilities a violation of IHL? Were should the line be drawn between "hate media" and "normal" war propaganda? Is it possible to make such a distinction and target media in accordance with this? Is a journalist who encourages war crimes a legitimate target of an attack? Does everyone who commits war crimes lose protection against attacks?

Case No. 25, The Environment and International Humanitarian Law

THE CASE

A. Article 35 of Protocol I

[**Source:** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); available on http://www.icrc.org/ihl]

Part III: Methods and means of warfare, Combatant and prisoner-of-war status

Section I: Methods and means of warfare

Article 35: Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. [...]

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

B. Article 55 of Protocol I

[**Source:** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); available on http://www.icrc.org/ihl]

Part IV: Civilian population

Section I: General protection against effects of hostilities

Chapter III: Civilian objects

Article 55: Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

C. Article I of 1977 United Nations Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modification Techniques

[**Source:** Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, Adopted by Resolution 31/72 of the United Nations General Assembly, December 10, 1976; available on http://www.un.org]

Article I

1. Each Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting or severe effects as the means of destruction, damage or injury to any other State Party.
2. Each Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article.

D. Report submitted by the ICRC at the 48th session of the General Assembly on the Protection of the Environment in Times of Armed Conflict. 29 July 1993

[**Source:** Report submitted by the ICRC at the 48th session of the General Assembly on the Protection of the Environment in Times of Armed Conflict. 29 July 1993; Adaptation from the French, footnotes omitted, available on http://www.icrc.org/ihl]

Foreword

The present Report, submitted to the forty-eighth session (1993) of the United Nations General Assembly, follows on a report prepared by the International Committee of the Red Cross (ICRC) in 1992 and examined by the General Assembly at its forty-seventh session.

On that occasion, the General Assembly invited the ICRC to pursue its work on the subject and to report to it at its next session.

This Report supplements document A/47/328 by including a review of work of experts conducted under ICRC auspices over the past year. As a follow-up to a request made at the forty-seventh session of the General Assembly, it also contains a set of basic rules as "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict" (Annex I).

For maximum clarity, the ICRC has opted for an overall report on the issue. The present document therefore takes up - at times in a slightly summarized form - the main elements of document A/47/328, which may be considered as an interim report, superseded by this Report.

Introduction

In recent decades, many armed conflicts have involved a wide range of threats to the environment. These have included long-lasting chemical pollution on land; maritime and atmospheric pollution; despoliation of land by mines and other dangerous objects; and threats to water supplies and other necessities of life. The consequences have affected not only belligerents, but also civilians and neutral States; and they have sometimes continued long after the end of the armed conflict. Such threats to the environment expose many difficult problems. Protection of the environment is of course only one of many considerations which must be borne in mind by those involved in armed conflicts, but it is an important one. The subject has come to be extensively discussed in national and international fora, including the United Nations.[...]

The international community has given the ICRC a mandate "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof". The ICRC has declared itself ready to undertake work aimed at protecting the environment in wartime [...].

There is no need to review in detail the debate which took place in the Sixth Committee, since records of its proceedings are available.

Mention should be made, however, of some of the items which were examined more thoroughly, and of the main conclusions reached by the Committee.

Most of the States which took part in the debate (as well as the ICRC) recognized the importance and relevance of existing rules and called for them to be implemented and respected.

Some States felt that the existing rules were sufficient and that what was needed was ensuring greater compliance with them. However, most of the States represented thought it also necessary to clarify and interpret the scope and content of some of those rules, and even to develop other aspects of the law relating to the protection of the environment in time of armed conflict. These include the need for better protection of the environment as such, the need for stricter application of the principle of proportionality (and, to this end, for a more precise definition of its scope in specific situations), the importance of defining more precisely the threshold of application of the rules, the need for a clear decision regarding the applicability in wartime of provisions of international

environmental law, and the advisability of setting up a mechanism to sanction breaches thereof.

The suggestions aiming for a complete overhaul of existing law were not deemed opportune.

The debate led to the adoption of Resolution A/47/37, which called on States to accede to the treaties in force and apply their provisions, in particular by incorporating them in their military manuals. Furthermore, the resolution invited the ICRC to continue its work on the question, to prepare a handbook of model guidelines for military manuals and to submit to the forty-eighth session of the General Assembly a report to be examined under the item of the agenda devoted to the United Nations Decade of International Law.

The present report begins by recalling the main provisions of existing law (I). It then goes on to list the results of the principal activities carried out recently by various organizations (II) and under ICRC auspices (III). Section IV describes the ICRC's position on issues relative to the protection of the environment in time of armed conflict, and section V presents some conclusions.

As mentioned above, the Annex to this report contains "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict".

I. REPORT ON EXISTING LAW

1. Background

Ever since its inception, international humanitarian law has set limits on the right of belligerents to cause suffering and injury to people and to wreak destruction on objects, including objects belonging to the environment. It has traditionally been concerned with limiting the use of certain kinds of weapons or means of warfare which continue to do damage even after a war is over, or which may injure people or property of States which are completely uninvolved in the conflict.

The Declaration of St. Petersburg of 1868 expressed this idea in the following terms:

"[...] the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy [...]".

Restating Article 22 of the Hague Regulations of 1907 Article 35, paragraph 1, of [...] Protocol I [...] expresses this fundamental rule as follows:

"In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited".

The concept of proportionality also sets important limits on warfare: the only acts of war permitted are those that are proportional to the lawful objective of a military operation and actually necessary to achieve that objective.

These fundamental rules are now part of customary international law, which is binding on the whole community of nations. They are also applicable to the protection of the environment against acts of warfare.

The rules of international humanitarian law have been drawn up to address the specific problems caused by warfare. As such, they are applicable as soon as an armed conflict breaks out.

In addition to the rules of law pertaining to warfare, general (peacetime) provisions on the protection of the environment may continue to be applicable. This holds true in particular for the relations between a belligerent State and third States.

The following paragraphs review the major international legal rules which are relevant to the protection of the environment in time of armed conflict.

2. International rules concerning the protection of property

Like the rest of international law, international humanitarian law has been slow in recognizing that the environment requires protection by a set of rules of law specific to it. Thus, the word "environment" does not appear in the Hague Regulations or in the 1949 Geneva Conventions, and none of those treaties addresses specific environmental issues. However, Article 23, paragraph 1 g) of the Hague Regulations states that it is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".

The destruction of property in time of armed conflict is also restricted by customary international law. The Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, which were unanimously affirmed by the United Nations General Assembly have codified this customary law. The sixth of these Principles lists crimes which are punishable as crimes under international law, divided into three categories: crimes against peace, war crimes and crimes against humanity. At the end of the list of war crimes in paragraph (b) appears "wanton destruction of cities, towns or villages, or devastation not justified by military necessity". In its comments the ILC noted that the Nuremberg Tribunal had pointed out that the war crimes defined in Article 6 (b) of its Charter were already recognized as war crimes under international law. This was because the rules set out in the Hague Convention of 1907, particularly Article 23, paragraph 1 (g), thereof which prohibits destruction which is not "imperatively demanded by the necessities of war", had in 1939 acquired the status of customary rules of international law.

In the event of military occupation, Article 55 of the Hague Regulations and Article 53 of the Fourth Geneva Convention set limits to the discretion of the Occupying Power, as far as the destruction of property is concerned. The latter rule is worth quoting:

"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

A Party to a conflict that destroys, for example, property protected by the Fourth Geneva Convention and in so doing causes damage to the environment violates the Fourth Convention, if such destruction is not rendered "absolutely"

necessary by military operations. If such destruction is "extensive", the act becomes a grave breach of that same Convention (Article 147), i.e. a war crime.

The rules discussed in this section do not relate to environmental issues explicitly, but they do protect the environment by prohibiting the wanton or unjustified destruction of property.

3. International rules concerning the protection of the environment as such

Protocol I includes two provisions which deal directly with the dangers that modern warfare represents for the environment. They protect the environment as such, although they do so in relation to human beings, who are the principal concern of international humanitarian law.

Those rules are Article 35, paragraph 3, and Article 55. [...] [*See* **Case No. 25**, The Environment and International Humanitarian Law, [*Cf.* A and B.] p. 680]

Article 35 sets out the general rule applicable to all acts of warfare, whereas Article 55 is intended to protect the civilian population from the effects of warfare on the environment. In both cases the following are prohibited: (a) attacks on the environment as such, and (b) using the environment as an instrument of warfare.

Article 35, paragraph 3, and Article 55 prohibit only such damage to the environment as is "widespread, long-term and severe", thereby making it clear that not all damage to the environment is outlawed. Indeed, damage to the environment is unavoidable in war. The point at issue, therefore, is where to set the threshold.

The question as to what constitutes "widespread, long-term and severe" damage and what is acceptable damage to the environment is open to interpretation. There are substantial grounds, including from the *travaux préparatoires* of Protocol I, for interpreting "long-term" to refer to decades rather than months. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be; and there is a need to limit as far as possible environmental damage even in cases where it is not certain to meet a strict interpretation of the criteria of "widespread, long-term and severe". Because Protocol I, as at present interpreted, does not necessarily cover all cases of damage to the environment and because not all States are party to it, the earlier conventional and customary rules, especially those of The Hague (1907) and Geneva (1949), continue to be very important.

Besides Article 35, paragraph 3, and Article 55, other provisions of Protocol I touch incidentally on protection of the environment in armed conflict. In particular, Article 56 deals with the danger to the environment resulting from the destruction of dams, dykes or nuclear electrical generating stations. Under the heading "Protection of objects indispensable to the survival of the civilian population", Article 54 prohibits in certain circumstances the destruction of, among other things, agricultural areas or irrigation works. Articles 52 ("General protection of civilian objects") and 57 ("Precautions in attack") have also an important bearing on the protection of the environment.

Finally, Article 36 obliges the Parties to Protocol I to determine whether the acquisition, development or use of a new weapon would be compatible with international law. Of course, the rules on the protection of the environment are to be taken into account during this assessment.

In conclusion, the provisions of Protocol I usefully supplement earlier principles and rules of international humanitarian law, and contain some important rules prohibiting a wide range of acts destructive of the environment in time of armed conflict.

As at 16 June 1993, 125 States are party to Protocol I. Its provisions on environmental protection are therefore binding international law for the majority of States, but not yet for all of them.

4. Other international rules

A number of other international instruments have a direct bearing on the protection of the environment in time of armed conflict. Without going into detail, the following treaties should be mentioned:

- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, of 17 June 1925. [*See* **Document No. 2**, p. 524.]
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, of 13 January 1993. [*See* **Document No. 13**, p. 592.]

This Convention should play a most important role, considering the fact that some chemical weapons may have very long-lasting, widespread and severe effects.

- Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954. [*See* **Document No. 3**, p. 525.]
- Convention concerning the Protection of the World Cultural and Natural Heritage, of 23 November 1972.
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD Convention"), of 10 December 1976.

The last-mentioned Convention, which was drafted under the auspices of the Committee on Disarmament, is intended to prohibit military or any other hostile use of "environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party" (Article I).

The Convention is thus primarily concerned with prohibiting the use of the forces of the environment as weapons. In so doing, of course, it inevitably outlaws damage to the environment resulting from the use of such methods of warfare.

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, of 10 October 1980. [*See* **Document No. 4**, p. 540.]

This Convention was concluded under United Nations auspices and is intended, as its name implies, to prohibit or restrict the use of certain weapons. To date, it has three annexed protocols dealing with (a) non-detectable fragments, (b) mines, booby-traps and other devices, and (c) incendiary weapons. The second and third of these should make a useful contribution to protecting the environment in time of armed conflict.

Furthermore, all other international rules limiting the development, production, testing or use of weapons of mass destruction make a significant contribution to the protection of the environment in time of armed conflict.

5. The special case of non-international armed conflict

The rules protecting the victims of non-international armed conflict are less well developed than those governing international armed conflict.

Article 3 common to the four Geneva Conventions of 1949 does not say anything about protecting the environment during civil wars; it addresses only humanitarian issues in the strictest sense.

The [...] Protocol II, [...] contains no provision relating explicitly to the environment. However, Article 14, on the protection of objects indispensable to the survival of the civilian population, has a direct impact on warfare and the environment, with its prohibition of attacks on agricultural areas, irrigation works, etc.

The same applies to Article 15, which protects "works and installations containing dangerous forces". These two provisions are applicable in the event of non-international armed conflict, their scope and content being very similar to those of Articles 52, 54 and 56 of Protocol I, applicable in international armed conflicts. Other legal provisions regarding the environment, for example rules of general or bilateral international treaties, remain applicable in principle to a State in which there is an internal conflict. [...]

II. PRINCIPAL ACTIVITIES IN RECENT YEARS

Much important work was undertaken in the early 1970s in connection with protecting the environment in time of armed conflict. This process led to the adoption of the main international rules governing this area, in particular the ENMOD Convention, Article 35, paragraph 3, and Article 55 of Additional Protocol I of 1977, and certain provisions of the 1980 Convention on conventional weapons. In subsequent years, there was little discussion on the protection of the environment in time of armed conflict, although certain conflicts had caused serious environmental damage, due in particular to the large-scale and indiscriminate use of mines, the bombing and shelling of whole areas and attacks on oil-producing installations, resulting in severe pollution.

The need to protect the environment in time of armed conflict was brought home to the world suddenly and tragically during the Gulf conflict in 1990-1991. In the months that followed the conflict, a number of meetings and symposia were held to discuss the question whether existing law offers an adequate response to environmental disasters.

This is not the place for a detailed discussion of those meetings (on which reports have in most cases been published). It is nevertheless necessary to recall briefly the principal questions they addressed and their main conclusions. At these meetings, generally speaking, the idea of creating an entirely new body of international rules for the protection of the environment was rejected. Most experts insisted on the importance of existing law (see section I) while acknowledging that there are a number of gaps in the rules currently applicable. The first step, therefore, is to ensure that even more States observe their existing obligations, that they accede to or ratify existing treaties and, at the same time, enact coordinate domestic legislation, including rules in their military manuals.

The content of this body of law has been discussed on many occasions. These discussions showed that protection of the environment in time of armed conflict is not provided for only by specific rules on this subject (see section I), but that other international rules also make a contribution to that end, for example certain fundamental principles of humanitarian law, whether treaty-based or customary, the rules of international environmental law and certain rules governing international responsibility.

Close attention was also paid to the implementation of existing law. Emphasis was laid on a number of means of encouraging proper implementation. Particular mention was made of dissemination, i.e. measures to make the law as widely known as possible, and the very useful role that could be played by the International Fact-Finding Commission, constituted under Article 90 of 1977 Protocol I.

It was felt that, while a new body of codified law on the subject would not be justified, there was nevertheless a need to develop or clarify existing law to deal with certain issues, such as:

(a) interpretation of the specific provisions of the ENMOD Convention and Protocol I;
(b) the simultaneous applicability of the rules of international environmental law and humanitarian law;
(c) determining what body of law is applicable between a belligerent and States which are not party to the conflict, but are nevertheless affected by means of warfare harmful to the environment;
(d) the need to do more to protect the environment as such and to find better ways of preventing damage to the environment in time of armed conflict.

As mentioned in the introduction to this Report, the UN General Assembly also addressed these questions at its forty-sixth and forty-seventh sessions.

A fundamental shift in focus on international cooperation for socio-economic development and environmental protection was recorded at the United Nations Conference on Environment and Development (UNCED), at which 178 States convened in Rio de Janeiro (1992). UNCED established the prime United Nations objective of "sustainable development". The Declaration of Rio de Janeiro contained three articles on armed conflict, and the UNCED Action Plan, entitled Agenda 21, made explicit reference to armed conflict in paragraph 39.6.

Both these documents were subsequently adopted at the forty-seventh session of United Nations General Assembly.

Among them, one should mention Principle 24 of the Rio Declaration [available on http://www.agora21.org/rio92/riodecl.txt] and paragraph 39.6 of Agenda 21 [*Cf.* United Nations A/CONF.151/126/Rev.1 (vol. 1), Annex II] which state respectively:

"Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

"Measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law. The General Assembly and its Sixth Committee are the appropriate forums to deal with this subject. The specific competence and role of the International Committee of the Red Cross should be taken into account."

Protection of the environment in time of armed conflict was also discussed at the Second Review Conference of the ENMOD Convention, held in Geneva in September 1992. (13) On that occasion, the Convention's field of application - and especially the type of environmental modification techniques which should be prohibited - was discussed at length, but the participants did not reach a unanimous conclusion. The question might be submitted to the Consultative Committee of Experts which could be convened at the request of one or more States Parties under Article 5 of the ENMOD Convention.

III. WORK CARRIED OUT UNDER ICRC AUSPICES

To discharge the mandate assigned to it by the General Assembly in its Decision 46/417 and by its Resolution 47/37, the ICRC convened three meetings of experts to study the problem of protecting the environment in time of armed conflict. The first meeting, held in Geneva from 27 to 29 April 1992, brought together over 30 experts from the armed forces, the scientific community, academic circles and governments as well as representatives of international governmental and non-governmental organizations. All were invited in their personal capacity.

The second and third meetings, held in Geneva in January and June 1993 respectively, brought together the same group of experts and several other participants ensuring broader geographical representation.

The goals of the meetings were as follows:

1. to define the content of existing law;
2. to identify the main problems involved in implementing this law;
3. to identify any gaps in existing law;
4. to determine what should now be done in this area;
5. to draft Model Guidelines for military manuals.

Reports presented by several experts sparked an initial general debate, during which was examined *inter alia* the question of whether or not the rules of

international environmental law were applicable in time of armed conflict. Most participants concluded that these rules could be presumed to be applicable at least to a certain extent, insofar as they do not contain specific disclaimers, but that further research on this question was necessary.

The importance and relevance of the currently applicable rules (whether of treaty-based or customary international humanitarian law, international environmental law, or rules governing international responsibility) were clearly reaffirmed, as was the need to make these rules more widely known, in particular by means of Guidelines expressly drawn up for members of the armed forces.

The need to clarify certain aspects of applicable law and to look for ways of protecting the environment in time of non-international armed conflict was recognized.

Finally, there was large support for the proposal made by some experts to protect - subject to conditions that remain to be set - nature reserves, which could be likened to demilitarized zones or other protected areas. The United Nations list of parks and equivalent reserves and UNESCO's designated biosphere reserves provide available references for identifying such nature reserves on maps for reference with military manuals. Priorities might be selected from these lists.

During these meetings a list of the most important matters to be discussed was drawn up. The following is a summary of the discussions on the specific issues listed.

1. The notion of the global interest of the international community for the protection of the environment in the provisions of international humanitarian law

There is a general interest - going well beyond that of the parties to the conflict themselves - in preserving the environment. Even in time of armed conflict, this general interest should be taken into account by the belligerents when selecting methods and means of warfare.

2. Balance between protection of the environment and military necessity (including the principle of proportionality): need for specific provisions or clarifications

It is necessary to underline the need to take environmental protection into account when assessing the military advantages to be expected from an operation. The accepted principles concerning the conduct of hostilities are important and relevant with regard to environmental protection. These include:

- the prohibition of acts causing damage which is not warranted by military necessity;
- the obligation, when possible, to choose the least harmful means of reaching a military objective;
- the obligation to respect proportionality between the expected military advantage and the incidental damage to the environment.

3. Rules of customary international law

Customary rules are of great importance. Indeed, some experts even felt that these rules were the key to protecting the environment in time of armed conflict, in particular as they prohibited attack on the environment as such.

4. Relationship between international humanitarian law and international environmental law (regional and universal regulations); similarity to the relationship between international humanitarian law and human rights law

a) between a **State not party** to the conflict and belligerents;
b) between **belligerents**.

The relationship between international environmental law and humanitarian law should be studied in greater depth. In principle the instruments of international environmental law remain applicable in time of armed conflict, although the question of their legal applicability had either not been contemplated or had been avoided in the treaties themselves. There is a need for a study of environmental agreements in general, bearing in mind their applicability in time of armed conflict. Whenever feasible, any new treaty adopted in this area should contain a provision specifically stipulating that it is applicable in time of armed conflict. In addition, new instruments should clearly reaffirm that the duties of States party to an international armed conflict to third States and relating to the protection of the environment are, as a matter of principle, not affected by the existence of an armed conflict.

5. Role of the Martens clause in the protection of the environment

The Martens clause states that in cases not covered by specific provisions, civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and from the dictates of public conscience. Its validity in the context of the protection of the environment in time of armed conflict is indisputable.

6. Interpretation of and relationship between the rules of Protocol I and the ENMOD Convention

The respective raisons d'être of the provisions of Protocol I and of the 1976 Convention on environmental modification techniques are different.

The need to interpret more clearly the terms employed in these two treaties might be included on the agenda of the Consultative Committee of Experts under ENMOD, which might be convened by 1995.

7. Acceptability of self-inflicted damage to the environment; scorched earth policy and use of the environment by States for their own protection and on their own territory

A distinction should be made between environmental destruction by belligerents on enemy territory, as opposed to environmental destruction on their own territory.

Self-inflicted damage would occur mainly on a State's own territory. Although the basic rule in such cases is the full sovereignty of the State over its territory, it was noted that this rule is undergoing gradual erosion.

Generally speaking, damage to the environment inflicted outside a State's own territory is covered by existing international environmental law and humanitarian law and the present trend towards regulating the protection of the civilian population in enemy territory should be extended to the protection of the environment as such. On the other hand, the question of damage caused by a State on its own territory is more problematical. The answer to it should be found in the law applicable in peacetime, which imposes particular obligations on States to protect their own environment.

8. Protection of the environment in naval warfare

Three main questions have to be addressed: (a) the degree to which customary rules of the law of the sea and the 1982 Law of the Sea Convention, in particular its provisions on the preservation and protection of the marine environment, should apply in time of armed conflict; (b) the applicability in time of armed conflict of current international legislation for the preservation and protection of the marine environment, especially the conventions adopted by regional organizations or under the auspices of the International Maritime Organization; (c) the applicability to naval warfare of general treaties of international humanitarian law, particularly 1977 Protocol I.

It is necessary to continue studies under way in the law of naval warfare and to clarify the content and scope of the customary and conventional law of the sea, especially the 1982 Law of the Sea Convention. This would make for greater protection of the environment since it is recognized that, while the 1982 Convention is nearing entry into force, many of its rules are already considered to be of customary nature and have been incorporated into several military manuals.

The organizations which have sponsored treaties for the preservation and protection of the marine environment should be requested to examine the applicability of such treaties in time of armed conflict.

The general principles of international humanitarian law, in particular those of proportionality and distinction, are applicable to naval warfare. In addition, certain provisions of general treaties of international humanitarian law should apply to naval warfare, notably some of those of Protocol I of 1977, but present texts may be inadequate in the context of naval warfare and could or should be adapted to the marine environment. This might be the case, for instance, of Articles 52 ("General protection of civilian objects") and 55 ("Protection of the natural environment") of 1977 Protocol I. Article 56 ("Protection of works and installations containing dangerous forces") could play (in particular its paragraph 6, providing for the conclusion of further agreements) an important role in the protection of the marine environment. The possible addition of oil rigs and pipelines to the list of works and installations containing dangerous forces might be in particular studied in the context of naval warfare.

Furthermore any action against civilian nuclear-powered vessels and ships carrying oil, liquid gas or other dangerous substances should be carried out taking into account the above-mentioned principle. The possibility to declare marine areas of recognizable environmental importance non-targets could be envisaged.

9. When should damage to the environment be qualified as a "grave breach"? State responsibility and compensation

Any violation of either treaty-based or customary rules attributable to a State would create an obligation on the part of the offending State towards the State or States whose environment suffered damage.

According to Article 3 of Hague Convention IV of 1907 and to Article 91 of 1977 Protocol I, a State violating an international obligation may be liable to pay compensation.

Some violations of Article 53 of the Fourth Geneva Convention of 1949 are listed as grave breaches in Article 147 of the same Convention and thus constitute war crimes, just like violation of Article 23 of Hague Convention IV.

Some experts felt that the violations of Articles 35 and 55 of 1977 Protocol I should be made as grave breaches.

The importance and relevance of the current work of the International Law Commission has to be underlined, in particular of Article 19 of the Draft Articles on State responsibility prepared by this Commission.

10. Applicability of the precautionary principle to the protection of the environment in time of armed conflict

This principle is an emerging, but generally recognized principle of international law. The object of the precautionary principle is to anticipate and prevent damage to the environment and to ensure that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason to postpone any measures to prevent such damage.

This principle appears mainly in recent treaties and other instruments designed for peacetime. Its possible applicability in armed conflict needs further study even if the precautionary principle is indeed already partially present in international humanitarian law treaties, in particular in Article 36 of Protocol I which governs the development of new weapons.

Despite the existence of the precautionary principle and of Article 36 of Protocol I, it is felt that environmental concerns had been largely ignored during the negotiation of most recent arms control treaties and that the latter had failed to prevent the development of new weapons.

Some experts were thus of the opinion that Article 36 of 1977 Protocol I was inadequate to ensure control of the development of new weapons, and that additional control mechanisms should be proposed. One expert suggested that an international body therefore be set up.

11. Protection of the environment in time of non-international armed conflict: content and scope of applicable law; difference with the provisions applicable in international armed conflict

Although neither Article 3 common to the 1949 Geneva Conventions nor Protocol II of 1977 established a specific protection for the environment in time of non-international armed conflict, the environment is nonetheless protected by general rules of international humanitarian law. Among them, it is worth mentioning

Articles 14 and 15 of 1977 Protocol II, and provisions of the World Heritage Convention of 1972. The latter, applicable in all armed conflicts, could play an important role; greater efforts should therefore be made to ensure its full implementation.

In addition to these rules of humanitarian law, most peacetime obligations resulting from universal or regional treaties remain applicable in time of non-international armed conflict.

In some cases, environmental treaties have indeed been applied and respected during non-international armed conflicts.

In several countries it has been decided to instruct soldiers to apply the same rules, regardless of whether the conflict was international or non-international. This practice, which makes up for the absence of specific provisions applicable in non-international conflict and corresponds to the Martens clause, should be more widely applied.

12. Means to ameliorate the protection of cultural and natural heritage sites in times of armed conflict

This topic was recently discussed by a Meeting on Protection of Cultural and Natural Heritage Sites.

The objectives of the meeting were to make existing treaties (18) more effective at the practical level and to encourage greater participation in these instruments, under which lists should be drawn up and deposited with the United Nations or UNESCO.

A number of practical measures were recommended, including the preparation of detailed maps of protected areas, the elaboration of material for the dissemination of the relevant treaties, and the drafting of guidelines for military manuals.

The renewed interest in this field shown by UNESCO was also mentioned. It was hoped that this would enhance the level of participation and improve the implementation of the treaties.

The experts took note with interest of those new developments. The importance of establishing strict procedures for the designation of protected sites in the sea as well as on land was emphasized, as was the fact that a protected area should be free of weapons.

At the end of their work, the experts encouraged the ICRC to pursue its work to clarify and, where necessary, develop the rules aiming to protect the natural environment in time of armed conflict.

IV. THE POSITION OF THE ICRC

The ICRC agrees to a great extent with the conclusions reached in the various meetings of experts organized in recent years and in particular in the three meetings organized under its auspices.

It has reservations about proposals for a new process of codification of the rules protecting the environment in time of armed conflict. For one thing, the ICRC feels that the result would be of dubious value and could even be

counter-productive. Moreover, the institution believes that, if several aspects of the existing law were elaborated on and if the law were more fully implemented, it would provide adequate protection of the environment in time of armed conflict.

The ICRC therefore wishes to see a special effort made to increase compliance with existing rules and to improve their implementation. This naturally requires the greatest possible number of States to become party to international humanitarian law treaties and to use the specific means of implementation provided for by these instruments and by other treaties and resolutions.

Though it is convinced that faithful implementation of existing law should go a very long way to limiting environmental damage in time of armed conflict, the ICRC is quite aware that this law is in need of interpretation, clarification and development. The meaning of certain terms should be agreed on, and a number of specific issues (such as the applicability in time of conflict of rules of international environmental law essentially intended for peacetime and the content of the law applicable to non-international armed conflicts) should be studied more closely.

The ICRC is also very much in favour of proposals to do more to protect nature reserves in time of armed conflict. Likewise, it feels that careful attention should be paid to the problem of environmental damage caused by the indiscriminate and unrecorded laying of mines. This question should be examined in the review process of the 1980 Convention on conventional weapons.

Finally, the use on the battlefield of certain weapons represents, in the ICRC's view, a growing risk to the environment. The law of armed conflict must therefore take technical developments into account and contain their effects. It should be stated very plainly that many methods and means of warfare available today will, if used, inevitably cause serious harm to the environment. Though means should obviously be found to provide a degree of protection for the environment, this should in no way be allowed to relieve those concerned of their duty to settle disputes peacefully, a course which was already advocated by the 1899 Hague Convention on the Peaceful Settlement of Disputes.

V. CONCLUSIONS

Recent deliberations have clearly demonstrated the need to continue to seek ways of protecting the natural environment in time of armed conflict, and have identified a number of important problems to which realistic and effective solutions must quickly be found and on which specific follow-up action may be taken.

The following questions could be examined by the Sixth (Legal) Committee:

1. Relationship between the ENMOD Convention and 1977 Additional Protocol I, in particular, definition of the terms "widespread, long-lasting/long-term and severe"

These terms call for interpretation and clarification. The Consultative Committee of Experts provided for in Article 5 of the ENMOD Convention should examine this question.

2. Applicability in armed conflict of international environmental law; general clarification and action in case of revision of the treaties

Further study is needed on this matter, and should take into account customary law, international environmental agreements, including the Convention on the Law of the Sea, and regional instruments. It could be carried out by a specialized organization such as the International Council of the Environment, if it were given the necessary resources, and should be based on a review of the most important environmental treaties. The various bodies in charge of the treaties concerned could also play a role, especially with respect to review procedures.

3. Protection of the environment and restriction on the use of mines; action to be taken during the Conference for reviewing the 1980 Convention

First of all, States should become party to the 1980 Convention.

The forthcoming Conference for reviewing the 1980 Convention on conventional weapons should take in due account of the damage to the environment caused by the use of conventional weapons such as mines and incendiary weapons, as well as new weapons. Attention should also be drawn to the obligation to determine the legality of the use of any new weapon.

Existing principles and customary rules should be strictly observed.

4. Protection of cultural sites and nature reserves and parks

The first step in ensuring protection of natural and cultural sites might be to draw up maps identifying them. IUCN and UNESCO could undertake this task. The guidelines laid down in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which established a mechanism for the definition and the registration of sites, could be followed. It might also be necessary to develop existing law in order to afford better protection to sites which are already specifically protected.

5. Protection of the environment in time of non-international armed conflict; possible application of the rules applicable in time of international armed conflict

This matter requires close attention as the environment must be protected in non-international armed conflicts also. Two observations seem to be especially relevant:

a) it is difficult to contemplate that acts prohibited in international armed conflicts might be permitted in non-international armed conflicts;
b) in some cases, global environmental considerations should prevail over a State's sovereignty.

6. Means of implementing provisions on the protection of the environment in time of armed conflict; possible role of the International Fact-Finding Commission provided for in Article 90 of 1977 Protocol I

The newly established Fact-Finding Commission should play a role in matters relating to the environment, and when necessary call on the service of experts in the matter. Other institutions (including Protecting Powers or the ICRC)

responsible for the implementation of international humanitarian law should take due account of the provisions on the protection of the environment.

Relevant questions should also be inserted in the questionnaires which are part of the reporting systems under various environmental law instruments.

7. Dissemination of provisions protecting the environment in time of armed conflict

Environmental aspects must be taken into account when disseminating the rules of international law relating to armed conflicts and vice versa. Under international humanitarian law, dissemination of these provisions is an obligation. This is not the case with respect to international environmental law, but it should be encouraged.

The importance of public awareness of the existence of the relevant provisions should be stressed. The need to teach those provisions to soldiers and others directly involved in armed conflict should also be emphasized.

8. Procedure for drafting Guidelines for Military Manuals and Instructions (see Annex)

The Guidelines which are submitted herewith have been drawn up in consultation with experts, with two main objectives in view:

- to harmonize the Guidelines with the above list of suggested follow-up measures;
- to provide help governments formulate their own national texts.

Future work of the ICRC

The ICRC is of the opinion that work in this area must continue. It is determined to fulfil its mandate to work for the understanding and the dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.

It is thus prepared to continue to contribute actively to the search for appropriate means of protecting the environment in time of armed conflict, by proposing solutions to current problems in this area.

The ICRC is in particular ready to take three measures which should have a positive impact on the protection of the environment in time of armed conflict:

- organization of meetings of experts, as it did in 1974 and 1976, to prepare the review conference of the 1980 Convention on Conventional Weapons;
- extension of its dialogue with military and legal circles so as to examine in depth the practical problems encountered in armed conflicts in implementing the rules governing the conduct of hostilities, including those relevant to the protection of the environment, and thus to clarify the meaning of those rules;
- further cooperation in the drafting of rules on the protection of the environment in time of armed conflicts for inclusion in military manuals, on the basis of the annexed Guidelines.

ANNEX:

GUIDELINES FOR MILITARY MANUALS AND INSTRUCTIONS ON THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

I. PRELIMINARY REMARKS

1) The present Guidelines are drawn from existing international legal obligations and from State practice concerning the protection of the environment against the effects of armed conflict. They have been compiled to promote an active interest in, and concern for, the protection of the environment within the armed forces of all States.

2) Domestic legislation and other measures taken at the national level are essential means of ensuring that international law protecting the environment in times of armed conflict is indeed put into practice.

3) To the extent that the Guidelines are the expression of international customary law or of treaty law binding a particular State, they must be included in military manuals and instructions on the laws of war. Where they reflect national policy, it is suggested that they be included in such documents.

II. GENERAL PRINCIPLES OF INTERNATIONAL LAW

4) In addition to the specific rules set out below, the general principles of international law applicable in armed conflict - such as the principle of distinction and the principle of proportionality - provide protection to the environment. In particular, only military objectives may be attacked and no methods or means of warfare which cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law.

G.P.I Arts. 35, 48, 52 and 57

5) International environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.

Obligations concerning the protection of the environment that are binding on States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict.

6) Parties to a non-international armed conflict are encouraged to apply the same rules that provide protection to the environment in international armed conflict and, accordingly, States are urged to incorporate such rules in their military manuals and instructions on the laws of war in a way that does not discriminate on the basis of how the conflict is characterized.

7) In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.

H.IV preamble, G.P.I Art. 1.2, G.P.II preamble

III. SPECIFIC RULES ON THE PROTECTION OF THE ENVIRONMENT

8) Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law.

H.IV.R Art. 23(g), G.C.IV Arts. 53 and 147, G.P.I Arts. 35.3 and 55

9) The general prohibition on destroying civilian objects, unless such destruction is justified by military necessity, also protects the environment.

H. IV. R Art. 23(g), G.C.IV Art. 53, G. P. I Art. 52, G. P. I I Art. 14

In particular, States should take all measures required by international law to avoid:

(a) making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives;

CW.P.III

(b) attacks on objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas or drinking water installations, if carried out for the purpose of denying such objects to the civilian population;

G.P.I Art. 54, G.P.II Art. 14

(c) attacks on works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, even where they are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population and as long as such works or installations are entitled to special protection under Protocol I additional to the Geneva Conventions;

G.P.I Art. 56, G.P.II Art. 15

(d) attacks on historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

H.CP, G.P.I Art. 53, G.P.II Art. 16

10) The indiscriminate laying of landmines is prohibited. The location of all pre-planned minefields must be recorded. Any unrecorded laying of remotely delivered non-selfneutralizing landmines is prohibited. Special rules limit the emplacement and use of naval mines.

G.P.I Arts. 51.4 and 51.5, CW.P.II Art. 3, H.VII

11) Care shall be taken in warfare to protect and preserve the natural environment. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population.

G.P.I Arts. 35.3 and 55

12) The military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party is prohibited. The term "environmental modification techniques" refers to any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

ENMOD Arts. I and II

13) Attacks against the natural environment by way of reprisals are prohibited for States party to Protocol I additional to the Geneva Conventions.

G.P.I Art. 55.2

14) States are urged to enter into further agreements providing additional protection to the natural environment in times of armed conflict.

G.P.1 Art. 56.6

15) Works or installations containing dangerous forces, and cultural property shall be clearly marked and identified, in accordance with applicable international rules. Parties to an armed conflict are encouraged to mark and identify also works or installations where hazardous activities are being carried out, as well as sites which are essential to human health or the environment.

e.g. G.P.I Art. 56.7, H.CP. Art. 6

IV. IMPLEMENTATION AND DISSEMINATION

16) States shall respect and ensure respect for the obligations under international law applicable in armed conflict, including the rules providing protection for the environment in times of armed conflict.

G.C.IV Art. 1, G.P.I Art. 1.1

17) States shall disseminate these rules, making them known as widely as possible in their respective countries, and include them in their programmes of military and civil instruction.

H.IV.R Art. 1, G.IV Art. 144, G.P.I Art. 83, G.P.II Art. 19

18) In the study, development, acquisition or adoption of a new weapon, means or method of warfare, States are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by applicable rules of international law, including these providing protection to the environment in times of armed conflict.

G.P.I Art. 36

19) In the event of armed conflict, the parties thereto are encouraged to facilitate and protect the work of impartial organizations contributing to preventing or repairing damage to the environment, pursuant to special agreements

between the parties concerned or, as the case may be, the permission granted by one of them. Such work should be performed with due regard to the security interests of the parties concerned.

e.g. G.C.IV Art. 63.2, G.P.I Arts. 61-67

20) In the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches. Military commanders are required to prevent and, where necessary, to suppress and to report to competent authorities breaches of these rules. In serious cases, offenders shall be brought to justice.

G.C.IV Arts. 146 and 147, G.P.I Arts. 86 and 87

DISCUSSION

1. a. Which approach has been traditionally adopted by IHL regarding the environment?
   b. Is every object part of the environment necessarily a civilian object, which may therefore not be attacked, independently of any specific rule on the environment? Why is this not a sufficient protection for the environment?
   c. Traditionally the protection of the environment has been linked to the protection of civilian population and civilians objects: would you say that this approach has changed?
2. Would you qualify the provisions in the Hague Conventions, the Conventions and the Protocols regarding the environment as being insufficient?
3. Can the environment or parts of it become a military objective as defined in Protocol I? Under which conditions? May those parts be attacked? (*Cf.* Arts. 35 (3), 52 (2) and 55 of Protocol I.)
4. a. What is the purpose of the ENMOD Convention? Which element does Article I of the Convention add to the treatment of the environment in International Humanitarian Law?
   b. Does the ENMOD Convention also cover attacks against military objectives? Do the provisions protecting the environment in Protocol I also cover attacks on military objectives?
   c. In light of the recent State practice would you say that the ENMOD Convention is necessary? Has the environment as such been used as a weapon since the adoption of this Convention in 1977? If not, does your answer prove that the Convention is not necessary?
5. Since Article 35 (3) focuses on the environment, do you consider Article I of the ENMOD Convention necessary? Do you think that the thresholds of applicability for Article 35 (3) of Protocol I and for Article I of ENMOD are the same? Would you make a differentiation between the two articles in terms of applicability?

6. Does the terminology used in Article I of the ENMOD Convention and Article 35 (3) Protocol I, namely that damage (or, respectively, effects) must be "widespread, long lasting and [respectively or] severe", have the same meaning?
7. To what extent may the articles protecting the environment be by-passed by invoking military necessity? Is there a difference between the provisions of Protocol I and Article I of the ENMOD Convention in that regard?
8. Would you consider the articles concerning the environment as being customary or emerging customary international law? How could they become customary international law? Only through practice in armed conflicts? Or also through general state practice concerning the protection of the environment?
9. Why and how could a new process of codification of rules protecting the environment be "counter-productive"?
10. Did the ICRC have a mandate to study the necessity to develop rules of IHL regarding the environment? Was it based on a UN General Assembly Resolution or solely on the Statutes of the International Movement of the Red Cross and the Red Crescent?

Document No. 26, ICRC, Protection of War Victims

[**Source:** *Report on the Protection of War Victims*, Prepared by the ICRC, Geneva, June 1993; footnotes omitted.]

[...]

2. Prevention

Armed conflicts cause unspeakable suffering, whatever is done to prevent it and however well international humanitarian law is respected. It is therefore vital to encourage and intensify all efforts to tackle the *root causes* of conflicts, such as poverty, inequalities, illiteracy, racism, the uncontrolled growth of huge cities, the collapse of governmental and social structures, corruption, crime organized on a world scale, drug trafficking and arms dealing ...

To encourage *compliance with international humanitarian law* is not enough. Such encouragement cannot serve as an excuse to ignore those fundamental problems, which are moreover not only the source of conflicts but often also stand in the way of respect for that law. How indeed should young people whose sole education has been that of the streets understand the underlying principles of humanitarian law and respect humanitarian work?

Neither the present document nor the International Conference for the Protection of War Victims have any ambition of addressing problems relating to the root causes of armed conflicts. It is nevertheless essential to stress that efforts to tackle those causes and efforts to protect the victims of war are mutually complementary.

The measures described below are therefore intended, to be taken *in peacetime*, to ensure that international humanitarian law will be respected if an armed conflict breaks out. They may well seem unspectacular, but they stem from the conviction that the most wonderful statements have no effect unless they are accompanied by persistent, long-term work.

2.1 Promotion of the international humanitarian law treaties

[...]

Now that the Geneva Conventions enjoy almost universal recognition, it would be desirable if the same could be achieved for the whole range of international humanitarian law treaties and particularly the Additional Protocols of 1977. It is only through such recognition that the humanitarian rules to be applied in armed conflicts can be laid down clearly and without ambiguity. Admittedly, many of the rules codified in the 1977 Protocols may be considered international customary law, but there are still grey areas. Since international humanitarian law, which applies in situations of armed conflict and therefore fraught with tension and distrust between the belligerents, suffers if there is any uncertainty as to the applicability of its rules, it is of paramount importance for its security and credibility that the rules taught during military training should be the same everywhere.

All States which have not yet adopted one or other of the international humanitarian law treaties are asked to examine or re-examine the possibility of doing so without delay

[...]

It is recommended that efforts be made to promote all international humanitarian law treaties and that all States party thereto should actively support such efforts.

Finally, note should be taken of the important task assigned to the International fact-finding Commission set up in accordance with Article 90 of 1977 Additional Protocol I. As recognition of the general competence of this Commission requires a formal declaration of acceptance, it is essential that all the States should make such a declaration and communicate it to the depositary State, either on ratifying or acceding to the Protocol or at a later date. The Commission will not be able to play an active role unless it is widely recognized. However, only 34 States have hitherto made the aforesaid declaration. [...]

2.2 Adoption in peacetime of national implementation measures

The virtually universal acceptance of the Geneva Conventions of 1949 and the fact that a large number of States are party to their 1977 Additional Protocols are not enough to guarantee the effective application of these treaties, owing to the inadequacy of laws and other measures adopted by States at national level to implement them.

Certain crucial obligations undertaken by States may well remain a dead letter if the necessary legislative and practical measures are not adopted, for it is by adopting such measures, in particular, that States demonstrate their genuine intention to fulfil their commitments.

Concern for this situation has prompted the international community to encourage the ICRC on various occasions to promote the adoption of such laws and measures. The ICRC accordingly followed up previous steps to that effect by writing to the States party to the Geneva Conventions of 1949 to request information with regard to the measures they had taken or were planning to take, at national level, to ensure that international humanitarian law was effectively applied. These written representations, some of which were made in conjunction with the National Red Cross or Red Crescent Societies, also request ideas as to mechanisms that could be used more effectively to help States fulfil their obligations.

On the basis of reactions to date - about one third of the States party to the Geneva Conventions have replied to the written enquiry - certain domains of international humanitarian law, are considered to be of greatest importance, in particular the repression of grave breaches, the protection of the red cross and red crescent emblem, and dissemination of international humanitarian law. National measures have also been adopted in other areas such as the definition of protected persons, safeguards for humane treatment, the protection of medical units and staff, the disciplinary system within the armed forces ensuring respect for international humanitarian law, and the training of legal advisers in these forces. The replies also indicated that although most States generally welcomed assistance in this field, they were not in favour of more compulsory systems or systems that might imply monitoring of the measures adopted.

The ICRC intends to continue collecting information in order to identify the most appropriate means of helping States to fulfil their obligations. [...]

2.3 Spreading knowledge of international humanitarian law

The dissemination of knowledge of international humanitarian law must imperatively begin in peacetime, for there is no chance of it being applied unless it is known by those whose duty it is to comply and ensure compliance with it. The importance of such work was recognized at the outset of modern international humanitarian law. It was accordingly included as an obligation in the Geneva Conventions of 1949 and their Additional Protocols of 1977.

The international community has furthermore mandated the ICRC to participate in this effort. It performs this task with the particular support of the National Red Cross and Red Crescent Societies and their Federation.

Activities to disseminate international humanitarian law have indisputably been considerably intensified over the past fifteen years. [...]

For its part, the ICRC has set up a structure specially for dissemination and has been able to raise the level of awareness of international humanitarian law in the various parts of the world through its network of regional delegations and with the support of the National Red Cross or Red Crescent Societies and their Federation. Thousands of seminars, courses, and exhibitions have been organized at both national and regional level for such diverse audiences as soldiers and officers, political and academic circles. The ICRC has also produced or helped to produce a significant range of teaching materials, adapted to various cultures. It has a list of over a thousand publications, many of them available in a large number of languages. Care has been taken to ensure that materials are suited to the level of

education concerned: children are not approached in the same way as academics, or soldiers in the same way as senior officers.

Between 1988 and 1991 the International Red Cross and Red Crescent Movement as a whole led a World Campaign for the Protection of Victims of War which increased the awareness of the public and of governments throughout the world.

However, although a number of States have realized the importance of disseminating international humanitarian law and have begun to make the necessary arrangements, the results are still far from satisfactory.

The ignorance of humanitarian rules shown by members of the armed forces or armed groups in certain recent conflicts, or their disregard for those rules, should induce every State to consider what precautions it is taking to avoid such excesses. The International Conference for the Protection of War Victims should serve as an opportunity to examine this question seriously and without complacency.

Three subjects have been singled out here for closer consideration, namely the coordination of efforts to spread knowledge of international humanitarian law with other efforts of a similar nature, training for the armed forces, and the role of the media.

2.3.1 The coordination of efforts to spread knowledge of international humanitarian law with other educational activities aimed at preventing conflicts

It is imperative to begin spreading knowledge of the principles and basic rules of international humanitarian law in time of peace and, at national level, to have a well thought out programme of instruction to do so. The work carried out among *young people* in particular should pave the way for specific courses in universities and for instruction within the armed forces.

It is only logical that the work undertaken to spread knowledge of international humanitarian law, with the aim of preventing excesses in armed conflicts, should go hand in hand with educational efforts to prevent the conflicts themselves.

In this context, dissemination of the *principles contained in the Charter of the United Nations and education in human rights* come particularly to mind. It is indispensable that greater attention be given to these domains, placing special emphasis on young people and on harmonization of such work with activities to spread knowledge of international humanitarian law. How can we talk about the eventuality of armed conflicts without simultaneously saying that the international community nowadays rejects this means of settling differences? Should we not point out that strict respect for human rights is the best way of avoiding armed conflicts? Should there not be a special effort to explain that human rights and international humanitarian law are complementary and not mutually contradictory?

In other aspects of prevention, the International Red Cross and Red Crescent Movement can play a role, though a more modest one.

States should be helped in such work mainly by other intergovernmental institutions, in particular UNESCO, or non-governmental organizations. [...]

2.3.2 Training for the armed forces

In countries where the armed forces are taught the rules of international humanitarian law, this subject is often a marginal item in military training programmes. However, unless international humanitarian law becomes an integral part of regular combat training and a key constituent of training programmes at all levels in the chain of command, it can hardly be expected to have a favourable impact on the conduct of members of the armed forces engaged in the field. International humanitarian law considerations have already been experimentally included, with success, in the military decision-making process during certain military manoeuvres. [...]

With the rapid development of different types of armed conflict, the armed forces are increasingly engaged in operations to maintain or restore law and order. This new role calls for particular attention to the training of the armed forces, in view of the basic differences between traditional combat missions and the tasks of maintaining law and order within their own country. In certain cases, such training should also be given to the police.

The ICRC recently organized a meeting of experts on the teaching of international humanitarian law to the armed forces, at which the majority of participants were senior officers from a variety of countries. The meeting concluded that it was important to increase the coordination of activities in this domain at the national, regional and international level. In particular, regional experience in Asia, Africa and Latin America suggests that greater cooperation could be established between armed forces and, more especially, between people responsible for instruction in international humanitarian law. [...]

2.3.3 The role of the media

The media have a key part to play during conflicts, as they are then the main means of communicating with the population. Their role consequently merits extensive consideration.

What can the media be expected to do to alert governments and the general public to tragic but forgotten situations? How can they help to spread knowledge of the humanitarian rules both in time of peace and in time of war? What is their duty as regards the denunciation of excesses? How should manipulation of the media for political purposes, and in particular to exacerbate hatred between diverse communities, be avoided? How can they avoid trivialising horror? Where exactly does the independence of the media with regard to the previous questions begin and end?

Although these various subjects have already been considered to some extent, they should be discussed in even greater detail with senior media management and with journalists. [...]

3. Action taken despite all adversity

It has been pointed out that the proliferation of armed conflicts and the course they are taking are threatening humanitarian values, and that everything must be done to protect them. [...]

Three interrelated issues call for particular attention here: the action to be taken to ensure respect for international humanitarian law; the coordination of humanitarian action; and the safety of those engaged in humanitarian work.

3.1 Action to be taken to ensure respect for international humanitarian law

In many recent armed conflicts, the difficulties encountered in applying international humanitarian law have been so great that even its underlying philosophy has been called into question.

International humanitarian law is based on the principle that parties who can find no other way of settling their differences other than by the use of force will agree to observe certain humanitarian principles during the conflict, irrespective of the merits of the cause being defended.

This approach is to the benefit of all the victims of armed conflict. It is therefore in the humanitarian interest of each of the parties to the conflict and does not place them at a political or military disadvantage, since respect for international humanitarian law does not have a significant effect on the military outcome of the conflict.

For this system to work, a number of conditions must be fulfilled. Many of them have been cited in the "Prevention" section of the present document.

The crucial question arising from recent armed conflicts is how the international community should react when the parties to a conflict are unwilling to respect the principles and rules of international humanitarian law, or are incapable of ensuring respect for them.

The International Conference for the Protection of War Victims provides an opportunity to clarify this question.

3.1.1 Is there still a place for international humanitarian law within the international system?

In a long-term assessment it might seem that international humanitarian law will not retain its present importance. The end of the Cold War restored hope of a world at peace based on the universally recognized values laid down in international law and guaranteed by the United Nations, which would itself be backed by an international court whose mandatory authority in international disputes would be recognized by every State, and by armed forces capable of imposing the decisions of such a tribunal. National armed forces would be progressively reduced to the minimum necessary for ensuring internal order.

In the system established by the Charter, as originally conceived and briefly described above, there would no longer be a place for armed conflicts and consequently for international humanitarian law, or for the principle that emergency humanitarian aid should be neutral and independent. This was clear to the International Law Commission at the outset of its deliberations.

Moreover, although the climate of the Cold War at first prevented all necessary arrangements from being made for the system to work well, it is now felt, as expressed recently by the United Nations Secretary-General, that *"...an opportunity has been regained to achieve the great objectives of the Charter"*.

[footnote 20 reads: Report by the Secretary-General entitled: An Agenda for Peace, document A 47/277 S/24111 of June 17, 1992]

It cannot, however, be ignored that the aforesaid objectives are still far from being achieved: the mandatory authority of the International Court of Justice is not recognized by all States, the States themselves still possess powerful armed forces and the United Nations does not have the resources to maintain or, if necessary, restore, an international order devoid of armed conflict and based on international law.

The essential role of the United Nations nonetheless remains the maintenance of peace and the search for a solution to these conflicts. To end them, it must take measures tantamount to a political commitment. Such a commitment, however, carries the risk that one or other of the parties, or even all of them, may reject the United Nations.

International humanitarian law and the neutrality and independence of humanitarian emergency aid consequently retain all their present significance, and the real difficulties encountered in applying this law cannot possibly be resolved by questioning the principles on which it is based.

3.1.2 The obligation of the States to "ensure respect" for international humanitarian law

When large-scale violations of international humanitarian law occur, the first response must be a redoubling of efforts to make it operative, whatever the difficulties involved.

For this purpose, it is essential to speak with parties to conflict in order to obtain their commitment to respect the obligations placed upon them by international humanitarian law, and to find practical solutions to urgent problems such as access to populations in need or to defenceless prisoners. It is here that the ICRC's role as a specifically neutral and independent intermediary assumes its full significance. The use of instruments provided by international humanitarian law for its own implementation, in particular, the designation of Protecting Powers or recourse to the International Fact-Finding Commission, must also be encouraged.

This indispensable dialogue is no longer sufficient, however, if grave breaches of international humanitarian law nonetheless persist. Belligerents are accountable for their acts to the entire international community, as the States party to the Geneva Conventions have undertaken to *"espect and ensure respect"* for these Conventions *"in all circumstances"*.

According to the terms of this provision, all the States party to the Geneva Conventions are under the obligation to act, individually or collectively, to restore respect for international humanitarian law in situations where parties to a conflict deliberately violate certain of its provisions or are unable to ensure respect for it.

There are lastly situations in which total or partial failure must be admitted, despite all efforts to ensure application of international humanitarian law. While these must certainly be maintained, violations are of such magnitude that their very continuation would represent an additional threat to peace within the meaning of Article 39 of the United Nations Charter.

It is then the responsibility of the United Nations Security Council to make such an assessment and recommend or decide on what measures are to be taken in accordance with Articles 41 and 42 of the Charter.

These measures differ from those provided for by the Geneva Conventions in that the use of force as a last resort is not excluded, and their purpose is not essentially to ensure respect for international humanitarian law but to tackle a situation which is threatening peace.

3.1.3 Action taken to ensure respect for international humanitarian law

A large range of options are possible within the framework of *Article 1 common to the Geneva Conventions* and Article 1 of Additional Protocol I. Among these are: diplomatic approaches of a confidential, public, individual or collective nature; encouragement to use the means of implementation provided for in international humanitarian law, such as the designation of Protecting powers and recourse to the International Fact-Finding Commission; and offers of good offices. It should be noted, moreover, that the limits imposed on such action are those of general international law, and that international humanitarian law could not possibly provide a State not involved in the conflict with a pretext for intervening militarily or for deploying forceful measures outside the framework provided for by the United Nations Charter.

Article 89 of Additional Protocol I moreover stipulates that the obligation to act in situations of serious violations of international humanitarian law, either jointly or individually, must be carried out in cooperation with the United Nations. The manner of this cooperation, however, has yet to be defined.

The steps taken to ensure respect for international humanitarian law have a direct effect on the work of organizations such as the ICRC. Their aim may even be to enable or facilitate the work of such organizations.

Conversely, the measures decided upon and recommendations made by the Security Council under Chapter VII of the Charter cannot be considered neutral within the meaning of international humanitarian law, even though their ultimate objective may in some cases include the aim of putting an end to violations of that law. The use of armed force is thereby not excluded. Should such force be used, it will itself be subject to the relevant provisions of international humanitarian law.

It follows that a humanitarian organization such as the ICRC cannot be involved in the execution of such measures. It is vital for the ICRC to retain its complete independence and with it the possibility to act as a neutral intermediary, between all the Parties to a conflict, including any armed forces deployed or authorized by the United Nations.

Independent humanitarian organizations must nonetheless take into account the new situations created by measures adopted by the Security Council and examine with those carrying them out and with all the parties concerned the way in which they can play their traditional role within this context such as care of the wounded, visits to and protection of detainees, transport and distribution of aid to vulnerable persons, transmission of family messages or the reuniting of families, etc.

As to the implementation of humanitarian measures stemming from decisions taken by the Security Council within its mandate to maintain or restore peace, the role of the subsidiary bodies or specialized agencies of the United Nations, and even that of the peace-keeping forces themselves, are questions which require further consideration first and foremost within the United Nations itself.

To sum up, it is important to mark a clear distinction between action taken to facilitate the application of international humanitarian law (which is primarily based on the consent of the Parties to conflict), and action (which does not exclude coercion) to maintain or restore peace. Recent practice should be analysed in this respect: apart from the undeniable merit of certain actions, the stress placed in peace-keeping or peace-making operations upon activities with purely humanitarian objectives threatens to create a certain confusion which may ultimately prove harmful to humanitarian work and to the objective of restoring peace. It should be noted, moreover, that although attention has been drawn several times, in specific situations, to the obligation to ensure respect for international humanitarian law, the action taken on this basis has not been a conclusive indication of customary practice.

Consequently, consideration must be given to a suitable framework for holding a regular multilateral and structured dialogue to address problems encountered in the application of international humanitarian law, bearing in mind the role that the International Conferences of the Red Cross and Red Crescent can play in this respect.

Consultation is therefore still necessary to determine the most appropriate methods and framework for implementation of the States' obligation to ensure respect for international humanitarian law, as well as the type of cooperation to be established with the United Nations in the event of serious violations of that law. Further consideration should also be given to the most suitable framework in which a structured multilateral discussion of specific difficulties encountered in its application could take place at regular intervals. The ICRC intends to hold talks on these subjects with government and United Nations experts in 1994.

3.2 Coordination of humanitarian action

In its desire to contribute more effectively to the growing needs of the victims of armed conflicts and natural disasters, the United Nations has recently established coordinating mechanisms.

Adopted by consensus on 19 December 1991 after several work sessions, General Assembly Resolution 46/182 envisages a series of measures for the improved coordination of humanitarian aid. The most important of these are:

- the appointment of a humanitarian coordinator directly responsible to the Secretary-General;
- the creation of a rotating and automatically renewable fund at the disposal of the specialized agencies during the first phase of an emergency;
- the creation of a permanent inter-agency consultative committee for the coordination of humanitarian aid.

Inter-agency coordination should help to avoid the overlapping or absence of action in particular situations or areas, thanks to a distribution of tasks according to the respective mandates of the different organizations. It should certainly be continued and further improved, for the magnitude of needs requires combined efforts to overcome them.

At this stage, however, it must be conceded that this dialogue aimed at a distribution of tasks has not yet enabled emergency action in the theatres of operations to be deployed on the scale and at the speed required. The ICRC itself stood alone for too long - despite the support it received from the Red Cross and Red Crescent National Societies and their Federation and the courageous work of certain non-governmental organizations - in a number of theatres of operation where additional assistance by other agencies would have been necessary. Apart from the quantitative aspect, such assistance would moreover have enabled the specific abilities of each organization to be turned to the best possible account to meet the victims' various needs.

The above-mentioned Resolution 46/282 certainly provides for early-warning systems. In addition, programmes for *disaster preparedness*, such as those of the National Red Cross and Red Crescent Societies under the aegis of their Federation, deserve to be encouraged.

However, the needs are so great that the basic problem is now the inability of the international community to react to those needs when they are identified. Given that there is a primary duty to provide aid on the spot and in good time in the face of atrocities committed against whole populations, to do so is also more economical and effective than to render aid belatedly or to have to receive hundreds of thousands of refugees and displaced persons.

Besides the need for a coordination of tasks, a *concerted approach* is extremely important to improve the effectiveness and quality of emergency humanitarian action. The political, logistic and socio-cultural difficulties that had to be overcome before emergency aid could be completely effective have for too long been underestimated. Action taken without respect for certain ethical principles may well be ineffective, or do more harm than good. Moreover, it enables the authorities to deny the humanitarian organizations which respect those principles the guarantees which they are duty bound to demand as regards the destination of aid and the monitoring of its distribution.

For this reason, it is important for the International Conference for the Protection of War Victims to encourage the work of the International Red Cross and Red Crescent Movement, in consultation with various non-governmental organizations, so as to draw up a code of conduct for organizations engaged in emergency aid.

It is also essential to ensure that the transition from the emergency phase to that of reconstruction and development takes place smoothly, for this decreases or minimizes the dependence of those receiving aid, as well as limiting the duration of relief undertaken by organizations set up specifically for emergency work.

3.3 The safety of those engaged in humanitarian action

[...]

Humanitarian action is dangerous nowadays and the terrible dilemma facing humanitarian organizations is to decide how far their representatives can be put at risk in order to supply women, children, prisoners, sometimes entire populations with food and medicines or other goods essential for their survival; to provide them with some measure of protection; and to give them comfort and support.

The danger is ever-present and each incident must be analysed and evaluated. Was it an accident? Was it due to the general climate of insecurity? Was it perpetrated by the armed forces or armed groups? Did it arise from the disobedience of a soldier? Did it reflect the unacknowledged desire of the authorities to hinder humanitarian action?

The measures that have to be taken will depend on the reply to these questions: and they might sometimes be more severe than those working in the field would wish.

Confronted by this problem, humanitarian organizations must be stringent and clear-sighted in setting limits to their operations, for there are degrees of risk beyond which they cannot and should not go.

The particular problem of armed escorts has arisen in this connection in certain recent situations. The use of such escorts is obviously regrettable in that according to international humanitarian law the emblem of the red cross or red crescent should be sufficient protection for those who have come to help.

However, international humanitarian law itself does not exclude the arming of medical personnel to protect the convoys for which they are responsible against acts of banditry. Regrettable though they may be, and irrespective of the multiple problems they entail, armed escorts are thus not a means of protection that can immediately be excluded.

An absolute condition for their use by independent humanitarian organizations must be the consent of the relevant party to a conflict or, in situations where the structures of the State are in such disarray that it is difficult to identify the authorities, the absence of formal opposition. It is one thing to protect oneself from banditry with the agreement of the party to a conflict on whose territory the humanitarian operation is taking place, but quite another thing to impose humanitarian convoys by force on a party to a conflict which refuses to grant permission for such convoys.

Obviously, humanitarian organizations have no other weapon than that of persuasion, and cannot themselves envisage imposing convoys by force.

But, as stressed above, an organization such as the ICRC would not be able to participate, not even marginally, in operations imposed by force upon Parties to conflict because they are after all of a military nature even though their aim is humanitarian. An organization which is called upon to act as a neutral intermediary in conflicts must of necessity retain the possibility to give protection and assistance to all the victims, including the potential victims of precisely such an operation.

Lastly, attention must be drawn to the particular problem of spreading knowledge of the humanitarian rules, which has an evident bearing on the safety of humanitarian activity.

It has been mentioned that thorough preparatory instruction in international humanitarian law should be provided in peacetime, but in many of the present conflict situations such prior instruction has not been given, or not sufficiently. The need to save the victims is so imperative that different approaches must be adopted, calling on the media to issue daily reports on how humanitarian work is conducted, its objectives and progress, and relying on the support of whatever political or military structure still exists.

The problems are even more serious in situations where government structures collapse.

In such extreme circumstances, to enable humanitarian action to take place it is indispensable to ensure that its nature and purpose are clearly understood. In view of recent experience, particular attention should now be given to means of getting this message across in such circumstances.

4. Repression and reparation

The States party to the 1949 Geneva Conventions are obliged to suppress all acts contrary to the provisions of those instruments and to repress any grave breaches. A number of these breaches are listed in the four Conventions and more are found in 1977 Additional Protocol I. All grave breaches are considered as *war crimes*.

Provision must be made in peacetime for the repression of breaches of rules of international humanitarian law; this has a dissuasive effect and therefore constitutes an important preventive measure.

However, the repression of breaches is also considered one of the emergency measures which must be taken in situations where international humanitarian law is violated on a massive scale.

This part of the report first discusses the role of the International Fact-Finding Commission. Although the Commission is not a court of law, its purpose is to facilitate the repression of breaches committed in situations of armed conflict.

The report goes on to examine the necessary penal measures at national and international levels.

4.1 The International Fact-Finding Commission

Additional Protocol I of 1977 introduced an important additional mechanism for implementing international humanitarian law. Article 90 of the Protocol provides for the establishment of an International Fact-Finding Commission when not less than 20 High Contracting Parties have agreed to accept its competence. This was the case as from June 25, 1991, when the 20 States elected the 15 members of the Commission.

The Commission is a permanent body whose mandate is to enquire into all allegations of grave breaches or other violations of the 1949 Geneva Conventions and of Protocol I, provided that the party alleging the violation and the party against

whom the allegation was made have both accepted the Commission's competence. At its first meeting on March 12 and 13, 1992 the Commission expressed its readiness, subject to the agreement of all the parties to the conflict in question, to enquire into other breaches of international humanitarian law, including those committed during non-international armed conflicts.

Any party which has made the declaration accepting its competence may apply to the Commission by right and without special agreement concerning breaches alleged to have been committed by any other party having made the same declaration. Any party which has not made the declaration may apply to the Commission on an ad hoc basis with the agreement of the other party or parties concerned. The Commission will present a report on the result of its enquiry and, if need be, its recommendations to the Parties concerned. it will not report its findings publicly unless requested to do so by all the parties to the conflict.

In its capacity as a permanent and completely independent body, the Commission represents a new and important mechanism for promoting respect for international humanitarian law. Fact-finding in a situation of armed conflict is a means of averting unnecessary dispute and violence. The Commission also affords the belligerents the opportunity to show their willingness to comply with international humanitarian law.

This machinery can only prove its effectiveness, however, if it can function and draw lessons from its experiences. For this reason, it is most important, as mentioned above, for the States which have not yet accepted the competence of the Commission to do so.

Apart from this important step, it devolves upon the States to avail themselves of the International Fact-Finding Commission in order to enquire, as soon as possible, into all breaches of international humanitarian law, including those committed in non-international armed conflicts. In this way they can show their commitment to this important mechanism of international humanitarian law, and their desire to shed light on alleged breaches of the law.

It should be pointed out that the role of the Commission is not to pass judgement on States, but to assist them in improving the application of the law.

4.2 Penal sanctions

An important part of international humanitarian law is concerned with the repression of breaches of its rules, given that sanctions are an integral part of every coherent legal system, and that the threat of punishment has a dissuasive effect.

4.2.1 National measures

The war crimes alleged by a party to a conflict almost always involve acts committed by the soldiers of the adverse party. It is therefore useful to point out that the obligation to suppress breaches of international humanitarian law and to repress grave breaches thereof requires the authorities to exercise great vigilence concerning acts committed by members of their own armed forces. As previously mentioned, this implies taking the necessary measures at the national level, especially by introducing these breaches into their penal codes.

In many countries, judges cannot base a judgement directly on international treaty law; the relevant provisions of that law should therefore be incorporated into the national legislation. The introduction of these provisions into the national penal system is indispensable, moreover, since the Geneva Conventions and Additional Protocol I contain no indication of the penalties to be applied to the various breaches.

To be effective during armed conflicts, moreover, repression must be carried out within a context of strict discipline in the conduct of hostilities and of determination throughout the whole military hierarchy. It is the laxity of commanders that turns soldiers into bandits.

The International Conference for the Protection of War Victims is invited to emphasize the duty of military commanders to inform their subordinates of their obligations under international humanitarian law, to do everything to avoid breaches of its rules and, if necessary, to repress or report any breaches committed to the authorities.

4.2.2 International measures

[...]

4.3 Reparation for damages

Additional Protocol I of 1977 contains one short article entitled "Responsibility" (Article 91) which specifies that a party to the conflict which violates the provisions of the 1949 Geneva Conventions or of Protocol I shall, if the case demands, be liable to pay compensation, and that it shall also be responsible for all acts committed by persons forming part of its armed forces.

This article confirms a rule which is today accepted as being part of customary law and was already stated, in almost identical terms, in Article 3 of the Hague Convention No IV of 1907. Moreover, an article common to the four Geneva Conventions emphasizes that no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred as a result of the commission of grave breaches of the Conventions. This provision entails first of all criminal responsibility, but it also implies that, irrespective of the outcome of an armed conflict, no decision or agreement can dispense a State from the responsibility to make reparation for damages caused to the victims of breaches of international humanitarian law or to pay compensation for those damages.

This responsibility applies first of all in the context of relations among States and has acquired a new dimension with the reaffirmation and development of the rules governing the conduct of hostilities. A State which has laid mines indiscriminately, or which has caused other unlawful damage to the environment, for example, is under the obligation to make reparation (in particular by carrying out mine-clearing operations) or pay compensation.

The problems arising in connection with reparation for damages to persons and individual compensation are more complex for the following reasons:

- Application for reparation or compensation can be made only via the State; this often makes the process and its outcome uncertain.

- Although legally a clear distinction should be drawn between them, confusion may arise between damages attributed to violations of the right to engage in warfare (jus ad bellum) and those attributed to breaches of international humanitarian law (jus in bello), and thus dilute the responsibility to make reparation.
- The international obligation to provide reparation which exists under international humanitarian law does not apply to non-international armed conflicts. However, in the internal situations brought about by these conflicts the national legal mechanisms which should enable victims to obtain reparation or compensation often fail to function adequately.

In practice there are of course cases in which the victims of breaches of international humanitarian law have obtained compensation.

Nevertheless the vast majority of victims do not receive the compensation to which they are entitled. A shocking example is provided by the innumerable children who have lost a limb to an exploding mine and have not even been granted the modest compensation of an artificial limb.

Of particular interest in this connection is the study by the Sub-Commission of the Human Rights Commission on the right of the victims of flagrant violations of human rights and fundamental freedoms to restitution, compensation and readaptation.

The International Conference for the Protection of War Victims should make it clear that it wishes procedures to be set up to provide reparation for damage inflicted on the victims of violations of international humanitarian law and award compensation to them, so as to enable them to receive the benefits to which they are entitled.

Document No. 27, ICRC, Assistance Policy

[**Source:** ICRC Assistance Policy (Adopted by the Assembly of the International Committee of the Red Cross on 29 April 2004) Public version; International Review of the Red Cross September 2004, Vol. 86, No. 855, p. 677; available on http://www.icrc.org]

ICRC Assistance Policy

(Adopted by the Assembly of the International Committee of the Red Cross on 29 April 2004)

Public version

1. Introduction

In recent decades, the ICRC's assistance activities have diversified and its assistance programmes have expanded. This development is due to a variety of factors that have caused the concept of humanitarian assistance to evolve well beyond mere emergency responses.

Emergency response itself has become increasingly complex, seeking to be more "intelligent" in order to achieve maximum effectiveness and to minimize the adverse consequences that humanitarian aid can have. In many situations, conflicts have become entrenched, forcing assistance work to cover the longer term, to meet needs that are at once urgent and recurrent, or even chronic. As a result, humanitarian work must be adapted and, very often, a link established between emergency and rehabilitation programmes in order to promote support or mobilization activities, stimulate adaptation mechanisms and persuade the authorities concerned to shoulder their responsibilities.

The ICRC is also faced with a proliferation of actors carrying out humanitarian work and the diversity of their areas of specialization, their abilities and their working methods, a situation that has fostered a spirit both of complementarity and of competition. Under the Seville Agreement [*See* **Document No. 30**, The Seville Agreement. p. 750.], the ICRC acts as the International Movement of the Red Cross and the Red Crescent's "lead agency" in the event of armed conflict and guides the other components in carrying out activities that, more often than not, are linked to assistance programmes. At the same time, the growing insecurity in some situations, which can go as far as the rejection of humanitarian aid, has forced the ICRC to modify its approaches and strategies. [...]

The ICRC has the capacity to act rapidly and effectively in the event of an acute crisis. It strives to play a role in preventing events that are disastrous in humanitarian terms. At the same time, it must continue to meet certain essential needs in chronic crises and sometimes even in post-crisis situations.

The ICRC's programmes in the areas of health, water and habitat, and economic security are a key aspect of this approach. [...]

The aim of this policy paper - a practical, action oriented tool - is threefold:

- to guide decision making on matters having to do with assistance, so as to ensure a professional, coherent, integrated approach that meets the essential needs of individuals and communities affected by armed conflict and other violent situations;
- to clarify and affirm the position of assistance work and of the Assistance Division within the ICRC, thereby helping to provide the organization with a strong identity;
- to serve as a reference framework for the formulation of thematic guidelines applicable to different areas of assistance. (...)

2. ICRC action

In accordance with Article 5.2 of the Statutes of the International Red Cross and Red Crescent Movement, [*See* **Document No. 20**, Statutes of the International Red Cross and Red Crescent Movement. p. 648.] the ICRC takes action in connection with international armed conflicts, non-international armed conflicts and internal disturbances. Under Article 5.3 of the Statutes, it may also furnish assistance in situations other than the abovementioned. In these circumstances, the ICRC's task is to provide protection and assistance for civilian and military victims.

In terms of priority, the ICRC takes action in situations where its work has added value for the affected population, and more specifically where:

- its role as a neutral and independent organization and intermediary facilitates access to those in need and to the authorities concerned;
- its integrated approach to assistance and protection can promote respect for the rights of the individual in accordance with the letter and spirit of the law (be it international humanitarian law, human rights law or refugee law);
- its presence in and knowledge of a given situation lend it particular legitimacy;
- it can mobilize the capacity and skills needed to provide essential aid.

The ICRC's strategy is based on a combination of five modes of action: persuasion, mobilization, denunciation, support and substitution/direct provision of services. Persuasion and mobilization are the preferred modes of action when it seeks to stop or prevent violations of international humanitarian law and to make the authorities aware of their responsibilities while urging them to meet the essential needs of the affected group. This also applies to preserving their dignity. Denunciation is reserved for exceptional cases. Support and substitution/direct provision are the preferred modes of action when what is needed is to help supply essential services or to take responsibility for them when the authorities are unable to do so. [...]

Assistance must always be regarded as forming part of an overall ICRC strategy. This necessarily entails close cooperation among all programmes and all levels of decision making.

3. Guiding Principles

3.1. Taking the affected group and its needs into account

The ICRC seeks to work in close proximity to the affected group. The organization must take account of the local value systems and the group's specific vulnerabilities and perception of its needs.

3.2. Effective humanitarian assistance of high quality

ICRC programmes must be planned, implemented and monitored in accordance with the highest professional standards. [...]

3.3. Ethical norms

When providing assistance, the ICRC must respect certain ethical standards, namely the applicable principles of the Movement, the principle of do no harm, and the principles set out in the relevant codes of conduct.[...]

3.4. Responsibilities within the Movement

As a component of the Movement, the ICRC must discharge its responsibilities in compliance with the Seville Agreement and the Statutes of the Movement currently in force. During armed conflict or internal disturbances and in their direct aftermath, the ICRC has a dual responsibility: its responsibility as a humanitarian organization for carrying out the specific activities arising from its mandate and its

responsibility for coordinating the international action taken by any components of the Movement involved in an operation or wishing to contribute to it. [...]

4. Strategies

4.1. Overall analysis of the situation and needs

The ICRC conducts an overall analysis of each situation in which it is involved (security and economic, political, social, environmental and cultural aspects) in order to identify the problems and needs of the affected groups in terms of resources and services and their relationship with the various actors involved. It especially endeavours to determine whether there have been violations of international humanitarian law and, if so, whether or not they are deliberate. [...]

4.2. Integrated approach

The ICRC's assistance work is flexible and wide-ranging. Its aim is to meet the essential needs of the affected group. The assistance integrated approach is based on a concept of overall health and includes the supply of and/or access to safe drinking water, food, a habitat and basic health care and health services. [...]

4.3. Combining different modes of action

The ICRC uses persuasion, mobilization and, where necessary, denunciation to induce the authorities to meet their obligation to provide essential services for the affected groups. Where the ICRC considers that its efforts are not going to bring about a satisfactory, timely response from the authorities, and that the problem is a serious one, it may simultaneously engage in appropriate support and/or substitution/direct provision activities. [...]

4.3.1 Persuasion

It is the fundamental responsibility of ICRC staff, [...] to determine the extent to which the authorities fail to meet their obligation to provide essential services (because they are unwilling and/or unable to do so) and the scale of the emergency that this has created. [...]

4.3.2 Support for local structures/partners

The ICRC provides support for local structures and partners wherever it considers that they constitute a viable means of ensuring access by the group affected to basic goods and services. [...]

4.3.3 Substitution/direct provision of services

The decision to substitute for the authorities and to provide a direct service for those affected depends on the urgency and gravity of the needs to be met. [...]

4.3.4 Mobilization

The ICRC may mobilize third parties who will endeavour to persuade the authorities to shoulder their responsibilities or, failing that, will strive either directly (themselves) or indirectly (by supporting others) to assist those affected. [...]

4.3.5 Denunciation

In case of important and repeated violations of international humanitarian law the ICRC may, in accordance with its policy guidelines and thus in exceptional cases, take steps to denounce those responsible.

4.4. Coordination

Insofar as this does not jeopardize its independence, neutrality or security, the ICRC promotes coordination of its activities with those of other actors to ensure the greatest possible complementarity of diverse efforts to provide those in need with humanitarian aid. [...]

4.5. Sharing tasks and responsibilities

The ICRC considers sharing tasks and responsibilities with other humanitarian organizations, formally or informally, insofar as this does not undermine its independence, its neutrality, its security, its access to areas affected by conflict or its ability to carry out protection activities. [...]

4.6. Partnerships

The ICRC develops and maintains a network of local and international partners. Its activities are carried out in cooperation with these partners only where their working methods and policies are compatible with the ICRC's objectives, strategies and principles [...]. Other components of the Movement are the ICRC's preferred, but not exclusive, partners.

4.7. Adaptation and innovation

If the strategies described above do not offer a suitable solution to a particular problem, the ICRC will consider drawing up other strategies, taking into account the many variables in the regional, national and international environment (in particular, security).

5. Action in the field of assistance

Unmet essential needs are what drive ICRC assistance work. The decision making process leading to any action is based on two levels of analysis.

5.1. First level: the ICRC identifies the groups for whom assistance is a priority

To this end, it relies on the following criteria:

5.1.1 Category of persons affected:

- persons specifically protected by international humanitarian law (for example, prisoners of war, persons deprived of their freedom, the wounded and sick, civilians and the shipwrecked);
- persons currently or potentially at risk owing to their nationality, religion, ethnic origin, sex, gender [...].

5.1.3 Gravity of problems [...]

5.1.4 Anticipated impact of action [...]

5.2. Second level: for each group identified, the ICRC defines the form that the operation will take

5.2.1 Integration within overall ICRC action [...]

5.2.2 Coherence of assistance activities

Assistance activities are oriented by the public health pyramid, which requires an integrated approach in the areas of water and habitat, economic security and health services. The result is a welldefined range of integrated activities. [...]

5.2.3 Capacity to carry out core activities

Among the wide range of activities carried out by humanitarian agencies in response to the needs of affected groups, the ICRC, drawing on its experience, has defined a set of activities it regards as core. These activities, whose level of priority and implementation depend on the context, are as follows:

- supply, storage and distribution of drinking water;
- environmental sanitation and waste management;
- energy supply for key installations such as hospitals, water treatment plants and water distribution networks, and appropriate technologies for cooking and heating;
- transitional human settlements (spatial planning, design and setting up of camps, construction of appropriate shelter);
- distribution of food rations;
- distribution of essential household items;
- distribution of seed, farming tools, fertilizer and fishing tackle;
- rehabilitation of agriculture and irrigation;
- livestock management;
- revival of small trade and handicrafts;
- minimum package of activities derived from primary health care (PHC);
- support for victims of sexual violence;
- pre-hospital care and medical evacuation of the wounded;
- emergency hospital care (surgery, obstetrics, paediatrics, internal medicine) and hospital management;
- repair/upgrading of medical facilities and other buildings;
- therapeutic feeding;
- physical rehabilitation programmes;
- health in detention. [...]

5.2.4 Partnerships

Where this sets no constraints on its independence or neutrality, the ICRC may undertake activities in partnership with one or more other actors, in particular other components of the Movement. [...]

5.2.5 Diversification of activities

Diversification may be considered where the above-mentioned core activities do not meet the needs identified in the most appropriate manner or where there is no possibility of a partnership. [...]

5.2.6 Other parameters to be considered

Action may also be considered where:

- assistance activities can serve as a launching pad for protection;
- assistance activities facilitate the positioning and promote the acceptability of the ICRC. [...]

5.2.7 Feasibility of action [...]

5.3. Implementation

The ICRC adapts its response to the situation.

In acute crises, the ICRC seeks to maintain a rapid response operational capacity. This will help strengthen its identity as an organization that works in close proximity to the affected groups and is effective in dealing with emergencies, while at the same time taking security constraints into account.

In pre-crisis situations, the ICRC takes action insofar as possible to prevent what could be a disaster in humanitarian terms, either by supporting existing systems or by mobilizing other entities to do so.

In chronic crises, the ICRC focuses on finding sustainable solutions to the problems it encounters. In particular, it explores the possibility of handing over its programmes to the authorities concerned - by strengthening the capacity of their services - or to other organizations. In cases where it has a residual responsibility, the ICRC continues its activities.

In post-crisis situations, the ICRC shoulders its residual responsibilities.

5.3.1 Water and habitat

Water and habitat programmes are designed to ensure access to safe water (for both drinking and household use) and to a safe living environment. The ultimate aim is to help reduce the rates of mortality and morbidity and the suffering caused by the disruption of the water supply system or damage to the habitat. [...]

5.3.2 Economic security

The main purpose of economic security programmes is to preserve or restore the ability of households affected by armed conflict to meet their essential needs. [...]

5.3.3 Health

ICRC activities to promote health are designed to ensure that the affected groups have access to basic preventive and curative care meeting universally recognized standards. To this end, the organization assists local or regional health services, which it sometimes has to replace temporarily. [...]

6. Operational directives

6.1. Involving the affected group in programme planning and management

Insofar as possible, the affected group must be involved in identifying its own needs and in designing and implementing programmes to meet those needs. The ICRC acts to build the capacity of competent local bodies capable of taking responsibility for assistance activities or playing an active part in the ICRC's work.

6.2. Assessing the situation - integrated needs and background analysis

The assessment of assistance needs must be based on an information network that is as broad as possible and must include a wide range of issues and areas of endeavour. These must encompass not only assistance related areas of activity, but also those relating to protection of the group concerned and security. Various possible scenarios should be taken into account (for example, "what is likely to happen if no assistance is provided"). [...]

6.5. Entry and exit strategies

Entry and exit strategies must be provided for in the initial plans and, for exit strategies in particular, must be drawn up together with the other actors concerned. This will promote community participation and support for the programme, right from the start, and will make it possible to identify in good time potential partners for the exit process later on. Exit strategies must be transparent and flexible. [...]

6.6. Monitoring

From the beginning, a system is put in place for situation monitoring and performance monitoring [...]

Case No. 28, Water and Armed Conflicts

THE CASE

A. Dying for Water

[**Source:** ZEMMALI Ameur, "Dying for Water", in *Forum. War and Water*, ICRC, Geneva, 1998, pp. 31-35.]

In modern armed conflicts, even were the general prohibition under international law on the use of poison to be complied with, water could still be contaminated as a direct result of military operations against water installations and works. Indeed, destroying or rendering useless part of a water production system is sometimes enough to paralyse the system as a whole. If repair work is held up because of continuing hostilities or for other reasons, such as a shortage of spare parts or inadequate or poor maintenance and cleaning procedures, there is an obvious and considerable risk of contamination, shortages or epidemics. [...]

An occupying power may [...] expropriate land, thus swallowing up springs and wells; may totally or partially prohibit the people in the occupied territories from irrigating the land, from using the water sources and watercourses to grow crops or run or develop their holdings as going concerns; may prevent the occupied population from siphoning off surface or groundwater or reaching aquifers; and may impose pumping quotas. [...]

These are all so many ways in which the occupied territory can be emptied of its orginal inhabitants. Of course, such moves do not affect just the population but also crops and livestock. [...]

In civil wars, which today account for most of the armed conflicts in the world, the use of water by the belligerent parties constitutes a serious threat to the population concerned. The expression "environmental or eco-refuge", which has become fashionable recently to describe people displaced as a result of the effects of armed conflicts or other disasters on their natural environment, is symptomatic of the serious damage these can do. Just taking as an example the hostilities carried out in a period of internal conflict, destroying or rendering useless a source of drinking water or a safe water supply can in very short order deprive the local population of an essential commodity; in the case of a "hostile" population or a population in an arid region, it is easy to imagine just what the outcome would be.

While thirst may sap the morale of troops on the battlefield, the lack of a safe water supply may force a population into exile and condemn crops and livestock to wither and die. To attack water is to attack an entire way of life. [...]

War's effect on access to water

[...] What can a peasant farmer do when faced with an armed soldier who blocks his access to water for personal use, for livestock or for irrigation? What's to be said when a hydraulic plant, water installations, supplies and irrigation works or the path leading to them have been mined? [...]

Despite the neutrality of humanitarian assistance, relief personnel are not spared the ill-treatment meted out to civilians. Repairing and restoring water installations, works and facilities require complex operations which involve bringing together the necessary technical expertise, equipment and manpower. Any action against one of these components hampers the others and makes access to water well nigh or completely impossible, thereby heightening the risks to the civilian population despite the protection it is granted under international law.

What the law says

Although international humanitarian law applicable in armed conflicts contains no specific regulations on water protection, it does have a number of rules relating to the subject. First it should be remembered that this branch of international law primarily seeks to protect any individual who is in the hands or in the power of the enemy, and that the assistance or relief which is their due is inconceivable without a guaranteed minimum level of health and hygiene - in other words, without water, which is the life-giving element in any and all circumstances.

Humanitarian law is also designed to protect civilian objects, including those indispensable to the survival of the civilian population. Article 29 of the Convention on the law relating to the non-navigational uses of international watercourses [available on http://www.http://un.org], adopted by the General Assembly of the United Nations in 1997, stipulates:

"International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules".

General protection under the law applicable to armed conflicts extends to more than international watercourses, and the four main prohibitions laid down in that law are worth noting:

- the ban on employing poison or poisonous weapons;
- the ban on destroying, confiscating or expropriating enemy property;
- the ban on destroying objects indispensable to the survival of the civilian population;
- the ban on attacking works or installations containing dangerous forces.

The four prohibitions, to which should be added the provisions on environmental protection, are expressly mentioned in the instruments relating to international armed conflicts, and the last two are also laid down in the law applicable to non-international armed conflicts. Starvation as a method of warfare is explicitly prohibited regardless of the nature of the conflict, and the concept of objects essential for the survival of the civilian population includes drinking-water installations and supplies and irrigation works. Immunity for indispensable objects is waived only when these are used solely for the armed forces or in direct support of military action. Even then, the adversaries must refrain from any action which could reduce the population to starvation or deprive it of essential water.

On the subject of works or installations containing dangerous forces, humanitarian law explicitly mentions dams, dykes and nuclear electrical generating sections. Even where these are military objectives, it is forbidden to attack them when such action could release dangerous forces and consequently cause heavy losses among the civilian population. The ban also extends on the same terms to other military objectives at or in the vicinity of such facilities. Immunity from attack is waived only when one or other of the works, installations or facilities is used in regular, significant and direct support of military operations and if attacks are the only feasible way to terminate such support.

So as best to ensure the protection of the civilian population and civilian objects, humanitarian law provides for certain precautionary measures including their removal from the vicinity of military objectives and their protection against dangers resulting from military operations. Reprisals against civilian objects are forbidden, and this explicitly applies to objects indispensable to the survival of the civilian population and works or installations containing dangerous forces.

The appropriate sanctions are incurred when such prohibitions are breached. Among the acts considered war crimes under humanitarian law are the following "grave breaches": extensive destruction and appropriation of property not justified

by military necessity and carried out unlawfully and wantonly, indiscriminate attacks on the civilian population or civilian objects, and attacks against works or installations containing dangerous forces. In addition, international criminal law has just extended the list of war crimes and applied them to non-international armed conflicts as well. Among the acts committed in international armed conflicts and classified as war crimes in the Statute of the International Criminal Court adopted on 17 July 1998, [...] are attacks which cause widespread, long-lasting and severe damage to the natural environment, employing poison or poisonous weapons, intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provide for under the Geneva Conventions. [...]

B. Berlin Rules on Water Resources

[**Source:** Berlin Rules on Water Resources, adopted by Resolution No. 2/2004 of the 71st Conference of the International Law Association, held in Berlin, Germany, 16-21 August 2004, available on http://www.ila-hq.org/html/layout_committee.htm]

[...]

CHAPTER X: PROTECTION OF WATERS AND WATER INSTALLATIONS DURING WAR OR ARMED CONFLICT

Article 50: Rendering Water Unfit for Use

Combatants shall not poison or render otherwise unfit for human consumption water indispensable for the health and survival of the civilian population

Commentary: The prohibition of poisoning of drinking water is a rule of customary international law. Annex to the IVth Hague Convention Respecting the Laws and Customs of War on Land, art. 23 (a). Civilians are entitled to an adequate water supply under all circumstances. Hence the prohibition of any action, whatever the motive, which would have the effect of denying the civilian population of the necessary water supply. The rule has been expanded to protect all vital human needs, a concept that in these Rules means water necessary to assure human health and survival. [...] This principle is also found in Protocol I [...], art. 54.

Article 51: Targeting Waters or Water Installations

1. Combatants shall not, for military purposes or as reprisals, destroy or divert waters, or destroy water installations, if such actions would cause disproportionate suffering to civilians.

2. In no event shall combatants attack, destroy, remove, or render useless waters and water installations indispensable for the health and survival of the civilian population if such actions may be expected to leave the civilian population with such inadequate water as to cause its death from lack of water or force its movement.

3. In recognition of the vital requirements of any party to a conflict in the defense of its national territory against invasion, a party to the conflict may derogate from the prohibitions contained in paragraphs 1 and 2 within such territories under its own control where required by imperative military necessity.

4. In any event, waters and water installations shall enjoy the protection accorded by the principles and rules of international law applicable in war or armed conflict and shall not be used in violation of those principles and rules.

Commentary: Paragraph 1 introduces a proportionality limitation on the destruction or diversion of water and water installations. Protocol I contains no specific rule on proportionality regarding water resources. The rule in paragraph 1 reflects the general rule of proportionality in armed conflict. No rule provides an absolute prohibition against an otherwise legitimate means of warfare, solely on account of potential incidental civilian damage. For example, damming or diverting a river in order to enable movement of troops cannot be outlawed automatically because of potential harm to civilians. The criterion for prohibition must be harm to civilians disproportionate to the military advantage. [...] Paragraph 2 comes from several provisions found in Protocol I, primarily art. 54 of the Protocol. The protection of ecological integrity during wars or armed conflicts is provided in Article 52.

Yoram Dinstein described art. 54 as "unjustifiable and utopian" because "the legality of siege warfare has not been contested in classical international law" and "if the destruction of foodstuffs sustaining the civilian population in a besieged town is excluded, how can a siege be a "siege?" [footnote 22: Yoram Dinstein, Siege Warfare and the Starvation of Civilians, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD; ESSAYS IN HONOUR OF FRITS KALSHOVEN 145-46 (Astrid Delissen & Gerard Tania eds. 1991).] The official commentary on Protocol I by the International Committee of the Red Cross concedes that the "statement of this general principle [prohibiting starvation of population as a method of warfare] is innovative and a significant progress of the law." The U.S. Department of State has taken the position that the provisions of Protocol I that "starvation of civilians is not to be used as a method of warfare" are among those provisions that "should be observed and in due course recognized as customary law, even if they have not already achieved that status." The US Naval Military Manual also recognizes this as a customary rule. While it would be advisable for States to mark such installations clearly to minimize the risk of damaging them, international humanitarian law does not require this. See Additional Protocol I, Annex I.

Paragraph 3 recognizes an exception for nations destroying water installations as an act of national selfdefense. See Protocol I, art. 54(5). Even then, States may derogate from the obligation not to damage water facilities only when compelled by dire (imperative) military necessity. Nor is there any prohibition in international law against denying water to enemy armed forces. The US Army Field Manual states in fact that there is no prohibition against "measures being taken to dry up springs, to divert rivers and aqueducts from their courses." Presumably this refers to springs, etc., used by the military and not necessary for civilian survival. [...] Paragraph 4 merely reinforces the point that waters and water installations are subject to protection under the law of war and armed conflict.

Article 52: Ecological Targets

Combatants shall not, for military purposes or as reprisals, destroy or divert waters, or destroy water installations, when such acts would cause widespread, long-term, and severe ecological damage prejudicial to the health or survival of the population or if such acts would fundamentally impair the ecological integrity of waters.

Commentary: Protocol I contains two general provisions relating to ecological harm, arts. 35 and 55. Art. 55, with its emphasis on health and survival of the population is of greater relevance to water resources. The text here follows that of Protocol I, art. 55, except that the

word "care" is infelicitous in the circumstances, applying a weak and vague criterion. It is arguable that the provision of Protocol I regarding ecological damage and this Article are not yet customary law. Consistent with the emphasis on ecological concerns in these Rules, this Article extends protection to the fundamental ecological integrity of the waters in question. The allegations made after the Gulf War that the Iraqi actions violated the laws of war by impairing the ecological integrity of Kuwait and the Gulf region suggest that the law is at least moving in this direction. The Advisory Opinion on the Use of Nuclear Weapons suggests that customary international law does indeed prohibit the causing of widespread, long term, and severe ecological damage prejudicial to the health or survival of the population. [...] This broader approach also appears to be required by the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

Article 53: Dams and Dikes

1. In addition to the other protections provided by these Rules, combatants shall not make dams and dikes the objects of attack, even where these are military objectives, if such an attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

2. This protection ceases if the dam or dike is used for other than its normal function and in regular, significant, and direct support of military operations and such attack is the only feasible way to terminate such use.

Commentary: This Article reproduces from Protocol I, art. 56(1), (2), with editorial changes. The rule apparently is not yet customary law. This rule "raises serious doubts about, for example the RAF "dambusters" raid during the Second World War, although the principal dams concerned "undoubtedly supplied power for a vital war industry." The 1992 German Military Manual interprets "significant and direct support of military operations" as comprising "for instance, the manufacture of weapons, ammunition and defense materiel. The mere possibility of use by armed forces is not subject to these provisions." [...]

Article 54: Occupied Territories

1. An occupying State shall administer water resources in an occupied territory in a way that ensures the sustainable use of the water resources and that minimizes environmental harm.

2. An occupying State shall protect water installations and ensure an adequate water supply to the population of an occupied territory.

Commentary: Under customary international law, an occupying State is only the administrator with a usufruct of State property. The U.S. Army Field Manual stipulates that the occupier "should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value." Applying this criterion to water resources requires the occupier to limit the use of water resources so as to ensure sustainability and to minimize environmental harm. The Fourth Geneva Convention, art. 55, stipulates that "[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population." This Article strengthens the rule as regards water supply and the obligation is made absolute. The language in the Madrid Armed Conflict Rules, art. VI, is more specific and detailed;

whether it makes a real change is debatable. [...]

Article 55: Effect of War or Armed Conflict on Water Treaties

1. Treaties creating legal regimes for an international watercourse or part thereof are not terminated by war or armed conflict between the parties to the treaty.
2. Such Treaties or parts thereof shall be suspended only where military necessity requires suspension and where suspension does not violate any provision of this Chapter.

Commentary: The rules of international law relating to the effect of armed conflict on validity of treaties are not entirely settled. The customary rule apparently is represented by Lord McNair's statement that "State rights of a permanent character, connected with sovereignty and status and territory, such as those created or recognized by a treaty of peace are not affected by the outbreak of war between the contracting parties." [Footnote 24: A.D. MCNAIR, THE LAW OF TREATIES 705 (2nd ed. 1961).] [...]

[...]

DISCUSSION

1. a. Do the Geneva Conventions and Protocol I sufficiently address the protection of water as an object indispensable for the survival of the civilian population in international and non-international armed conflicts?
   b. Why are rules concerning water essential in warfare?
   c. Do the four main prohibitions mentioned in the article [A. Dying for Water] provide adequate protection of water?
2. a. Is water needed for the civilian population not by definition a civilian object that consequently may not be attacked? (*Cf.* Art. 23 (g) of the Hague Regulations and Art. 52 of Protocol I.)
   b. Is it sufficient to treat water like food under IHL? May foodstuffs destined for combatants be attacked and destroyed according to IHL? (*Cf.* Arts. 52 and 54 of Protocol I.)
   c. Shouldn't water be considered a medical material? May such a material destined for combatants be attacked and destroyed under IHL? Could water be considered a medicine? (*Cf.* Art. 33 of Convention I.)
3. Is water an object indispensable to the survival of the civilian population? Does the attack of an object indispensable to the survival of the civilian population violate IHL? Even though that object may be simultaneously a military objective? If such an object is a military objective, is it lawful to attack it as long as the attack is proportionate and necessary? (*Cf.* Art. 54 of Protocol I.)
4. What does the adoption of Resolution 2/2004 mean for the protection of water in armed conflicts? Does it extend the pre-existing protection? Does it simply confirm this protection?
5. Do you agree with Yoram Dinstein's description of Article 54? Could the prohibition of starvation as a method of warfare be recognised as customary law? Why?
6. Could any or all of the provisions in the Berlin rules on Water Resources be considered as customary law? Which ones?

Case No. 29, ICRC, Customary International Humanitarian Law

THE CASE

A. ICRC Report 1995

[**Source:** *International Humanitarian Law: From Law to Action: Report on the Follow-up to the International Conference for the Protection of War Victims*, Presented by the International Committee of the Red Cross, in consultation with the International Federation of the Red Cross and Red Crescent Societies, at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Commission I, Question 2 of the Agenda; reproduced in: IRRC, No. 311, March-April 1996, pp. 194-222; available on http://www.icrc.org]

INTERNATIONAL HUMANITARIAN LAW: FROM LAW TO ACTION: REPORT ON THE FOLLOW-UP TO THE INTERNATIONAL CONFERENCE FOR THE PROTECTION OF WAR VICTIMS

[...]

2. Customary rules of International Humanitarian Law

2.1 The invitation to the ICRC

Recommendation II of the Intergovernmental Group of Experts proposes that "*the ICRC be invited to prepare, with the assistance of experts on IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies*".

2.2 The ICRC's objective

The ICRC is ready to assume this task in order to attain a practical humanitarian objective, that is, to determine what rules are applicable to humanitarian problems that are not covered by treaty provisions, or whose regulation under the treaties can be clarified by practice.

There may be no treaty-based rule governing a problem where no treaty contains such a rule, or when the treaty rule is not applicable in a particular conflict because the State concerned is not bound by the treaty codifying the rule in question.

Knowledge of customary rules is also of vital importance when it comes to determining what rules apply to armed forces operating under the aegis of organizations which are not formally parties to the international humanitarian law treaties, such as the United Nations.

2.3 Importance of the report in regard to international armed conflicts

As far as international armed conflicts are concerned, the question is not of much practical interest in relation to matters governed by the Geneva Conventions of 1949, since 185 States are bound by those treaties.

Admittedly, under the constitutional system of some States, customary rules - in contrast to treaty rules - are directly applicable in domestic law. As explained

elsewhere in this report [...], the States party nonetheless have the obligation to enact legislation that ensures the incorporation of international humanitarian law into the domestic legal regime, so that all its rules, and not just those considered as customary, can and must be applied by the executive and judiciary.

Indeed, it would theoretically be very difficult to determine practice and gauge its acceptance in this respect since States, being almost all party to the Geneva Conventions, act either in conformity with or in violation of their treaty obligations. Can such behaviour also form the basis of customary rules?

As for matters governed by Additional Protocol I of 1977, the question is of more practical interest since this treaty has not yet been universally accepted. But considering that there are 137 States party, customary international humanitarian law certainly cannot be determined on the basis of the behaviour of the 54 States that are not yet bound by it. Furthermore, the evolution of international customary law has not been halted by its codification in Protocol I. Quite the contrary, it has been strongly influenced by the drafting of Protocol I and by the behaviour of States vis-à-vis this treaty.

2.4 Importance of the report in regard to non-international armed conflicts

As regards non-international armed conflicts, the rules governing the protection of persons in the power of a party to a conflict have been partially codified in Article 3 common to the Geneva Conventions and in Additional Protocol II, and often do no more than spell out the "hard core" of international human rights law applicable at all times.

The establishment of customary rules will be of particular importance in another area of the law governing non-international armed conflicts, that of the conduct of hostilities. This covers mainly the use of weapons and the protection of civilians from the effects of hostilities.

In the area of the conduct of hostilities, the treaty rules specifically applicable to non-international armed conflicts are in fact very rudimentary and incomplete.

For this reason, knowledge of customary rules will be especially necessary when the ICRC prepares a model manual on the law of armed conflicts for use by armed forces and when governments produce their national manuals. Indeed, in keeping with the recommendations of the Intergovernmental Group of Experts, these manuals should also cover non international armed conflicts [...].

It will have to be determined in this regard to what extent a State may use against its own citizens methods and means of combat which it has agreed not to employ against a foreign enemy in an international armed conflict. The potential impact on international customary law of the practice of non-governmental entities involved in non-international armed conflicts and the extent of acceptance they show will also have to be determined. Finally, the question will arise as to the degree to which practices adopted under national law by the parties involved in a non-international conflict reflect acceptance of the tenets of international law.

2.5 ICRC procedure and consultations

To prepare the report, the ICRC intends initially to ask researchers from different geographical regions to assemble the necessary factual material. Without wishing to opt for one or other of the different theories of international customary law, or attempting to define its two elements - the observance of a general practice and acceptance of this practice as law - the ICRC believes that, to establish a universal custom, the report must encompass all forms of practice and all cases of acceptance of this practice as law: not only the conduct of belligerents, but also the instructions they issue, their legislation, and statements made by their leaders; the reaction of other States at the diplomatic level, within international forums, or in public statements; military manuals; general declarations on law, including resolutions of international organizations; and, lastly, national or international court decisions.

Account needs to be taken of all forms of State practice, so as to permit all States - and not only those embroiled in armed conflict - to contribute to the formation of customary rules.

Basing customary law exclusively on actual conduct in armed conflicts would, moreover, be tantamount to accepting the current inhumane practices as law. Yet at the International Conference for the Protection of War Victims, States rejected such practices unanimously, as does public opinion.

The ICRC will entrust the factual material assembled to experts representing different geographical regions and different legal systems, asking them to draft reports on existing custom in various areas of international humanitarian law where such an exercise would meet a priority humanitarian need. These reports will be discussed in 1997 at meetings of experts representing governments, National Societies and their Federation, and international, intergovernmental and non-governmental organizations. On the basis of the experts' reports and of the discussions, the ICRC will summarize the material in a report which, together with any recommendations, will be submitted to States and to the international bodies concerned before the holding of the subsequent International Conference of the Red Cross and Red Crescent.

2.6 The fundamental importance of treaty law

Although the report to be prepared concerns customary law, the ICRC remains convinced of the need for universal participation in the treaties of international humanitarian law and of the necessity to continue the work of codifying this law. It is very difficult to base uniform application of the law, military instruction and the repression of breaches on custom, which by definition is in constant evolution, is still difficult to formulate and is subject to controversy. In the meantime, the report requested of the ICRC should go some way towards improving the protection of victims of armed conflicts. [...]

B. ICRC, Study on Customary International Humanitarian Law

[**Source:** ICRC Press release No. 05/17 17 March 2005, Customary law study enhances legal protection of persons affected by armed conflict; available on http://www.icrc.org]

Geneva (ICRC) - Following more than eight years of research, the International Committee of the Red Cross (ICRC) has made public a study of customary international humanitarian law applicable during armed conflict. [...]

By identifying 161 rules of customary international humanitarian law, the study enhances the legal protection of persons affected by armed conflict. "This is especially the case in non-international armed conflict, for which treaty law is not particularly well developed," said [ICRC President]. Mr Kellenberger "Yet civil wars often result in the worst suffering. The study clearly shows that customary international humanitarian law applicable in non-international armed conflict goes beyond the rules of treaty law. For example, while treaty law covering internal armed conflict does not expressly prohibit attacks on civilian objects, customary international humanitarian law closes this gap. Importantly, all conflict parties - not just States but also rebel groups, for example - are bound by customary international humanitarian law applicable to internal armed conflict."

In addition to treaty law such as the Geneva Conventions and their Additional Protocols, customary international humanitarian law is a major source of rules applicable in times of armed conflict. While treaty law is based on written conventions, customary international humanitarian law derives from the practice of States as expressed, for example, in military manuals, national legislation or official statements. A rule is considered binding customary international humanitarian law if it reflects the widespread, representative and uniform practice of States accepted as law.

In late 1995, the International Conference of the Red Cross and Red Crescent commissioned the ICRC to carry out the study. It was researched by ICRC legal staff and dozens of experts representing different regions and legal systems, including academics and specialists drawn from governments and international organizations. The experts reviewed State practice in 47 countries as well as international sources such as the United Nations, regional organizations and international courts and tribunals.

"The ICRC fully respected the academic freedom of the authors and editors of the study," said Mr Kellenberger. "It considers the study an accurate reflection of the current state of customary international humanitarian law. The ICRC will make use of it in its work to protect and assist victims of armed conflict worldwide. I also expect scholars and governmental experts to use the study as a basis for discussions on current challenges to international humanitarian law."

C. List of Customary Rules of International Humanitarian Law

[**Source**: Annex to Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict by Jean-Marie Henckaerts, IRRC, Volume 87, No. 857, March 2005, pp. 198-212.]

Annex. List of Customary Rules of International Humanitarian Law

This list is based on the conclusions set out in Volume I of the study on customary international humanitarian law. As the study did not seek to determine the customary nature of each treaty rule of international humanitarian law, it does not necessarily follow the structure of existing treaties. The scope of application of the rules is indicated in square brackets. The abbreviation IAC refers to customary rules applicable in international armed conflicts and the abbreviation NIAC to customary rules applicable in non-international armed conflicts. In the latter case, some rules are indicated as being "arguably" applicable because practice generally pointed in that direction but was less extensive.

THE PRINCIPLE OF DISTINCTION

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]

Rule 4. The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects. [IAC/NIAC]

Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. [IAC/NIAC]

Rule 9. Civilian objects are all objects that are not military objectives. [IAC/NIAC]

Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives. [IAC/NIAC]

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited. [IAC/NIAC]

Rule 12. Indiscriminate attacks are those:

(a) which are not directed at a specific military objective;
(b) which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [IAC/NIAC]

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited. [IAC/NIAC]

Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. [IAC/NIAC]

Precautions in Attack

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives. [IAC/NIAC]

Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. [IAC/NIAC]

Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [IAC/arguably NIAC]

Precautions against the Effects of Attacks

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. [IAC/NIAC]

Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. [IAC/arguably NIAC]

Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. [IAC/arguably NIAC]

SPECIFICALLY PROTECTED PERSONS AND OBJECTS

Medical and Religious Personnel and Objects

Rule 25. Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

Rule 26. Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited. [IAC/NIAC]

Rule 27. Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 30. Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited. [IAC/NIAC]

Humanitarian Relief Personnel and Objects

Rule 31. Humanitarian relief personnel must be respected and protected. [IAC/NIAC]

Rule 32. Objects used for humanitarian relief operations must be respected and protected. [IAC/NIAC]

Personnel and Objects Involved in a Peacekeeping Mission

Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. [IAC/NIAC]

Journalists

Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities. [IAC/NIAC]

Protected Zones

Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. [IAC/NIAC]

Rule 36. Directing an attack against a demilitarised zone agreed upon between the parties to the conflict is prohibited. [IAC/NIAC]

Rule 37. Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

Cultural Property

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity. [IAC/NIAC]

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity. [IAC/NIAC]

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited. [IAC/NIAC]

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory. [IAC]

Works and Installations Containing Dangerous Forces

Rule 42. Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. [IAC/NIAC]

The Natural Environment

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.

B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.

C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited. [IAC/NIAC]

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. [IAC/ arguably NIAC]

Rule 45 The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. [IAC/arguably NIAC]

SPECIFIC METHODS OF WARFARE

Denial of Quarter

Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited. [IAC/NIAC]

Rule 47. Attacking persons who are recognised as hors de combat is prohibited. A person hors de combat is:

(a) anyone who is in the power of an adverse party;
(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
(c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape. [IAC/NIAC]

Rule 48. Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited. [IAC/NIAC]

Destruction and Seizure of Property

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]

Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. [IAC/NIAC]

Rule 51. In occupied territory:

(a) movable public property that can be used for military operations may be confiscated;
(b) immovable public property must be administered according to the rule of usufruct; and
(c) private property must be respected and may not be confiscated except where destruction or seizure of such property is required by imperative military necessity. [IAC]

Rule 52. Pillage is prohibited. [IAC/NIAC]

Starvation and Access to Humanitarian Relief

Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited. [IAC/NIAC]

Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. [IAC/NIAC]

Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. [IAC/NIAC]

Rule 56. The parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. [IAC/NIAC]

Deception

Rule 57. Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law. [IAC/NIAC]

Rule 58. The improper use of the white flag of truce is prohibited. [IAC/NIAC]

Rule 59. The improper use of the distinctive emblems of the Geneva Conventions is prohibited. [IAC/NIAC]

Rule 60. The use of the United Nations emblem and uniform is prohibited, except as authorised by the organisation. [IAC/NIAC]

Rule 61. The improper use of other internationally recognised emblems is prohibited. [IAC/NIAC]

Rule 62. Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited. [IAC/arguably NIAC]

Rule 63. Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited. [IAC/arguably NIAC]

Rule 64. Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is prohibited. [IAC/NIAC]

Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited. [IAC/NIAC]

Communication with the Enemy

Rule 66. Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith. [IAC/NIAC]

Rule 67. Parlementaires are inviolable. [IAC/NIAC]

Rule 68. Commanders may take the necessary precautions to prevent the presence of a parlementaire from being prejudicial. [IAC/NIAC]

Rule 69. Parlementaires taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability. [IAC/NIAC]

WEAPONS

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. [IAC/NIAC]

Rule 71. The use of weapons which are by nature indiscriminate is prohibited. [IAC/NIAC]

Poison

Rule 72. The use of poison or poisoned weapons is prohibited. [IAC/NIAC]

Biological Weapons

Rule 73. The use of biological weapons is prohibited. [IAC/NIAC]

Chemical Weapons

Rule 74. The use of chemical weapons is prohibited. [IAC/NIAC]

Rule 75. The use of riot-control agents as a method of warfare is prohibited. [IAC/NIAC]

Rule 76. The use of herbicides as a method of warfare is prohibited if they:

(a) are of a nature to be prohibited chemical weapons;
(b) are of a nature to be prohibited biological weapons;
(c) are aimed at vegetation that is not a military objective;
(d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or
(e) would cause widespread, long-term and severe damage to the natural environment. [IAC/NIAC]

Expanding Bullets

Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]

Exploding Bullets

Rule 78. The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]

Weapons Primarily Injuring by Non-detectable Fragments

Rule 79. The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]

Booby-traps

Rule 80. The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited. [IAC/NIAC]

Landmines

Rule 81. When landmines are used, particular care must be taken to minimise their indiscriminate effects. [IAC/NIAC]

Rule 82. A party to the conflict using landmines must record their placement, as far as possible. [IAC/arguably NIAC]

Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. [IAC/NIAC]

Incendiary Weapons

Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat. [IAC/NIAC]

Blinding Laser Weapons

Rule 86. The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited. [IAC/NIAC]

TREATMENT OF CIVILIANS AND PERSONS HORS DE COMBAT

Fundamental Guarantees

Rule 87. Civilians and persons hors de combat must be treated humanely. [IAC/NIAC]

Rule 88. Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or on any other similar criteria is prohibited. [IAC/NIAC]

Rule 89. Murder is prohibited. [IAC/NIAC]

Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited. [IAC/NIAC]

Rule 91. Corporal punishment is prohibited. [IAC/NIAC]

Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited. [IAC/NIAC]

Rule 93. Rape and other forms of sexual violence are prohibited. [IAC/NIAC]

Rule 94. Slavery and the slave trade in all their forms are prohibited. [IAC/NIAC]

Rule 95. Uncompensated or abusive forced labour is prohibited. [IAC/NIAC]

Rule 96. The taking of hostages is prohibited. [IAC/NIAC]

Rule 97. The use of human shields is prohibited. [IAC/NIAC]

Rule 98. Enforced disappearance is prohibited. [IAC/NIAC]

Rule 99. Arbitrary deprivation of liberty is prohibited. [IAC/NIAC]

Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. [IAC/NIAC]

Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. [IAC/NIAC]

Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility. [IAC/NIAC]

Rule 103. Collective punishments are prohibited. [IAC/NIAC]

Rule 104. The convictions and religious practices of civilians and persons *hors de combat* must be respected. [IAC/NIAC]

Rule 105. Family life must be respected as far as possible. [IAC/NIAC]

Combatants and Prisoner-of-War Status

Rule 106. Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status. [IAC]

Rule 107. Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

Rule 108. Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

The Wounded, Sick and Shipwrecked

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. [IAC/NIAC]

Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. [IAC/NIAC]

Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property. [IAC/NIAC]

The Dead

Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. [IAC/NIAC]

Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [IAC/NIAC]

Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [IAC]

Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [IAC/NIAC]

Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [IAC/NIAC]

Missing Persons

Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. [IAC/NIAC]

Persons Deprived of their Liberty

Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [IAC/NIAC]

Rule 119. Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. [IAC/NIAC]

Rule 120. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. [IAC/NIAC]

Rule 121. Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene. [IAC/NIAC]

Rule 122. Pillage of the personal belongings of persons deprived of their liberty is prohibited. [IAC/NIAC]

Rule 123. The personal details of persons deprived of their liberty must be recorded. [IAC/NIAC]

Rule 124.

A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the

conditions of their detention and to restore contacts between those persons and their families. [IAC]

B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [NIAC]

Rule 125. Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [IAC/NIAC]

Rule 126. Civilian internees and persons deprived of their liberty in connection with a non international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable. [NIAC]

Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected. [IAC/NIAC]

Rule 128.

A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC]

B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC]

C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC]

The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.

Displacement and Displaced Persons

Rule 129.

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. [IAC]

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. [NIAC]

Rule 130. States may not deport or transfer parts of their own civilian population into a territory they occupy. [IAC]

Rule 131. In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. [IAC/NIAC]

Rule 132. Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. [IAC/NIAC]

Rule 133. The property rights of displaced persons must be respected. [IAC/NIAC]

Other Persons Afforded Specific Protection

Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected. [IAC/NIAC]

Rule 135. Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

Rule 136. Children must not be recruited into armed forces or armed groups. [IAC/NIAC]

Rule 137. Children must not be allowed to take part in hostilities. [IAC/NIAC]

Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

IMPLEMENTATION

Compliance with International Humanitarian Law

Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]

Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]

Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]

Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. [IAC/NIAC]

Rule 143. States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]

Enforcement of International Humanitarian Law

Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law. [IAC/NIAC]

Rule 145. Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]

Rule 146. Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]

Rule 147. Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]

Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]

Responsibility and Reparation

Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:

(a) violations committed by its organs, including its armed forces;
(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct. [IAC/NIAC]

Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. [IAC/NIAC]

Individual Responsibility

Rule 151. Individuals are criminally responsible for war crimes they commit. [IAC/NIAC]

Rule 152. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders. [IAC/NIAC]

Rule 153. Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. [IAC/NIAC]

Rule 154. Every combatant has a duty to disobey a manifestly unlawful order. [IAC/NIAC]

Rule 155. Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered. [IAC/NIAC]

War Crimes

Rule 156. Serious violations of international humanitarian law constitute war crimes. [IAC/NIAC]

Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]

Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]

Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes. [NIAC]

Rule 160. Statutes of limitation may not apply to war crimes. [IAC/NIAC]

Rule 161. States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. [IAC/NIAC]

DISCUSSION

1. a. In your opinion, what are the main findings of the ICRC study? For international armed conflicts? For non-international armed conflicts?
   b. Which rules go beyond the existing treaty law applicable to each category of armed conflicts?
   c. Which rules go less far than the corresponding treaty rules? Which treaty rules (in the fields covered by the study) have not been found to be customary?
2. How can there be customary humanitarian law if the practice in armed conflicts is inhumane?
3. What are the risks and what are the opportunities of the ICRC's study?
4. What are the advantages of treaty rules over customary rules in protecting the victims of war? What are the advantages of customary rules over treaty rules?
5. a. IHL being a well codified branch of international law, why and when is it necessary to determine the rules of customary IHL?
   b. Are there particularities in creating or assessing customary law in the field of International Humanitarian Law (compared with, e.g. the law of treaties or the law of the sea)?
   c. Why should (only) the customary rules of IHL apply to operations of UN Peace Forces? Does that not beg the question whether military operations of the UN are governed by the same rules as those of States? Is there any practice on this very question?
6. a. In matters regulated by Protocol I did the study have to analyse only the practice of the 33 States not party or also the practice of the 163 States Parties? How can one determine whether an act by a State Party respecting or violating the Protocol also counts as practice for customary international law?

Can you imagine an example of such "treaty practice" clearly counting or clearly not counting as practice for customary law? Are the same criteria applicable to assess acts of respect of treaty obligations and violations?

b. Did the study have to focus, as far as States Parties are concerned, on their practice before they became bound to the treaty? Is the development of customary IHL frozen or at least slowed down by a successful codification (*lato sensu*)? Or, on the contrary, is it speeded up by the crystallizing of the treaty norms, which then triggers conformity of State practice with those rules?

c. How could State behaviour in drafting Protocol I be relevant for customary international law? Do statements made at the diplomatic conference drafting Protocol I count as State practice for the development of customary IHL? Which of such statements have a greater weight than others?

d. How could the behaviour of States *vis-à-vis* Protocol I, since its drafting, be relevant? Does widespread State participation in an IHL treaty make its rules customary? Does such participation count as State practice?

e. Can violations of treaty obligations count as custom?

7. Are the answers given to question 6 the same for the Conventions with 192 States Parties and only one State not party (Niue) ? Can you explain any differences?

8. What is the relationship between principles and customary law? Are rules which may be deduced from principles or from other rules more important than rules based on practice?

9. Must humanitarian behavior adopted for policy reasons be distinguished from behavior adopted out of a sense of legal obligation? How can these motives be distinguished? In particular in case of omissions?

10. What is the relevance of the Martens clause for assessing customary international humanitarian law?

11. a. May a State, in a non-international armed conflict, use means and methods prohibited in international armed conflicts? From a moral and political point of view? From a legal point of view? Could a study of State practice answer the latter question? A study of actual State behaviour? Did practice in non-international or both in international and non-international armed conflicts have to be studied in order to answer that question?

b. Are non-governmental armed groups bound by customary law?

c. Is the practice of non-governmental entities, *e.g.*, rebels, in non-international armed conflicts, contributing to customary international law applicable in non-international armed conflicts?

d. When does practice of parties to non-international armed conflicts respecting obligations under national law contribute to customary IHL? How would you assess the *opinio iuris*? Is an acceptance of the practice as *international law* necessary to make it customary IHL?

e. If States refuse to improve the protection of victims of non-international armed conflicts by bringing the applicable rules through treaties closer to

those of international armed conflicts, can one expect (to see) such a result from a study of customary law?

12. a. Do all expressions of custom listed under paragraph 2.5 Part A of the Case constitute practice? Or do some of them rather express *opinio iuris*? Or do all of them express practice and *opinio iuris*?

b. Is the practice of some States more important than that of others? Are some States specially affected by IHL? What about States affected by armed conflicts? States with large armed forces? States with detailed military manuals?

c. Does the practice of belligerents and of non-belligerents count equally? What kind of rules of customary IHL could be derived from the actual practice of belligerents? May one thus limit those contributing to the formation of customary law to belligerents? How can one establish such practice? Does it count even if it is contrary to official declarations? Are reports of humanitarian organizations on "violations" useful? Does every act of a combatant constitute State practice? Is it at least State practice when the combatant is not punished?

d. Can customary IHL be derived only from abstract state acts such as diplomatic statements, undertakings and declarations? By belligerents? By non-belligerents? By both? What if the actual behaviour of the belligerents is incompatible with their statements?

Document No. 30, The Seville Agreement

[**Source:** Text of the Agreement adopted by consensus in Resolution 6 of the the Council of Delegates in Sevilla, Spain, November 26, 1997. Available on http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JP4Y]

AGREEMENT ON THE ORGANISATION OF THE INTERNATIONAL ACTIVITIES OF THE COMPONENTS OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

PREAMBLE

The mission of the International Red Cross and Red Crescent Movement is *"to prevent and alleviate human suffering wherever it may be found, to protect life and health, and ensure respect for the human being, in particular in times of armed conflict and other emergencies, to work for the prevention of disease and for the promotion of health and social welfare, to encourage voluntary service and a constant readiness to give help by the members of the Movement, and a universal sense of solidarity towards all those in need of its protection and assistance".*

The accomplishment of this common mission calls for the combined efforts and participation of all the components of the Movement. To respond with speed,

flexibility and creativity to the needs of all those calling for impartial humanitarian protection and assistance, the components must join their forces and capitalize on their diversity. To achieve that goal through effective collaboration in a spirit of mutual trust, to ensure an efficient mobilization of resources, the components must therefore, based on a clear sense of purpose and their common mission, organize their international activities on a sound and predictable basis. This implies observance of the Fundamental Principles and of the Statutes of the Movement, and a synergetic cooperation, coupled with a clear division of labour, among components having distinct but closely related and complementary roles and competencies.

This Agreement is more than an instrument of operational management or a statement of understanding. It sets into motion a profound change in attitude between members of the same Movement: the adoption of a collaborative spirit, in which every member of the Movement values the contributions of other members as partners in a global humanitarian enterprise. It is an agreement on cooperation and not merely on a division of labour, and it applies to all those international activities which, under the Movement's Statutes, the components are called upon to carry out in close collaboration. It establishes clear guidelines for the performance of tasks by Movement members, using the specific areas of competence and the complementary capacities of each to best effect. It provides for continuity of activities as situations change, and aims at fostering among the components a stronger sense of identity, of solidarity, of mutual trust and of shared responsibility.

With those objectives set out, this Agreement on the organization of the international activities of the Movement's components constitutes an essential element of a new common strategy of action that will allow the components to achieve three important goals:

- to provide more effective response to humanitarian needs using to best effect the Movement's many resources;
- to promote better respect for humanitarian principles, and for international humanitarian law;
- to create a stronger International Red Cross and Red Crescent Movement in which all components cooperate to the optimum extent.

PART I - GENERAL

Article 1: Scope of the Agreement

1.1 The Agreement applies to those international activities which the components are called upon to carry out in cooperation, on a bilateral or multilateral basis, to the exclusion of the activities which the Statutes of the Movement and the Geneva Conventions entrust to the components individually. [...]

1.3 Pursuant to Article 7, paragraph 1 of the Statutes of the Movement, the Agreement defines the organization of international activities carried out in bilateral or multilateral cooperation [...]:

1.4 Nothing in this Agreement shall be interpreted as restricting or impairing the specific role and competencies of each component according to the Geneva Conventions and their additional Protocols, and under the Statutes of the Movement.

Article 2: Object and Purpose of the Agreement

The object and purpose of the Agreement is:

a) to promote the efficient use of the human, material and financial resources of the Movement and to mobilize them as rapidly as possible in relief operations and development activities in the interest of the victims of armed conflicts or of internal strife and their direct results, as well as of natural or technological disasters, and of vulnerable persons in other emergency and disaster situations in peacetime;

b) to promote closer cooperation among the components in situations referred to in Article 2 a) above;

c) to strengthen the development of National Societies and to improve cooperation among them, thus enabling National Societies to participate more effectively in the international activities of the Movement;

d) to obviate differences between the components as to the definition and the organization of their respective international activities and responsibilities within the Movement;

e) to strengthen functional cooperation among the ICRC, the Federation and National Societies.

Article 3: Guiding Principles

The organization of the international activities of the components is at all times governed by the values and principles which guide the Movement, as enshrined in:

- the Fundamental Principles of the Red Cross and Red Crescent;
- the Statutes of the Movement;
- the Geneva Conventions and their Additional Protocols.

Article 4: Management Principles

Implicit in the Statutes of the Movement are two organizational concepts which this Agreement defines as "the lead role" and "the lead agency".

A) Lead Role

4.1 The Geneva Conventions and the Statutes of the Movement entrust specific competencies to each component which therefore plays a lead role in these matters.

4.2 The concept of lead role implies the existence of other partners with rights and responsibilities in these matters.

B) Lead Agency

4.3 The lead agency concept is an organizational tool for managing international operational activities. In a given situation, one organization is entrusted with the function of lead agency. That organization carries out the general direction and coordination of the international operational activities.

4.4 The lead agency concept applies primarily in emergency situations as referred to in Article 2 a) above, where rapid, coherent and effective relief is required in response to the large-scale needs of the victims, on the basis of an evaluation of these needs and of the capacity of the National Society concerned to meet them. [...]

PART II - INTERNATIONAL RELIEF ACTIVITIES

Article 5: Organization of International Relief Operations

5.1 Situations Requiring a Lead Agency

A) International and non-international armed conflicts, internal strife and their direct results, within the meaning of the Geneva Conventions and their Additional Protocols and the Statutes of the Movement:

a) within the meaning of the Geneva Conventions and of this Agreement, the term "situation of armed conflict" covers the entire territory of the parties to a conflict as far as the protection and assistance of the victims of that conflict are concerned;

b) the term "direct results of a conflict" within the meaning of the Geneva Conventions applies beyond the cessation of hostilities and extends to situations where victims of a conflict remain in need of relief until a general restoration of peace has been achieved;

c) the term "direct results of a conflict" shall also apply to situations in which general restoration of peace has been achieved, hence the intervention of the ICRC as a specifically neutral and independent institution and intermediary is no longer required but victims remain in need of relief during the post-conflict period, especially within the context of reconstruction and rehabilitation programmes;

d) the term "direct results of a conflict" shall also apply to situations in which victims of a conflict are to be found on the territory of a State which is neither party to a conflict nor affected by internal strife, especially following a large scale movement of refugees.

B) Natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society and thus call upon the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* to apply;

C) Armed conflict concomitant with natural or technological disasters.

5.2 Armed Conflict and Internal Strife: Elements of Identification

For the purposes of the application of the present Agreement and the organization of the international activities of the components,

a) an armed conflict exists when the armed action is taking place between two or more parties and reflects a minimum of organization;

b) internal strife does not necessarily imply armed action but serious acts of violence over a prolonged period or a latent situation of violence, whether of political, religious, racial, social, economic or other origin, accompanied by one or more features such as: mass arrests, forced disappearances, detention for security reasons, suspension of judicial guarantees, declaration of state of emergency, declaration of martial law.

5.3 Lead Agency Role of each Component

5.3.1 The ICRC will act as lead agency, as provided for in Article 4 of the present Agreement, in situations of international and non-international armed conflicts, internal strife and their direct results as referred to in Article 5.1, Section A and in paragraphs a) and b), and in Section C (armed conflict concomitant with natural or technological disasters).

5.3.2 The Federation will act as lead agency in situations referred to in Article 5.1, paragraphs c) and d) of Section A, and in Section B (natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society).

5.3.3 A National Society may undertake the functions of lead agency necessary for the coordination of international relief assistance within its own territory subject to the concurrence of the ICRC or the Federation, as the case may be, as provided for in Article 3, paragraph 3 of the Statutes of the Movement.

5.3.4 If a natural or technological disaster occurs in a situation of conflict where the ICRC is already engaged, the ICRC will call upon the Federation to provide additional appropriate expertise to facilitate relief.

5.3.5 If an armed conflict or internal strife breaks out in a situation where there is ongoing Federation relief assistance activity, the transition provisions apply, as provided for in Article 5.5 of the present Agreement. [...]

5.5 Transition

5.5.1 Where, as a result of a change of situation, responsibility for directing and coordinating an international relief operation is transferred from the ICRC or from the Federation in accordance with the relevant Articles of the present Agreement, the incumbent lead agency shall, in agreement with the operating National Society and in consultation with the participating National Societies, take all the steps appropriate to ensure an efficient and harmonious handover of the management and conduct of the new international relief operation by the component taking over the lead agency function. [...]

5.6 Other International Relief Actions by National Societies

5.6.1 In situations where the needs of the victims do not call for the organization of an international relief operation under a lead agency, a National Society which provides direct assistance to the Society of the country affected by a conflict or a disaster shall immediately inform the ICRC or the Federation, as the case may be.

5.6.2 Mutual emergency relief assistance agreements in case of natural or technological disasters between neighbouring National Societies, and bilateral or multilateral

development agreements between National Societies shall be notified in advance to the Federation.

5.6.3 The fact that one or several National Societies submit a request for aid to the ICRC or to the Federation, or hand over relief supplies to one of them, shall in no way be deemed to modify the organization of functions and responsibilities between the two institutions as defined in the present Agreement. In such an event, the institution which is not competent will so inform the National Society or Societies concerned and will refer the matter without delay to the competent institution.

5.7 Operational Difficulties

5.7.1 Should an international relief operation directed and coordinated either by the ICRC or by the Federation be obstructed for a prolonged period, the lead agency shall consult the components involved with a view to bringing their combined influence to bear so that the obstacles to the operation may be overcome as soon as possible in the sole interest of the victims. [...]

5.8 United Nations Specialized Agencies

5.8.1 In order to maintain among the components a coherent approach that will preserve the Movement's unity and independence, a National Society wishing to conclude a cooperation agreement with a specialized agency of the United Nations, shall keep the Federation and/or the ICRC informed. [...]

Article 6: Responsibilities for General Direction and Coordination of International Relief Operations

6.1 In situations defined in the present Agreement, where the general direction and coordination of an international relief operation is exercised by the ICRC or the Federation acting as lead agency, this function carries the following responsibilities:

6.1.1 *General Responsibilities*

a) to define the general objectives of the international relief operation based on access to the victims and on an impartial assessment of their needs;

b) to direct the implementation of these objectives;

c) to ensure that all actions within the relief operation are effectively coordinated;

d) to establish appropriate mechanisms of consultation with Red Cross and Red Crescent partners;

e) to coordinate international Red Cross and Red Crescent relief operations with the humanitarian activities of other organizations (governmental or non-governmental) where this is in the interest of the victims and is in accordance with the Fundamental Principles;

f) to act as a spokesman for the international relief action and to formulate the Red Cross and Red Crescent partners' response to public interest;

g) to mobilize financial resources for the relief operation and to launch appeals integrating when necessary other directly or indirectly related Red Cross and Red Crescent activities.

h) to ensure that the resources mobilized for an international relief operation are managed in a sound and efficient manner by the operating and the participating National Societies;

i) to promote, by means of project delegations, bilateral or multilateral cooperation agreements between participating and operating National Societies;

6.1.2 *Specific Responsibilities*

A) In situations where the ICRC is acting as lead agency:

a) to establish and maintain relations and contacts with all the parties to the conflict and take any steps necessary for the conduct of international relief operations for victims, in accordance with the relevant provisions of international humanitarian law and in compliance with the Fundamental Principles of independence, neutrality and impartiality;

b) to assume ultimate responsibility for international relief operations vis-à-vis the parties to the conflict and the community of States party to the Geneva Conventions;

c) to define and ensure the application of any measure which may prove necessary to guarantee, to the greatest extent possible, the physical safety of personnel engaged in relief operations in the field;

d) to ensure respect for the rules in force relating to the use of the red cross and red crescent emblems for protective purposes;

e) to draw up, in consultation with the National Societies concerned, public statements relating to the progress of the relief operation.

B) In situations where the Federation is acting as lead agency:

a) to ensure that the participating and the operating National Societies comply with the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* (1995) and the *Code of Conduct for International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief* (1995);

b) to offer the National Societies rapid information on disasters in order to permit mobilization and coordination of all possible forms of relief;

c) to promote, beyond the emergency phase, the establishment and the development of rehabilitation and reconstruction programmes, and to mobilize for this purpose the support of National Societies of other countries;

d) to decide, in agreement with the National Society of the country concerned, and after consultation of the donor Societies, on the use of any goods or funds that remain available at the end of an international relief operation.

6.2 Coordination of an International Relief Operation by a National Society within its own Territory

6.2.1 [...] [A] National Society may act as a lead agency in the sense of undertaking the coordination of an international relief operation within its own territory, subject to the concurrence of, and on the basis of general objectives defined by the ICRC or the Federation, as the case may be.

6.2.2 In this context, this function of coordination by a National Society within its own territory implies primarily the following responsibilities:

a) to direct the implementation of the general objectives defined for the international relief operation;

b) to direct the work of personnel made available by participating National Societies placed under the authority of the operating National Society for the purpose of the operation;

c) to coordinate the relief operation with the humanitarian activities of other organizations (governmental or nongovernmental) having a representation and being active locally when this is in the interest of the victims and in accordance with the Fundamental Principles;

d) to act as a spokesman for the international relief operation to respond to public interest;

e) to ensure respect for the rules in force relating to the use of red cross and red crescent emblems;

f) to ensure that the action is carried out and conducted in accordance with the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* (1995) and the *Code of Conduct for International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief* (1995);

g) to ensure that the financial and material ressources made available for the purpose of the relief operation through ICRC and/or the Federation, as the case may be, are managed in a sound and efficient manner;

h) to provide required and appropriate information to the Federation or the ICRC, as the case may be, on the progress of the relief operation in order to enable them to report to donors having responded to international appeals launched to mobilize the necessary financial resources to meet the general objectives set out.

PART III - STRENGTHENING OF THE MOVEMENT: DEVELOPMENT AND FUNCTIONAL COOPERATION

All components shall strive to assist each other to realize their full potential and adopt a policy of constructive complementarity in elaborating a comprehensive development approach.

Article 7: Development of National Societies

7.1 A National Society is primarily responsible for its own development

7.1.1 National Societies shall contribute as far as their means permit to the development of other National Societies requiring such assistance, by means of bilateral or multilateral development agreements.

7.1.2 Such agreements shall take account of the relevant policies and strategies adopted by the Federation's General Assembly.

7.2 The Federation has the lead role with regard to development activities and to the coordination of international development support to National Societies. The ICRC provides support in matters falling within its statutory core competencies.

7.2.1 The specific tasks of the Federation in development activities include:

a) formulating and reviewing development policies on behalf of the Movement in consultation with the other components;

b) assisting National Societies to draw up development plans and project proposals;

c) providing standards and guidelines for programme design and planning;

d) setting criteria for mobilization and allocation of resources for development.

7.2.2 The ICRC shall contribute to the development of the National Societies in the following matters, in coordination with the Federation:

a) technical and legal assistance in establishing and reconstituting National Societies;

b) support of the National Societies' programmes for disseminating knowledge of international humanitarian law and the Fundamental Principles;

c) involvement of the National Societies in measures taken to promote international humanitarian law and ensure its implementation;

d) preparation of the National Societies for their activities in the event of conflict;

e) contribution to the training of National Society personnel in fields related to its mandate.

7.2.3 In armed conflict situations, internal strife and their direct results, the Federation may continue to assist the National Society of the country concerned in its further development, taking into account that in such situations, where the ICRC is acting as lead agency as provided for in Article 5.3, the ICRC has the responsibility to coordinate and direct the relief operations in favour of the victims.

7.2.4 In armed conflict situations, internal strife and their direct results, the ICRC may expand its cooperation with the operating National Society concerned in order to strengthen its operational capacity. In such cases, the ICRC shall coordinate with the plans of the National Society concerned and the Federation in this regard.

7.2.5 Whenever it appears to either institution that a National Society has become unable to protect its integrity and to act in accordance with the Fundamental Principles, the ICRC and the Federation shall consult each other on the advisability of taking action, either jointly or separately. In the latter case, the two institutions shall keep each other informed of any action taken and of subsequent results.

Article 8: Functional Cooperation between the Components of the Movement

8.1 The coherence of the action of the components of the Movement depends on cooperation and coordination among them in undertaking emergency actions in general or specific cases, as well as in all other areas of activity.

8.2 Functional cooperation between the ICRC, the National Societies and the Federation applies in particular to the following areas of international activities:

a) establishment and recognition of National Societies and protection of their integrity;

b) use and respect of the red cross and red crescent emblems;

c) human resources development, training and preparation of personnel for international relief operations;

d) cooperation at delegation level;

e) relations with international institutions, non- governmental organizations and other actors on the international scene;

f) coordination of international fundraising. [...]

8.4 The process of development of functional cooperation among the components, and the opportunities for its evolution in response to changes in the external environment can only be enhanced by continuous dialogue and regular consultation between those responsible for international activities within the ICRC and the Federation and with National Societies with a view to analyzing and anticipating needs. The initiative in respect of each specific area might best be taken by the organization having the lead role in that area.

Article 9: Communication, Fundamental Principles and International Humanitarian Law

9.1 Public Relations and Information

9.1.1 In their public relations, the ICRC, the Federation and National Societies, while performing their respective functions and thereby informing the public of their respective roles within the Movement, shall harmonize their activities so as to present a common image of the Movement and contribute to a greater understanding of the Movement by the public.

9.1.2 In order to ensure maximum efficiency in advocating humanitarian principles, according to the policies promulgated to that effect by the Council of Delegates, the components of the Movement shall cooperate in coordinating campaigns and developing communication tools. Whenever necessary, they may set up mechanisms to that effect, taking into account the lead roles of the different components.

9.2 Fundamental Principles

9.2.1 All components of the Movement shall ensure that the Fundamental Principles are respected by the Movement's components and statutory bodies.

9.2.2 The ICRC has the lead role in the maintenance and dissemination of the Fundamental Principles. The Federation and the ICRC shall collaborate in the dissemination of those Principles among the National Societies. National Societies have a key role to play in upholding and disseminating the Fundamental Principles within their own country.

9.3 International Humanitarian Law

9.3.1 The ICRC has the lead role for promoting, developing and disseminating international humanitarian law (IHL). The Federation shall assist the ICRC in the promotion and development of IHL and collaborate with it in the dissemination of IHL among the National Societies.

9.3.2 National Societies shall disseminate, and assist their governments in disseminating IHL. They shall also cooperate with their governments to ensure respect for IHL and to protect the red cross and red crescent emblems.

PART IV - IMPLEMENTATION AND FINAL PROVISIONS

Article 10: Implementation

10.1 All components of the Movement undertake to respect and implement the present Agreement on the organization of their international activities, in accordance with Article 7 of the Statutes of the Movement.

10.2 Each component - the Federation, the ICRC, and National Societies - is individually responsible for the implementation of the provisions of this Agreement, and shall instruct its volunteers and staff accordingly.

10.3 Beyond their individual responsibility to implement the provisions of this Agreement, the ICRC and the Federation, because of their directing and coordinating roles, have a special responsibility to ensure that the Agreement be fully respected and implemented by the Movement as a whole.

10.4 As the institutions most often called on to act as lead agency in international activities, the ICRC and the Federation have a need to:

- share information on global operational activities of common interest;
- discuss possible difficulties which may hamper smooth cooperation between the components.

It is for these institutions to agree between themselves what arrangements are best suited to meet this need.

10.5 The Standing Commission, by virtue of the role conferred upon it by Article 18 of the Statutes of the Movement, shall call annually for a report on the implementation of the Agreement from the ICRC and the Federation, which will be transmitted to all National Societies as part of a consultative process.

10.6 The Standing Commission shall include an item on the Agreement on the agenda of each Council of Delegates, thus establishing a process of regular review of the Agreement.

10.7 If differences arise between the components concerning the implementation of the Agreement and if these cannot be otherwise resolved, the Standing Commission may establish an *ad hoc* independent body, as and when required, to arbitrate, with the agreement of the Parties, differences between the components of the Movement where conciliation and mediation have failed.

Article 11: Final Provisions

The present Agreement [...] was adopted by consensus, in Resolution 6 of the Council of Delegates in Seville, Spain, on 26 November 1997.

Case No. 31, ICRC, The Question of the Emblem

THE CASE

A. Protocol Additional to the Geneva Conventions (Protocol III)

[**Source:** ICRC, Draft Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Geneva, 12 October 2000.]

[N.B. This Protocol was adopted on December 8, 2005, by a Diplomatic Conference held in Geneva.]

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE ADOPTION OF AN ADDITIONAL DISTINCTIVE EMBLEM (PROTOCOL III)

PREPARED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS IN CONSULTATION, WITH THE INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES*

* This text was drawn up following discussions within the Joint Working Group established by the Standing Commission of the Red Cross and Red Crescent pursuant to the mandate assigned to it by Resolution 3 of the 27th International Conference of the Red Cross and Red Crescent and subsequent consultations.

Geneva
12 October 2000

PREAMBLE

The High Contracting Parties,

(PP1) *Reaffirming* the provisions of the Geneva Conventions of 12 August 1949 (in particular Articles 26, 38, 42 and 44 of the First Geneva Convention) and, where applicable, their Additional Protocols of 8 June 1977 (in particular Articles 18 and 38 of Additional Protocol I and Article 12 of Additional Protocol II), concerning the use of distinctive emblems,

(PP2) *Desiring* to supplement the aforementioned provisions so as to enhance their protective value and universal character,

(PP3) *Noting* that this Protocol is without prejudice to the recognized right of High Contracting Parties to continue to use the emblems they are using in conformity with their obligations under the Geneva Conventions and, where applicable, the Protocols additional thereto; [...]

(PP5) *Stressing* that the distinctive emblems are not intended to have any religious, ethnic, racial, regional or political significance, [...]

(PP7) *Recalling* that Article 44 of the First Geneva Convention makes the distinction between the protective use and the indicative use of the distinctive emblems; [...]

(PP9) *Recognizing* the difficulties that certain States and National Societies may have with the use of the existing distinctive emblems; [...]

Have agreed on the following:

Article 1: Respect for and scope of application of this Protocol

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. This Protocol reaffirms and supplements the provisions of the four Geneva Conventions of 12 August 1949 ("the Geneva Conventions") and, where applicable, of their two Additional Protocols of 8 June 1977 ("the 1977 Additional Protocols") relating to the distinctive emblems, namely the red cross, the red crescent and the red lion and sun, and shall apply in the same situations as those referred to in these provisions.

Article 2: Distinctive emblems

1. This Protocol recognizes an additional distinctive emblem in addition to, and for the same purposes as, the distinctive emblems of the Geneva Conventions. The distinctive emblems shall enjoy equal status.

2. This additional distinctive emblem, composed of a red frame in the shape of a square on edge on a white ground shall conform to the illustration in the annex to this Protocol. This distinctive emblem is referred to in this Protocol as the "third Protocol emblem".

3. The conditions for use of and respect for the third Protocol emblem are identical to those for the distinctive emblems established by the Geneva Conventions and, where applicable, the 1977 Additional Protocols.

4. The medical services and religious personnel of armed forces of High Contracting Parties may, without prejudice to their current emblems, make temporary use of any distinctive emblem referred to in paragraph 1 of this Article where this may enhance protection.

Article 3: Indicative use of the third Protocol emblem

1. National Societies of those High Contracting Parties which decide to use the third Protocol emblem may, in using the emblem in conformity with relevant national legislation, choose to incorporate within it, for indicative purposes:

   a) a distinctive emblem recognized by the Geneva Conventions or a combination of these emblems; or

   b) another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross through the depositary prior to the adoption of this Protocol. [...]

2. A National Society which chooses to incorporate within the third Protocol emblem another emblem in accordance with paragraph 1 above, may, in conformity with national legislation, use the designation of that emblem and display it within its national territory.

3. National Societies may, in accordance with national legislation and in exceptional circumstances and to facilitate their work, make temporary use of the distinctive emblem referred to in Article 2 of this Protocol.

4. This Article does not affect the legal status of the distinctive emblems recognized in the Geneva Conventions and in this Protocol, nor does it affect the legal status of any particular emblem when incorporated for indicative purposes in accordance with paragraph 1 of this Article.

Article 4: International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies

The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and their duly authorized personnel, may use, in exceptional circumstances and to facilitate their work, the distinctive emblem referred to in Article 2 of this Protocol.

Article 5: Missions under United Nations auspices

The medical services and religious personnel participating in operations under the auspices of the United Nations may, with the agreement of participating States, use one of the distinctive emblems mentioned in Articles 1 and 2.

Article 6: Prevention and repression of misuse

1. The provisions of the Geneva Conventions and, where applicable, the 1977 Additional Protocols, governing prevention and repression of misuse of the distinctive emblems shall apply equally to the third Protocol emblem. In particular, the High Contracting Parties shall take measures necessary for the pre-vention and repression, at all times, of any misuse of the distinctive emblems mentioned in articles 1 and 2 and their designations, including the perfidious use and the use of any sign or designation constituting an imitation thereof.
2. Notwithstanding paragraph 1 above, High Contracting Parties may permit prior users of the third Protocol emblem, or of any sign constituting an imitation thereof, to continue such use, provided that the said use shall not be such as would appear, in time of armed conflict, to confer the protection of the Geneva Conventions and, where applicable, the 1977 Additional Protocols, and provided that the rights to such use were acquired before the adoption of this Protocol.

Article 7: Dissemination

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that this instrument may become known to the armed forces and to the civilian population. [...]

Article 11: Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited. [...]

B. ICRC, Diplomatic Conference on the Additional Emblem is Postponed

[**Source:** ICRC, *Information on the emblem No. 5*, 13 October 2000, http://www.icrc.org/emblem]

13-10-2000 Diplomatic conference on additional emblem postponed

On 12 October the Swiss government informed the ICRC and the International Federation that it had decided to postpone the diplomatic conference on the emblem until early 2001. The prospects for a successful diplomatic conference were good until a change occured in the international climate as a result of events

in the Middle East. The priority for both the Movement and the Swiss authorities is to make sure the conditions are right for the states party to the Geneva Conventions to adopt the draft 3rd protocol creating an additional emblem.

Despite the delay in holding the conference, confidence remains high in Geneva that a successful outcome will be achieved when the conference is convened early next year. This optimism is based on the substantial progress that has already been made on the text of the draft protocol. The text reflects wide consensus on essential principles, including the creation of an additional emblem and the importance of the universality of the Movement.

The clear commitment of the Movement's leadership to find a solution as quickly as possible remains as strong as ever. The progress in discussions with governments made during 2000 encouraged the conviction that a solution to emblem problems could be found by the end of this year. With the Swiss government's firm commitment to continue active consultations with the states party to the Geneva Conventions, there is confidence that the draft protocol will now be adopted in 2001.

Meanwhile the revised version of the draft 3rd protocol will be sent to states and National Societies. It will form the basis for the ongoing consultations, particularly on the use and form of the additional emblem.

The postponement of the diplomatic conference will also probably mean the postponement of the 28th International Conference planned for 14 November. This had been called to revise the statutes of the Movement in the light of the 3rd additional protocol to the Geneva Conventions. A decision on this will be taken by the Standing Commission in the coming days.

C. 28th International Conference of the Red Cross and Red Crescent, Resolution 3, Adoption of resolution 5 of the Council of Delegates 2003

[**Source:** 28th International Conference of the Red Cross and Red Crescent, Resolution 3, Adoption of the Resolution 5 of the Council of Delegates 2003; available on http://www.icrc.org/ihl]

The 28th International Conference of the Red Cross and Red Crescent,

recalling Resolution 3 (27th International Conference) adopted on 6 November 1999,

adopts Resolution 5 adopted by the Council of Delegates on 1st December 2003 (see annex).

RESOLUTION 5 OF THE COUNCIL OF DELEGATES 2003

The Council of Delegates,

taking note of the report submitted by the Standing Commission as requested by the 27th International Conference of the Red Cross and Red Crescent, held in Geneva in 1999, and Resolution 6 of the Council of Delegates in 2001,

reiterating the commitment of the International Red Cross and Red Crescent Movement to achieve, with the support of the States Parties to the 1949 Geneva Conventions, a comprehensive and lasting solution to the question of the

emblem, on the basis of the proposed draft Third Protocol Additional to the Geneva Conventions, once it is adopted, as soon as circumstances permit,

recalling the legal and protective value of the emblems used by the International Red Cross and Red Crescent Movement, which, by virtue of their inclusion in the Geneva Conventions and continuous practice for over a century, have become universally recognised symbols of impartial and neutral aid and protection to the victims of war, natural disasters and other catastrophes,

1. *welcomes* the work of the Standing Commission, its Special Representative on the Emblem and its ad hoc Working Group, the ICRC and the International Federation to develop the basis for a comprehensive and lasting solution to the question of the emblem;
2. *further welcomes* the progress made since the 27th International Conference, in particular the drafting of the proposed Third Protocol Additional to the Geneva Conventions on the Emblem (12 October 2000) as well as the adoption of Resolution 6 of the 2001 Council of Delegates;
3. *deeply regrets* developments which have made it impossible to bring the process to its expected outcome with the adoption of the draft Third Additional Protocol;
4. *recalls* the Fundamental Principles of the Red Cross and Red Crescent, in particular the principle of universality;
5. *underlines* the urgency of reinforcing measures for the protection of war victims, medical personnel and humanitarian workers in all circumstances, and the significance in this context of the proposed Third Additional Protocol;
6. *requests* the Standing Commission to continue to give high priority to securing, as soon as circumstances permit, a comprehensive and lasting solution to the question of the emblem, in cooperation with the Swiss government as depositary of the Geneva Conventions and with other concerned governments and components of the Movement, on the basis of the proposed draft Third Additional Protocol;
7. *requests* the Special Representative of the Standing Commission on the Emblem to bring this resolution to the attention of the 28 th International Conference of the Red Cross and Red Crescent.

DISCUSSION

1. a. Why has the International Red Cross and Red Crescent Movement encountered problems arising from a plurality of protective emblems? Can you imagine that there are more demands for additional emblems or demands for a unique emblem? Who makes such demands? Which of these demands are more influential?

   b. Do the problems have something to do with the comment made in the Preamble (PP5) of the draft Protocol III regarding the absence of religious connotation in the red cross emblem? Is this harder to claim since the acceptance of the second emblem, the red crescent? What impact does this have on the principle of universality? Would the adoption of additional

Protocol III put an end to the religious connations that some see in the emblem? In the context of its Article 2 and/or of its Article 3?

c. What dangers to the emblem's authority arise with use of additional emblems? Could it damage one of its fundamental principles: neutrality? In the light of the draft Protocol, what do you think? Would the latter allow for a reinforcement of the protection of war victims?

d. Why does the International the Red Cross and the Red Crescent Movement refuse to abandon the existing emblems in favour of a new unique emblem? Who would have had more problems from such a change: the ICRC, the National Societies, the Federation, the States, or the victims of armed conflicts? What kinds of problems would they have had?

e. Are emblems other than the red cross protected by the Conventions and the Protocols? Which ones? Who may use these other emblems? (*Cf.* Art. 38 of Convention I; Art. 41 of Convention II; Arts. 8 (1) and 18 of Protocol I; Annex I and Arts. 4-5 of Protocol I; Art. 12 of Protocol II.)

f. Are there emblems used by the national Societies and medical units that are not protected by the Conventions and the Protocols? Which ones? Why are they not protected? Why do some States want emblems other than the red cross or crescent to be used by their national societies and medical units?

2. a. If a new emblem were to be added, how could this be accomplished?

b. Is a new separate treaty necessary? Could a new emblem not be introduced by revising Annex I of Protocol I? Does Protocol I not provide a procedure for amendments (*Cf.* Arts. 97-98 of Protocol I and Art. 24 of Protocol II.) Yet how likely is it that all of the 192 States Parties (to the Conventions) will agree on such a revision? Particularly if a whole new treaty must be approved?

c. Must not the Statutes of the Movement also be amended? (*See* **Document No. 20**, Statutes of the International Red Cross and Red Crescent Movement, Art. 20, p. 648.) Would it not prove perhaps easier to amend the Statutes than the Conventions?

d. Would amending the Statutes without amending the Convention be a violation of the Convention? If not, what practical effects would only amending the Statutes have?

3. Who may use the emblem? In what circumstances and conditions? When may it or must it be used as a protective device? For indicative use? What is the objective of the emblem in these two cases? How can it be assured that this purpose is achieved? (*Cf.* Arts. 39-43 of Convention I and Art. 18 of Protocol I.)

4. For which reasons do you think the Council of Delegates decided to exclude the possibility of abandoning the current emblems as one of the solutions to the problems arising from a plurality of emblems?

5. a. Why was the negotiations process for the adoption of draft Protocol III abandoned after the revival of violence in the Middle East as from the end of 2000?

b. Why is this conflict more than any other likely to stop this process of adoption of a new universal emblem?

c. What is the status of the "Palestinian Red Crescent"? And of the Israeli "Magen David Adom" (Red Star of David)? Why are these two national societies not part

of the Movement? Is it in both cases a problem linked to the emblem? Do you believe that the adoption of Protocol III would put an end to these problems? Would this allow the two national societies to join the Movement?

d. Is the question of the emblem the only objection to this integration? What other obstacles must be overcome in order for the "Palestinian Red Crescent" to integrate the Movement? Do you know of other national societies that are in a situation similar to the "Palestinian Red Crescent"? Which ones?

e. Do you know other national societies that are in the same situation as the Israeli "Magen David Adom"? Which ones? Would the adoption of Protocol III lead to a solution also for these other national societies?

Case No. 32, ICRC, Disintegration of State Structures

THE CASE

[**Source:** *Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law*, Geneva, January 19-23, 1998; original document in French, footnotes partially omitted.]

I. THE DISINTEGRATION OF STATE STRUCTURES

Under international law, a State is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

The disintegration of State structures seems to occur when the third constitutive element of statehood, a government in effective control, fades away. [...]

A situation of this type has roots that go much deeper than a mere rebellion or *coup d'état*. It involves the implosion of national institutions, authority, law and order, in short the body politic as a whole. It also implies the breakdown of a set of values on which the State's legitimacy is based, often resulting in a withdrawal of the population into a form of nationalism which is based on religious or ethnic affiliation and which becomes a residual and viable form of identity. In most cases, when State structures collapse, the maintenance of law and order as well as other forms of authority fall into the hands of various factions. The State itself does not physically disappear, but gradually loses the capacity to carry out the normal functions of government.

The disintegration of the State occurs at various levels of intensity and may affect different parts of the country. At the low end of the spectrum, the government may remain in office but have only little control over the population and the territory. At a higher level of disintegration, certain crucial structures may formally remain in operation, so that the State can still be legitimately represented before the international community but is nevertheless composed of several warring factions. The government is in effect no longer characterized by uncontested power and a monopoly on the use of force. The regular armed forces, which are often one of the only institutions remaining in these weakened States, also gradually fall apart. A particularly alarming development is the proliferation of veritable private armies

and "security" detachments, which are often nothing but branches of conglomerates with economic interests and which are free of any real State control.

The next level in the process is marked by the total implosion of government structures, so that the State is no longer legitimately represented before the international community. Chaos and crime - already widespread during the preceding phases and often foreshadowing total disintegration - become generalized and the factions no longer exercise effective control over their members and have no clearly established chain of command. There are no valid representatives with whom humanitarian organizations can talk and insecurity becomes a real problem.

The armed conflicts which arose or evolved in such a context have brought and continue to bring humanitarian organizations face to face with new challenges and growing difficulties. These conflicts have been defined in turn "destructured" or "anarchic". [...] We have chosen to use the term "anarchic" conflicts in this document.

II. "ANARCHIC" CONFLICTS

1. Characteristics

On the basis of an analysis of several conflicts involving the disintegration of State structures in which the ICRC and other humanitarian organizations have found it most difficult to perform their work and to keep their bearings, the essential characteristics of these internal conflicts may be described as follows:

- the disintegration of the organs of the central government, which is no longer able to exercise its rights or perform its duties in relation to the territory and the population;
- the presence of many armed factions;
- divided control of the national territory;
- the breakdown of the chain of command within the various factions and their militias.

These characteristics are generally closely interconnected. They are fundamental and cumulative, for in the absence of any one of them, the conflict in question would not be "anarchic" within the meaning we ascribe to it. On the other hand, they may be found, and hence a conflict may be described as "anarchic", only at a certain stage in the hostilities. [...]

2. The effects in humanitarian terms

Internal conflicts, which were financed from abroad during the years of the Cold War, now tend to be waged within an autarkic kind of war economy based on robbery and illicit traffic. This has led to a splintering of guerrilla movements, which the providers of external aid had, often artificially, regarded as united. When a movement or faction relies exclusively on robbery and contraband for its subsistence, it is drawn into a spiral of crime in which every small group, or even every individual, acts for himself.

The ICRC has found from its direct experience in the field that these effects tend to be greater in "anarchic conflicts". Indeed, in conflicts that take place amid the

disintegration of State structures, the civilian population is often directly at stake, since the aim of each faction is to acquire living space.

The main humanitarian effects of this type of conflict are:

1. Humanitarian organizations are obliged to establish and to maintain at all times contacts with each of the various factions and with a plethora of their representatives. This is necessary in order for them to understand the social, political and economic context in which they are called upon to work; to thwart attempts at manipulating humanitarian assistance on the part of various factions wishing to cultivate or acquire supporters through the distribution of humanitarian aid; and to ensure the safety of local and expatriate humanitarian staff. The extreme individualization of the factions has made contacts and negotiations very uncertain. Every soldier - adult or child - virtually becomes a spokesperson, or in any case someone with whom to negotiate.
2. The more fragmented the territory is by fighting between the factions involved in a conflict, the less civilians will be likely to identify with the dominant local faction, and therefore remain in their places of origin. This leads to mass population movements, both within the national borders (internally displaced people) and beyond them (refugees). [...]
3. Because of the prevailing chaos, discipline among the troops is rare and in extreme cases every combatant is his own commander. Accordingly, the concept of a "war ethic" becomes a delusion, while rape, kidnapping, hostage-taking, looting and other penal-law crimes become practically commonplace. Total lack of discipline combined with the stress of combat and fear always leads to wanton violence. In these contexts, efforts to spread knowledge of the rules of military conduct, of principles such as respect for the red cross/red crescent emblem and for humanitarian organizations, are meeting with increasing obstacles, which call for innovative approaches. The message to be conveyed can no longer, as in more traditional conflicts, be addressed to members of the hierarchy in the hope that it will be passed on to their subordinates. [...]
4. The loose structure characteristic of factions and their militia makes it more and more difficult, if not impossible, to distinguish between combatants and civilians. This has always been a problem in internal conflicts, particularly because guerrillas made their social basis - the "masses" - an important factor of their struggle. This phenomenon is accentuated in "anarchic" conflicts, for during most of the time the militiamen mingle with civilians, often without wearing a uniform or any other distinguishing sign. An additional problem is thus created for humanitarian organizations, which are finding it more and more difficult to ensure that only civilians benefit from humanitarian assistance.
5. The anarchy that results from the disintegration of the State undermines the values that lie at the very heart of humanitarian action and international humanitarian law. The breakdown of the set of values symbolic of the State fosters a strong identity-related component which makes principles such as impartiality unacceptable to the parties to a

conflict and even to individuals. The obvious consequence is increased risk for all those present. In this framework, it is even more difficult for humanitarian organizations to respect a nonetheless vitally important work ethic in all circumstances. The latter includes refusing to make any compromises when it comes to their operational methods of action, for this can only have a negative impact on all aid agencies in the future.

6. In this context of disintegration, new, more immediate and tangible interests have appeared: they reflect local and/or regional economic concerns and often the personal interests of faction leaders or of groups with links to organized crime networks. The primacy of this race for personal and direct profit over the collective interest also exposes humanitarian workers to growing risks, since the factions will not hesitate to appropriate the goods those workers administer with a view to assisting the victims of armed conflicts. The humanitarian organizations are no longer considered as independent purveyors of relief but as an economically "interesting" component. [...]
7. At the same time, in "anarchic" conflicts, humanitarian organizations are often compelled to take the place of State structures or services that no longer exist. This is particularly striking in the case of medical activities. [...]

Once the State has imploded, a paradox is created: humanitarian action becomes both more necessary and more difficult, if not impossible. This is because the hierarchical structure of the parties to the conflict is insufficient to enable them to respect international humanitarian law, and also because that structure is inadequate for providing humanitarian organizations with the minimum security conditions they need in order to operate. [...]

III. APPLICABILITY AND APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

States that are in the process of disintegration are nevertheless [...] subject to international law, even in the absence of a government able to ensure the continuity of the State's functions. By the same token, the treaties to which the failed State is a party remain in force.

Human rights instruments play only a minor role in such situations since their implementation depends largely on the existence of effective State structures. A more prominent role is played by international humanitarian law instruments applicable in armed conflicts [...]. This is because international humanitarian law is binding not only upon States but also upon non-State entities, such as insurgent groups, the armed factions taking part in the hostilities, and the individuals belonging to them.

The emergence of "anarchic" conflicts, however, raises questions of both the applicability and the application of international humanitarian law.

1. Applicability of Article 3 common to the 1949 Geneva Conventions

Common Article 3 obliges the parties to a non-international armed conflict to respect certain minimum humanitarian rules [...].

Accordingly, the main questions with regard to the applicability of common Article 3 in "anarchic" conflicts are (a) whether the factions participating in such a conflict constitute "parties to the conflict" and (b) whether the intensity and form of the hostilities between these factions are characteristic of an armed conflict.

(a) Definition of a "party to the conflict"

Common Article 3 does not define the term "party to the conflict". [...] The general consensus of expert opinion is that armed groups opposing a government must have a minimum degree of organization and discipline - enough to enable them to respect international humanitarian law - in order to be recognized as a party to the conflict.

[...] The question therefore arises as to whether, in situations where there is a proliferation of warring factions characterized by their lack of organization, these factions qualify as "parties to the conflict" and hence common Article 3 can be considered to apply?

Given the humanitarian purpose of common Article 3, its scope of application must be as wide as possible and should not be limited by unduly formal requirements. It is revealing in this respect that various recent UN Security Council resolutions have called upon "all parties to the conflict" to respect international humanitarian law, and this also in the context of such "anarchic conflicts" as those in Somalia and Liberia.

[Footnote 7 reads: *See, e.g., S.C. Res 814, 26 March 1993, para. 13 "[...] reiterates its demand that all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law [...]"; S.C. Res. 788, 19 November 1992, para. 5 "[...] calls upon all parties to the conflict [in Liberia] [...] to respect strictly the provisions of international humanitarian law".*]

(b) Existence of an armed conflict

With regard to the term "armed conflict", expert opinion has also and almost exclusively taken into account conflicts between a government and a rebel party, but not conflicts between different factions in a country. The experts moreover agree that internal tensions and disturbances, such as riots and isolated and sporadic acts of violence, do not constitute an armed conflict within the meaning of common Article 3.

In the cases cited above, however, the Security Council implicitly stated that hostilities linked to the disintegration of the State constituted an armed conflict. The International Court of Justice has declared for its part that the rules of common Article 3, in so far as they constitute "elementary considerations of humanity", apply not only in cases of armed conflict, but in all situations by virtue of customary law.

[Footnote 8 reads: International Court of Justice, Reports of judgments, advisory opinions and orders: Case concerning military and paramilitary activities in and against Nicaragua, 27 June 1986, p. 114, para. 218. [...]]

There can thus be no doubt that the rules of Article 3 apply in an "anarchic" conflict. Moreover, when these rules are applicable, all individuals belonging to a faction have the duty to respect them.

2. Applicability of Protocol II

For Protocol II to be applicable requires, first of all, that a faction must be fighting against the government, thereby excluding situations of confrontation between non-governmental factions. Another condition laid down in Protocol II is that a

party to a conflict must exercise such control over the national territory as to enable it to carry out sustained and concerted military operations and to implement the Protocol. Experience shows that this condition is hardly ever fulfilled by an armed faction party to an "anarchic" conflict. [...]

3. Application of the fundamental principles of common Article 3

As referred to above, the International Court of Justice has declared that the rules laid down in common Article 3 correspond to "elementary considerations of humanity" which are binding on all individuals. Moreover, a number of Security Council resolutions, including those on "anarchic conflicts", call upon all parties to respect international humanitarian law and reaffirm that those responsible for breaches thereof should be held individually accountable. It is therefore clear that these exceptional situations are not beyond the scope of the law. Quite the contrary, they are subject to a series of customary norms which are collectively binding on the various parties to the conflict and individually binding on each individual taking part in the hostilities. [...]

The problem posed by this type of conflict is therefore not so much that of which norms are applicable as it is that of their implementation. This can be said of all national and international legislation applicable on the territory of the State which is disintegrating. Since by definition the disintegration of the State carries with it the risk of non-compliance with the entire corpus of the law, it is in the interest of the international community to make sure, by means of cooperation and in accordance with the UN Charter, that such "no-law" zones do not come into existence.

Once the State has started to crumble and the armed conflict has broken out, it is the States' duty to fulfil their obligation to "respect and ensure respect for" international humanitarian law in all circumstances, by not acting in a way that could lead to a further deterioration in the situation and potential breaches of humanitarian law.

4. The United Nations Charter

As the Security Council's resolutions tend to show, "anarchic" conflicts may give rise to humanitarian crises which can be considered to pose a threat to international peace and security. In such cases, political-military intervention within the framework defined in the UN Charter must remain a possibility so that activities to provide humanitarian assistance and protection for the groups of people in peril can be resumed. Indeed, political problems cannot be solved by humanitarian actions alone, and the members of the international community are not only bound to fulfil their obligations under humanitarian law but also to shoulder the responsibilities conferred on them in the UN Charter. [...]

IV. PROPOSALS

[T]he weakening or the disintegration of the State impairs acceptance and even understanding of the rules and principles underpinning international humanitarian law and all humanitarian action.

The only way to avoid reaching this stage is to prevent State structures from collapsing. Yet there are many causes of disintegration, and the task of remedying them largely exceeds the competence of humanitarian agencies.

Humanitarian organizations, and the ICRC in particular, can help to ensure the survival, even in the most extreme situations, of respect for the principles governing humanitarian action and for the fundamental norms of international humanitarian law. [...]

1. Humanitarian action

(a) Identification of local structures or groups

For a better knowledge and understanding of the situations in which humanitarian agencies are called upon to act, local structures or groups which have survived the implosion of the State should be identified and supported as appropriate. In practically all conflict situations there are structures, traditional or not, that have continued to exist after the collapse of the State and that have taken over various of its functions. In Somalia, for example, the traditional clan system survived in spite of everything, and groups of women that had formed spontaneously and were greatly encouraged and supported made it easier for humanitarian organizations to provide food aid.

It is nevertheless important to realize that such alternative structures do not exist in every situation and that even where they do, they cannot really replace those of the State. [...]

(b) The role of local customs

Even more than the structures themselves, it is necessary to identify all the local reflexes, customs and "codes of honour" that are bound to exist and to survive, even in the societies most seriously affected by the breakdown of the State and by widespread conflict. These traditional rules are often bound up with religious beliefs and are generally safeguarded by the old people - the sages of the tribe or clan. It is the rules that are unwritten and uncodified but are nevertheless deeply rooted in the society, even one that has become highly disintegrated, which continue to be recognized and even respected, and which can facilitate humanitarian work.

(c) Dissemination of humanitarian law and principles

Spreading knowledge of the rules and fundamental principles of international humanitarian law presents a special challenge in "anarchic" conflicts because of the plethora of participants in the violence, who form small loosely-structured groups, and because of the difficulty of reaching them owing either to security problems or to the dim view they take of the presence of foreigners on their soil. Moreover, when there is a means of reaching these small groups, conveying to them a message centred on the principles of humanitarian law and persuading them to comply with the law, calls for an understanding of their environment and their motives and for a very great willingness to listen. [...]

(d) Reducing the risks of humanitarian assistance

Today, humanitarian organizations are de facto - by reason of the volume of assistance they inject into "anarchic" conflicts - first-rank players on the economic

and social, and hence also on the political, scenes. Any humanitarian initiative has its inevitable corollary of a major outpouring of goods, which can alter the local economic and social fabric and can even fan the fighting among factions.

To counter these risks, recourse could be had to micro-projects - self-managed community kitchens, seed distributions, livestock vaccination campaigns or help to resume income-generating activities. Projects such as these lie midway between emergency operations and development programmes [...]. Micro-projects also make it possible to carry out very localized work, which not only provides support for the autarkic economy of countries in conflict where State structures have imploded, but also helps to combat the rise in banditry. When broad action is indispensable, humanitarian organizations must show even greater openness and lucidity in analysing the side-effects of their work. [...]

(e) Training humanitarian personnel

[...]

Emergency humanitarian work, in particular in the context of "anarchic" conflicts, requires faultless professionalism, itself based on thorough prior knowledge of the region, the local groups and cultures, the risks and ethics inherent to situations of this type. By the same token, humanitarian assistance for the people caught up in the conflict calls for close cooperation with local staff, on the basis of the same professional and ethical criteria.

2. The role and responsibilities of the international community [...]

(a) The obligation to "ensure respect" for international humanitarian law

[...] The collapse of civil society and the ungovernable outbreak of violence is a matter that concerns the entire international community. Indeed, Article 1 of the Geneva Conventions stipulates that the States must "ensure respect" for international humanitarian law. [...] There are nevertheless always a number of measures [States] can adopt, such as an arms embargo, the freezing of foreign assets, or a threat to reduce military and financial aid.

(b) Taking account of new players in armed conflicts

Consideration must be given to the means of involving the new players in modern conflicts in the application and dissemination of international humanitarian law. In today's conflicts, in addition to the traditional participants in situations of armed violence, other types of protagonists have a direct or indirect role to play. They may be private militias in the service of commercial companies or paramilitary groups on orders from a government. They may be transnational companies or supranational economic players who could hold considerable sway over the parties to a conflict. They may be religious or political groups able to unite the masses around a message. [...]

(c) The need for an international jurisdiction

It should be constantly borne in mind that the message concerning respect for the principles and rules of international humanitarian law will have very little

impact if it is not accompanied by the prospect of punishment in the event of violations.

This is true both for combatants, who know full well that the weakness or collapse of the chain of command is a guarantee of impunity, and for the society as a whole, since the breakdown of the State and the implosion of its functions, in particular the judiciary, clearly render the State incapable of fulfilling its obligation of bringing to trial the perpetrators of grave breaches of the law. The result is the abandoning of responsibility at all levels, which is both a cause and an effect of the disintegration of State structures. In the case of "anarchic" conflicts, where the legal system has become ineffective or has disappeared entirely, the establishment of an international criminal tribunal is of primary importance for ensuring the future application of and respect for international humanitarian law.

(d) Military intervention

In the most serious cases, the Security Council may ask States to intervene militarily in accordance with Chapter VII of the UN Charter. Before engaging in such operations, however, it is essential to set precise objectives and to draw up a clear plan of action so as to avoid creating any confusion between the humanitarian and military spheres. While such operations cannot be considered humanitarian in and of themselves, they may make it possible to restore conditions in which international humanitarian law can be applied and humanitarian activities can be pursued.

(e) Prevention of armed conflicts

The most adequate and cost-effective international action would of course consist in preventing the very outbreak of armed conflict, through monitoring and effective response to early warning signals. [...] It is often the follow-up to this early warning that is absent. [...]

DISCUSSION

1. a. What are the necessary conditions for application of Art. 3 common to the Conventions?

   b. Can the acts, which "are and shall remain prohibited at any time and in any place whatsoever" according to common Art. 3, only be committed in an armed conflict? Can they only be prohibited in an armed conflict? Can they only be prohibited for "parties to the conflict"? Which of these prohibitions need a minimum of structure to realistically be respected? Which can be respected by each individual?

   c. Does the wording of common Art. 3 clarify that it only prohibits acts which can be attributed to "parties to the conflict"?

   d. In "anarchic" conflicts do factions constitute "parties to the conflict" such that common Art. 3 applies? Every faction or only some? Is the status of a faction as a "party to the conflict" generally more easily determined if the government uses armed forces to combat a rebel faction than if rival factions fight each other? Particularly if such inter-faction hostilities involve numerous disorga-

nized factions? Why is a minimum degree of organization and discipline within a faction relevant to its recognition as a "party to the conflict"?

e. What constitutes "armed conflict" for purposes of applying common Art. 3? Does common Art. 3 provide a definition? To what level of intensity must hostilities rise in order to constitute an "armed conflict" sufficient for the Article's application? Is sporadic violence sufficient for application? An internal disturbance? What form must the hostilities take? Are hostilities between different, non-governmental factions in a country sufficient?

f. Does common Art. 3 perhaps apply in all situations? Does **Case No. 130**, ICJ, Nicaragua v. US, para. 218. p. 1365, referred to in the document actually state that common Art. 3 applies outside armed conflicts? At least those rules in common Art. 3 which constitute "elementary considerations of humanity"?

g. Do you agree that internal tensions and disturbances, such as riots and isolated and sporadic acts of violence are not covered by common Art. 3? Why? Because Art. 1 (2) of Protocol II states that they are not armed conflicts? (*Cf.* Art. 1 (1) of Protocol II.)

2. What are the necessary conditions for application of Protocol II? (*Cf.* Art. 1 of Protocol II.) Is the threshold for application of Protocol II different than for common Art. 3? If so, is it higher or lower than for application of common Art. 3?

3. If IHL does not apply, is, *e.g.*, violence against civilians prohibited by international law? Are there customary norms that bind the various parties and individually bind each person? Is it customary to respect those rules?

4. What law applies protecting individuals caught up in "anarchic" conflicts if IHL instruments do not apply? Is International Human Rights Law applicable in "anarchic" conflicts where the actor is not the State but private factions? Are its rules adequate? Does the implementation of International Human Rights Law depend more on the existence of effective State structures than the implementation of IHL? Which mechanisms of implementation of International Human Rights Law can still function in "anarchic" conflicts?

5. a. What problems do you see with implementation of IHL in "anarchic" conflicts? Which mechanisms of IHL implementation can still function in such conflicts? Which cannot function?

b. What is the responsibility of the international community in "anarchic" conflicts? Are "anarchic" conflicts a threat to international peace and security? What can the UN Security Council do? What can States party to the Conventions do? What must they do? (*Cf.* Art. 1 common to the Conventions.)

c. What measures can be taken by the ICRC or other humanitarian organizations to prevent such "anarchic" conflicts? What measures should be taken after hostilities have broken out? What do you think of the proposals mentioned here? Can you add to these?

d. What specific difficulties does a humanitarian organisation come across in such "anarchic" conflicts? In regards to its principles such as neutrality and impartiality? In regard to its work methods for protection and assistance?

Case No. 33, ICRC's Approach to Contemporary Security Challenges

THE CASE

[**Source:** Official Statement available on http://www.icrc.org, Focus/Debate on Humanitarian Action.]

Humanitarian security: "a matter of acceptance, perception, behaviour..."

At a meeting in Geneva (31.03.04) ICRC operations director Pierre Krähenbühl outlined the organization's view of current threats to humanitarian work in conflict zones and re-affirmed its commitment to the principles of impartiality, independence and neutrality.

Address given at the High-level Humanitarian Forum
Palais des Nations, Geneva
31 March 2004 [...]

The year 2003 has undoubtedly been a difficult - and often dramatic - one for the conduct of humanitarian operations. There were threats and attacks deliberately targeting aid organisations and their personnel, something that has raised questions about the ability of these organisations to fulfil their mandate and generated a debate around the future of humanitarian action. There are important stakes in this debate for the ICRC and we would like to share some thoughts and indications about how the ICRC assesses these developments and how it plans to address some of their most significant implications.

Evolving environments

Conflict environments in today's world continue to be highly diverse in terms of causes, characteristics and typologies. At a global level, we note a renewed polarisation or radicalisation. This polarisation has taken on different forms but the one that is affecting the conflict environments most notably is the confrontation taking place between a number of states engaged in what has become known as the "fight against terrorism" and a series of radical non-state actors determined to oppose them and prepared to resort to the use of non-conventional methods which include attacks of deliberate terror against civilians and so-called soft targets, for example humanitarian organisations.

While a number of individual contexts are affected by these global trends, local causes remain predominant in assessing reasons for conflicts in many other parts of the globe: economic, social, health and other related issues.

Implications for security

Carrying out humanitarian activities in zones of armed conflict or internal violence has always been a dangerous undertaking. The ICRC currently has 10,000 staff members working in 75 countries. At every moment of the day they travel to areas that have seen fighting occur or cross front lines between opposing parties. They meet, negotiate or deal with the whole range of different arms carriers: from military to police, paramilitary to rebel, child soldier to mercenary.

Security of personnel and beneficiaries alike amounts to a crucial institutional responsibility: while working in contexts of armed conflict or situations of violence

evidently implies being confronted with significant levels of risk, the ICRC has always sought to develop approaches and instruments of security management that limit, to the largest possible extent, exposure to such risks.

The "classic" security environment is commonly described as one where the main risk is of finding oneself at the wrong moment in the wrong place. It is worth noting - as we discuss some of the new features in terms of risks - that this type of security environment remains in the experience of the ICRC by far the most widespread in the world today.

This being said, in 2003, the ICRC was the victim of a series of deliberate attacks that claimed the lives of four colleagues in Afghanistan and Iraq. A fifth colleague was caught in cross-fire and killed in Baghdad. Several other organisations among which the Afghan Red Crescent Society, the UN family and NGOs suffered similar tragic losses.

While two out of the three deliberate attacks, specifically those north of Kandahar in March and south of Baghdad in July, appear to have been the result of an apparent association of the ICRC's presence with the broader international political and military action in the contexts, the October car-bomb attack against the ICRC offices in Baghdad was a direct and planned targeting of the organisation.

Was this a new element? Not specifically: being deliberately targeted in a given context has happened before. [...]

Therefore, what is new today? From an ICRC perspective, what is new in the present context is the global nature of the threat, the fact that it is not geographically circumscribed. The ICRC's security concept was defined as an essentially context-based approach. A given delegation in the field evaluates its security environment on the basis of a series of institutional indicators - we call them our security pillars - among which acceptability figures prominently.

Today however, those indicators may appear favourable in a given context and actors coming from the outside could nevertheless target our staff.

A complicating factor is the fact that access to the groups carrying out these attacks is at present very difficult when not outright impossible. Yet for the ICRC, dialogue with all actors involved in or affecting the outcome of a given situation of conflict is a vitally important part of our operating procedures. Without such dialogue, it is impossible to achieve required levels of acceptability and thus impossible to reach populations at risk to carry out our protection and assistance activities.

In a polarised environment furthermore, there are expectations that any actor ought to take sides. One is friend or foe, ally or enemy. This makes it all the more complex for actors, such as the ICRC, who invoke principles of independence and neutrality, to get their message across. From this results a heightened question of perception of the legitimacy of humanitarian action and in particular of the ICRC's neutral and independent way of operating.

This development entails two specific risks: **that of being rejected and that of being instrumentalised.**

It appears at present that any actor seen in one way or another to be contributing to the stabilization or transition efforts in Afghanistan or to the occupation of Iraq is potentially at risk. Since in addition the ICRC's identity is perceived in some

circles as mainly Western - because of our funding, our emblem, our headquarters - the risk of being mistaken for an integral part of the broader political and military presence is high.

Regardless of what the motives might have been the ICRC has strongly condemned these attacks against its staff, which seriously affect its ability to provide protection and assistance to the extent required by the situations in Iraq and Afghanistan.

Another element of risk is that of being instrumentalised, in other words the risk of integration by some state actors of humanitarian action into the range of tools available to them in the conduct of their campaign against terrorist activities. A variety of expressions thereof have been noted in recent months. They include statements by some governments describing their military presence in Iraq and Afghanistan as "mainly humanitarian". The establishment of the Provincial Reconstruction Team (PRT) concept by the international forces in Afghanistan is another example. The ensuing blurring of lines between the role and objectives of political and military actors on the one hand and humanitarian actors on the other creates serious perception and operational problems for an organisation such as the ICRC.

ICRC response

How does the ICRC intend to address some the most pressing implications of the developments? I would like in responding to this question to share with you some of our current thinking and respond to certain of the ideas raised in the discussion paper submitted to us by OCHA for this meeting.

The ICRC security management concept is based on some of the following central parameters:

- The ICRC has a largely decentralised and bottom-up management culture. This applies equally to security management. The strong belief is that the closer one is to populations at risk, the better one is placed to analyse events and formulate strategies.
- To remain effective, this broad field autonomy has to unfold within clearly defined institutional frameworks: our mandate, principles and security concept.
- The ICRC approach to security management is that responsibility lies with the operational managers themselves. There is no separation between security management and operational management. [...]
- When the security unit attached to the department of operations was established at headquarters ten years ago, a central pre-condition set by operational field managers was that responsibility for security management would not be removed from them. In that sense, the security unit has more of a watchdog function and focuses mainly on overall policy development, monitoring, support and training.
- The ICRC is also convinced that security - long-before becoming an issue of physical protection - is a matter of acceptance, perception of the organisation, individual behaviour of a delegate and ability to listen, communicate and project a consistent and coherent image to all actors

involved in a conflict. In other words, of being predictable: be seen to be doing what one says.

How does the earlier-described changing environment impact on this overall ICRC approach?

- In the face of tragedies such as last year's one could be tempted to further centralize decision-making at headquarters. The ICRC is convinced that it must maintain a decentralised approach.
- It needs to integrate the global nature of the threat, in other words the security management concept has to include approaches that can raise awareness and levels of preparedness for dangers that may develop beyond the borders of a given context and yet affect it.
- This also requires new ways of communicating with the different parties to a given situation. Meaning in particular to find ways of communication with those who may misunderstand or reject us today.
- It also means making a strong stand for neutral and independent humanitarian action. Old recipes for a different world? Not in our view certainly. Quite on the contrary a principled position maintained with conviction in the face of challenge.

Arguably, what the ICRC needs to be much more effective at are some of the following things:

- **improving the integration of national staff members into the security analysis and evaluation** carried out in respective contexts. [...] Similarly improving the dialogue on security with key national or local partners, such as our colleagues in National Red Cross or Red Crescent Societies.
- **explaining why impartiality or independence matter, why neutrality is relevant:**

  Impartiality, we understand very simply as meaning that humanitarian action should benefit people regardless of their origin, race, gender, faith, etc. In that sense, no one should be deprived of assistance or protection because of what he or she believes in. [...]

  Independence, we see as implying that our humanitarian action needs to be distinct - and perceived as so - from political decision-making processes. The reason for this is straightforward: in any conflict, parties will tend to reject humanitarian actors they suspect of having ulterior political motives.

  This explains - and does not come as a surprise to you - why we are so adamant in our insistence in the respect for respective identities, mandates and operational approaches. This is something we are pleased to note as figuring prominently in the discussion paper.

  However, different types of integrated approaches - combining political, military, reconstruction and humanitarian tools - advocated by the UN on the one hand and a number of states on the other in our view conflict with this principle and the ICRC cannot and will not subscribe to such policies.

> In this regard we would like to underline our concern with the references in the OCHA discussion paper to a commitment to "common action" such as the "withdrawal of humanitarian presence...in areas where there is a pattern of gross violations". While understanding the intended purpose, we have experienced situations where such approaches of conditionality - in Afghanistan and Iraq for example - saw populations abandoned under the pretext that a party, which the international community sought to ostracise or isolate, controlled them.
>
> Neutrality is not always easy to make understood either. It is often taken for indifference. The ICRC is not neutral in the face of violations of international humanitarian law. What the ICRC does not do is take sides in a conflict or ascribe fault to one side or the other. We take a conflict as a fact and comment on the conduct of hostilities.
>
> Neutrality is therefore a means to an end, not an end in itself. It is a tool to keep channels open for concrete action. We intend to keep the dialogue open with all parties; there are no actors yielding power over populations that we would refuse to talk to. We do not comment by that on their worthiness as interlocutors, nor do we thus grant them any particular status.

Advocacy for an independent and neutral humanitarian approach includes a claim to a clear distinction to be maintained between humanitarian action on the one hand and political-military action on the other. Not because the ICRC shies away from the military: to the contrary, we want and often have an active dialogue with them. Neither because we claim that there are not circumstances when - other actors being incapable of fulfilling their missions - a military unit might be a last resort. We do on the other hand want to avoid the current blurring of lines produced by the characterisation of military "hearts and minds" campaigns or reconstruction efforts as humanitarian.

The ICRC has in that regard a problem with the Provincial Reconstruction Teams in Afghanistan. Not in regard to the strictly speaking military or security objectives they have set for themselves. In keeping with our neutrality, that is not a dimension we wish to comment on. We are however concerned because they integrate humanitarian responses into an overall military and security concept, in which responding to the needs of parts of the population can be a constituent part of a strategy to defeat an opponent or enemy. [...]

We realise that this might contribute to a feeling that the ICRC is once again keen to underline its "apartness", that the world changes and the ICRC continues to insist on the same old recipes. Nothing is further from our mind. There are many very useful comments in the discussion paper, including illustrations of contradictions and weaknesses within the broader humanitarian community. The ICRC has nothing to be complacent about and is keen to learn from the experience of others.

We are in that sense genuinely determined to engage with all humanitarian actors and other stakeholders in a transparent dialogue on these issues, both in specific conflict situations where analysis and threat assessment sharing is often

vital, and in more conceptual debates where progress can be achieved in understanding respective interpretations of humanitarian action.

We recognize fully that there are today many other definitions of humanitarian action than ours. We are not claiming that all other actors should or can agree to our definition and operational philosophy. We also recognize that there have been and may well be in the future situations where our approach fails to produce the expected results and others may have to step in.

We strongly believe on the other hand that we need to make our position well known: it is important that we be able to convey what we will be part of, i.e. dialogue, consultation and coordination with others and what we will not be part of, i.e. coordination or integration by others. We are determined to maintain our principled operational approach in place, believing that it remains effective and necessary.

DISCUSSION

1. a. What is the meaning of "humanitarian"? What constitutes humanitarian action? Which objectives does humanitarian action aim to fulfil? What is the aim of peacekeeping? And of conflict resolution?
   b. What relationship exists between humanitarian endeavours and political action? Must they be completely separate? Can they be? Is it really possible for humanitarian organizations to maintain independence within such a symbiotic relationship? How should this relationship manifest itself?
   c. Must humanitarian action necessarily be neutral and impartial? Why?
2. a. What risks to humanitarian organizations, their workers, and even the victims of conflict arise when humanitarian endeavours and political or military action become blurred?
   b. Should military forces be engaged in humanitarian action? What are the risks and advantages of such an engagement?
   c. Should humanitarian organizations not benefit from at least military protection, particularly with the increasing use of violence against humanitarian organizations? What are the risks of any armed protection? Against a party to the conflict? Against bandits? What is the difference between a party to the conflict and bandits? What if armed protection is the only way to reach the victims?
   d. How would you explain this declining respect for humanitarian organisations? Does it come from the fact that the types and nature of conflicts have changed? Or does it stem from an increase in peace operations? Or is it simply due to the fact that there is a lack of international commitment for peace efforts? Or finally, is it due to the vast number of humanitarian organizations in the field?
3. How does the ICRC traditionally guarantee the security of its staff? Which of these methods lose their efficiency due to which features of the present security environment?

4. a. Is there a direct correlation between the increased number of humanitarian actors in a conflict and more effective achievement of humanitarian goals? Why? How can greater complementarity and task division be achieved?
   b. What are the advantages and risks for the ICRC and for the war victims of an increased coordination between the humanitarian actors in the field? If the coordination includes the ICRC and is initiated by the UN?
   c. Who should be responsible for this co-ordination? Who is currently responsible?

Document No. 34, ICRC, New Weapons

[**Source:** *New Weapons*, Fact Sheet, ICRC Advisory Service on International Humanitarian Law, Geneva, November 2001; available on http://www.icrc.org]

New Weapons

[...] Additional Protocol I [...] prohibits the employment of certain weapons, means and methods of warfare and requires that their legality be assessed. The vast majority of States are now bound by the rules of Additional Protocol I.

Obligatory review

Pursuant to Article 36 of Additional Protocol I, every State Party is under an obligation to assess the legality of any new weapons, means or methods of warfare it studies, develops, acquires or adopts. It must determine whether their employment would, in some or all circumstances, violate the rules of Additional Protocol I or other rules of international law.

It is noteworthy that some States not yet party to Additional Protocol I have adopted procedures to ensure their weapons are subjected to this type of review.

Procedures and mechanisms

Additional Protocol I does not specify how determination of the legality of weapons, means and methods of warfare is to be carried out. It is thus the responsibility of every State Party to adopt the administrative, regulatory and other measures needed to fulfil its obligations under Article 36.

Existing measures adopted by States vary. They range from establishment of a committee with responsibility for such assessments to attribution of authority to conduct such reviews to specific departments within the Ministry of Defence, or to the Judge Advocate General of a specific branch of the armed forces.

Where committees have been established, they are usually composed of representatives from the Ministry of Defence, the armed forces and the Ministry of Foreign Affairs. They may meet at regular intervals or as required. In some cases, committee decisions can be appealed.

Whatever the review mechanism chosen, States are encouraged to adopt a multidisciplinary approach to reviews which takes into account, as appropriate, the advice of military, legal, medical and environmental experts.

It is recommended that States undertake reviews at the earliest possible stage, whether during the study and development of new weapons, means or methods of warfare, or at the time of their acquisition or adoption, but in any case, prior to their employment.

In States which have a national committee for the implementation of international humanitarian law, this committee can encourage the adoption of national review procedures.

Scope of reviews

The obligation to conduct legal reviews applies to all new weapons, means and methods of warfare, whether anti-personnel or antimateriel.

The expression "methods of warfare" refers *inter alia* to the ways in which weapons are used. Examples of methods of warfare prohibited by Additional Protocol I include indiscriminate attacks, attacks on installations containing dangerous forces when such attacks cause severe losses among the civilian population, and the starvation of civilians.

Existing weapons, means and methods of warfare which are modified after an initial review also fall within the scope of Article 36.

Although not specifically required to do so by Article 36, States should also examine the legality of weapons to be exported. This is a logical extension of the obligation contained in Article 1 respectively of the four four 1949 Geneva Conventions and Additional Protocol I "to respect and to ensure respect" for these treaties.

Rules and factors to be considered in the conduct of reviews

States must consider whether new weapons, means or methods of warfare under review are prohibited by customary international law or treaty law applicable to them. They must also consider the rules on the conduct of hostilities, including those set out in Additional Protocol I.

Prohibitions relating to specific weapons, means and methods of warfare may be found in a number of treaties, including, among the most recent:

- the 1972 Biological Weapons Convention;
- the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques;
- the 1980 UN Convention on Conventional Weapons and its Protocols;
- the 1993 Chemical Weapons Convention; and
- the 1997 Convention on the Prohibition of Anti-Personnel Mines.

The rules governing the conduct of hostilities found in Additional Protocol I include prohibitions on weapons, means or methods of warfare:

- of a nature to cause superfluous injury or unnecessary suffering (Article 35(2));
- which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (Article 35 (3));

- which cannot be directed at a specific military objective or the effects of which cannot be limited as required by Additional Protocol I, and consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction (Article 51(4)).

States are encouraged to consider other factors such as the military necessity for and intended use of new weapons, means and methods of warfare; their effects on health and available information on the nature of the injury caused (especially if this is unknown or unfamiliar); and whether another weapon, mean or method of warfare could achieve the same military purpose. [...]

Document No. 35, ICRC, Biotechnology, Weapons and Humanity

A. Appeal by the International Committee of the Red Cross

[**Source:** Official Statement, Appeal on Biotechnology, Weapons and Humanity; ICRC's appeal to the political and military authorities and to the scientific and medical communities, industry and civil society on the potentially dangerous developments in biotechnology, 25 September 2002; See also the page "Biotechnology, weapons and humanity" on the ICRC website, http://www.icrc.org]

APPEAL
OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS
ON BIOTECHNOLOGY, WEAPONS AND HUMANITY

[...]

Background

The "age of biotechnology", like the industrial revolution and the "information age", promises great benefits to humanity. Yet if biotechnology is put to hostile uses, including to spread terror, the human species faces great dangers.

The International Committee of the Red Cross (ICRC), in keeping with its mandate to protect and assist victims of armed conflict, is particularly alarmed by the potential hostile uses of biological agents.

Potential benefits of advances in biological sciences and technologies are impressive. These include cures for diseases, new vaccines and increases in food production, including in impoverished regions of the world.

Yet the warnings of what can go wrong are profoundly disturbing. The ICRC believes these merit reflection at every level of society. Testimony from governments, UN agencies, scientific circles, medical associations and industry provides a long list of existing and emerging capacities for misuse. These include:

- Deliberate spread of existing diseases such as typhoid, anthrax and smallpox to cause death, disease and fear in a population.
- Alteration of existing disease agents rendering them more virulent, as already occurred unintentionally in research on the "mousepox" virus.

- Creation of viruses from synthetic materials, as occurred this year using a recipe from the Internet and gene sequences from a mail order supplier.
- Possible future development of ethnically or racially specific biological agents.
- Creation of novel biological warfare agents for use in conjunction with corresponding vaccines for one's own troops or population. This could increase the attractiveness of biological weapons.
- New methods to covertly spread naturally occurring biological agents to alter physiological or psychological processes of target populations such as consciousness, behavior and fertility, in some cases over a period of years.
- Production of biological agents that could attack agricultural or industrial infrastructure. Even unintended release of such agents could have uncontrollable and unknown effects on the natural environment.
- Creation of biological agents that could affect the makeup of human genes, pursuing people through generations and adversely affecting human evolution itself.

The life processes at the core of human existence must never be manipulated for hostile ends. In the past, scientific advances have all too often been misused. It is essential that humanity acts together now to prevent the abuse of biotechnology.

The ICRC calls on all concerned to assume their responsibilities in this field, before it is too late. We must reaffirm the ancient taboo against the use in war of "plague and poison", passed down for generations in diverse cultures. From the ancient Greeks and Romans, to the Manu Law of War in India, to rules on the conduct of war drawn from the Koran by the Saracens, the use of poison and poison weapons has been forbidden. This ban was codified in the 1863 Lieber Code during the US Civil War and, internationally, in the 1899 Hague Declaration and the Regulations annexed to the 1907 Hague Convention IV. [*See* **Document No. 1**, The Hague Regulations, p. 517: also available on http://www.icrc.org/ihl]

In February 1918, the ICRC launched an impassioned appeal, describing warfare by poison as "a barbaric invention which science is bringing to perfection..." and protesting "with all the force at [its] command against such warfare, which can only be called criminal." This appeal is still valid today.

Responding in part to the ICRC's appeal, States adopted the 1925 Geneva Protocol, [*See* **Document No. 2**, The 1925 Geneva Chemical Weapons Protocol, p. 524.] reaffirming the general ban on the use of poison gas and extending it to cover bacteriological weapons. This norm is now part of customary international law - binding on all parties to all armed conflicts.

The 1972 Biological Weapons Convention significantly reinforced this prohibition by outlawing the development, production, stockpiling, acquisition, retention and transfer of biological weapons. As regards new advances in biotechnology and possible terrorist threats, this Convention covers all biological agents which "have no justification for prophylactic, protective or other peaceful purposes" and includes the means to deliver such agents. (Article 1, 1972 Biological Weapons Convention). The ICRC deeply regrets that lengthy negotiations to strengthen this Convention

through a compliance-monitoring regime did not come to fruition as expected in November 2001. This underlines the urgent need for a renewed commitment by all States to ensure effective control of biological agents.

The responsibility to prevent hostile uses of biotechnology lies with each State. But it extends beyond governments to all persons, especially to military, scientific and medical professionals and those in the biotechnology and pharmaceutical industries. [...]

The ICRC appeals in particular:

TO ALL POLITICAL AND MILITARY AUTHORITIES

- To become parties to the 1925 Geneva Protocol and the 1972 Biological Weapons Convention, if they have not already done so, to encourage States which are not parties to become parties, and to lift reservations on use to the 1925 Geneva Protocol,
- To resume with determination efforts to ensure faithful implementation of these treaties and develop appropriate mechanisms to maintain their relevance in the face of scientific developments,
- To adopt stringent national legislation, where it does not yet exist, for implementation of the 1925 Geneva Protocol and the 1972 Biological Weapons Convention, and to enact effective controls on biological agents with potential for abuse,
- To ensure that any person who commits acts prohibited by the above instruments is prosecuted,
- To undertake actions to ensure that the legal norms prohibiting biological warfare are known and respected by members of armed forces,
- To encourage the development of effective codes of conduct by scientific and medical associations and by industry to govern activities and biological agents with potential for abuse, and
- To enhance international cooperation, including through the development of greater international capacity to monitor and respond to outbreaks of infectious disease.

TO THE SCIENTIFIC AND MEDICAL COMMUNITIES AND TO THE BIOTECHNOLOGY AND PHARMACEUTICAL INDUSTRIES

- To scrutinize all research with potentially dangerous consequences and to ensure it is submitted to rigorous and independent peer review,
- To adopt professional and industrial codes of conduct aimed at preventing the abuse of biological agents,
- To ensure effective regulation of research programs, facilities and biological agents which may lend themselves to misuse, and supervision of individuals with access to sensitive technologies, and
- To support enhanced national and international programs to prevent and respond to the spread of infectious disease.

The ICRC calls on all those addressed here to assume their responsibilities as members of a species whose future may be gravely threatened by abuse of

biological knowledge. The ICRC appeals to you to make your contribution to the age-old effort to protect humanity from disease. We urge you to consider the threshold at which we all stand and to remember our common humanity.

The ICRC urges States to adopt at a high political level an international Declaration on "Biotechnology, Weapons and Humanity" containing a renewed commitment to existing norms and specific commitments to future preventive action.

Geneva, September 2002

B. United Nations General Assembly Resolution

[**Source:** Resolution adopted by the General Assembly (A/59/110), on 10 December 2004; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; available on http//www.un.org; footnotes are not reproduced.]

Resolution adopted by the General Assembly

[on the report of the First Committee (A/59/466)]

59/110. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

The General Assembly, [...]

Noting with satisfaction that there are one hundred and fifty-two States parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, including all of the permanent members of the Security Council,

Bearing in mind its call upon all States parties to the Convention to participate in the implementation of the recommendations of the Review Conferences, including the exchange of information and data agreed to in the Final Declaration of the Third Review Conference of the Parties to the Convention [...] and to provide such information and data in conformity with standardized procedure to the Secretary-General on an annual basis [...]

Welcoming the reaffirmation made in the Final Declaration of the Fourth Review Conference that under all circumstances the use of bacteriological (biological) and toxin weapons and their development, production and stockpiling are effectively prohibited under article I of the Convention,

Recalling the decision reached at the Fifth Review Conference to hold three annual meetings of the States parties of one week's duration each year commencing in 2003 until the Sixth Review Conference and to hold a two-week meeting of experts to prepare for each meeting of the States parties,

1. *Notes with satisfaction* the increase in the number of States parties to the Convention [...], reaffirms the call upon all signatory States that have not yet ratified the Convention to do so without delay, [...].

3. *Recalls* the decision reached at the Fifth Review Conference to discuss and promote common understanding and effective action: in 2003 on the two topics of the adoption of necessary national measures to implement the

prohibitions set forth in the Convention, including the enactment of penal legislation, and national mechanisms to establish and maintain the security and oversight of pathogenic micro-organisms and toxins; in 2004 on the two topics of enhancing international capabilities for responding to, investigating and mitigating the effects of cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease, and strengthening and broadening national and international institutional efforts and existing mechanisms for the surveillance, detection, diagnosis and combating of infectious diseases affecting humans, animals and plants; and in 2005 on the topic of the content, promulgation and adoption of codes of conduct for scientists; and calls upon the States parties to the Convention to participate in its implementation; [...]

66th plenary meeting
3 December 2004

Document No. 36, ICRC, The Challenges of Contemporary Armed Conflicts

[**Source:** *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent 2-6 December 2003; footnotes are partially reproduced; available on http://www.icrc.org]

INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS [...]

INTRODUCTION [...]

The purpose of the present ICRC Report is to provide an overview of some of the challenges posed by contemporary armed conflicts for international humanitarian law, stimulate further reflection, and outline prospective ICRC action. [...]

First, the ICRC believes, [...] that the four Geneva Conventions and their Additional Protocols, as well as the range of other international IHL treaties and the norms of customary law provide a bedrock of principles and rules that must continue to guide the conduct of hostilities and the treatment of persons who have fallen into of the hands of a party to an armed conflict. Second, [...] some dilemmas that the international community grappled with decades ago were, in general, satisfactorily resolved by means of IHL development. [...] Thirdly, international opinion - both governmental and expert, as well as public opinion - remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism, in legal terms. While no one can predict what the future might bring, this Report purports to be a snapshot, as seen by the ICRC, of challenges to IHL as they currently stand. Its aim is to reaffirm the proven tenets of the law and to suggest a nuanced approach to its possible clarification and development.

Lastly, and this cannot be emphasized enough by way of introduction, the present Report deals with only a limited number of challenges identified by the

ICRC and should by no means be taken as a comprehensive review of all IHL-related issues that will be scrutinized at the present time or in the future. [...]

II. INTERNATIONAL ARMED CONFLICTS AND IHL

International armed conflict is by far the most regulated type of conflict under IHL. [...] Despite certain ambiguities that have led to differing interpretations - which is a characteristic of any body of law - the ICRC believes that this legal framework is on the whole adequate to deal with present day inter-state armed conflicts. The framework has, for the most part, withstood the test of time because it was drafted as a careful balance between the imperative of reducing suffering in war and military requirements.

The four Geneva Conventions of 1949 have been ratified by almost the entire community of nations (191 state parties to date) and their provisions on the protection of persons who have fallen into enemy hands reflect customary international law. The same may be said in particular of the Fourth Geneva Convention's section on occupation, which provides basic norms on the administration of occupied territory and the protection of populations under foreign occupation. Even though Additional Protocol I still lacks universal ratification (161 state parties to date), it is not disputed that most of its norms on the conduct of hostilities also reflect customary international law.

It has not been easy to determine which legal issues, among many related to international armed conflict, deserve to be examined [...]. The initial choices were made based on the differing interpretations that the relevant norms give rise to in practice and, more importantly, on the consequences that such interpretations have for the protection of civilians. Among them are the notion of direct participation in hostilities under IHL, related conduct of hostilities issues, and the concept of occupation.

Direct Participation in Hostilities

Under humanitarian law applicable in international armed conflicts, civilians enjoy immunity from attack "unless and for such time as they take a direct part in hostilities". It is undisputed that apart from loss of immunity from attack during the time of direct participation, civilians, as opposed to combatants, may also be criminally prosecuted under domestic law for the mere fact of having taken part in hostilities. In other words, they do not enjoy the combatant's or belligerent's "privilege" of not being liable to prosecution for taking up arms and are thus sometimes referred to as "unlawful" or "unprivileged" combatants or belligerents. One issue that has, especially in recent months, given rise to considerable controversy is the status and treatment of civilians who have taken a direct part in hostilities. Related to it is the meaning of what constitutes "direct" participation in hostilities, [...].

There is currently a range of governmental and academic positions on the issue of the status and treatment of civilians who have directly participated in hostilities and have fallen into enemy hands. At one end are those - a minority - who claim that such persons are outside any international humanitarian law protection. The middle ground is represented by those who believe that "unprivileged"

combatants are covered only by article 3 common to the Geneva Conventions and article 75 of Additional Protocol I (either as treaty or customary law). According to the interpretation espoused by the ICRC and others, civilians who have taken a direct part in hostilities and who fulfill the nationality criteria provided for in the Fourth Geneva Convention remain protected persons under that Convention. Those who do not fulfill the nationality criteria are at a minimum protected by the provisions of article 3 common to the Geneva Conventions and of article 75 of Additional Protocol I (either as treaty or customary law).

The ICRC does not, therefore, believe that there is a category of persons affected by or involved in international armed conflict who are outside any IHL protection or that there is a "gap" in IHL coverage between the Third and Fourth Geneva Conventions, i.e. an intermediate status into which civilians ("unprivileged belligerents") fulfilling the nationality criteria would fall. International humanitarian law provides that combatants cannot suffer penal consequences for direct participation in hostilities and that they enjoy prisoner of war status upon capture. IHL does not prohibit civilians from fighting for their country, but lack of prisoner of war status implies that such persons are, among other things, not protected from prosecution under the applicable domestic laws upon capture. Direct participation in hostilities by civilians, it should be noted, is not a war crime.

Apart from having no immunity from domestic penal sanctions, civilians who take a direct part in hostilities lose immunity from attack during the period of direct participation. [...]

While the ICRC therefore does not believe that there is an "intermediate" category between combatants and civilians in international armed conflict, the questions of what constitutes "direct" participation in hostilities and how the temporal aspect of participation should be defined ("for such time as they take a direct part in hostilities") are still open. In the ICRC's view - given the consequences of direct participation mentioned above and the importance of having an applicable definition that would uphold the principle of distinction - the notion of direct participation is a legal issue that merits further reflection and study, as well as an effort to arrive at proposals for clarification of the concept. This is all the more important as civilian participation in hostilities occurs in international and non-international armed conflicts. [...]

Related Conduct of Hostilities Issues

The package of IHL rules on the conduct of hostilities was one of the crowning achievements of the diplomatic process that ended with the adoption of the 1977 first Additional Protocol to the Geneva Conventions. While most of these rules have garnered broad acceptance and become customary law in the intervening years, it is acknowledged that certain ambiguities in formulation have given rise to differences in interpretation, and, therefore, in their practical application. The changing face of warfare due to, among other things, constant developments in military technology has also contributed to disparate readings of the relevant provisions. Among them are the definition of military objectives, the principle of proportionality and the rules on precautionary measures.

Military Objectives

In the conduct of military operations, only military objectives may be directly attacked. The definition of military objectives provided for in Additional Protocol I is generally considered to reflect customary international law. Under article 52 (2) of the Protocol, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

The [...] drafters wanted to exclude indirect contributions and possible advantages. Without these restrictions, the limitation of lawful attacks to "military" objectives could be too easily undermined and the principle of distinction rendered void.

The definition of military objectives, read together with the principle of distinction, the prohibition of indiscriminate attacks, the obligation to minimize civilian casualties, as well as the principle of proportionality, clearly rejects interpretations advanced formerly in doctrines of "total warfare", [...].

If the political, economic, social or psychological importance of objects becomes the determining factor - as suggested in certain military writings - the assessment of whether an object is a military objective becomes highly speculative and invites boundless interpretations. By the same token, interpretations that accept attacks on the morale of the civilian population as a means of influencing the enemy's determination to fight would lead to unlimited warfare, and could not be supported by the ICRC.

A particular problem arises with regard to so-called dual-use objects, i.e. objects that serve both civilian and military purposes, such as airports or bridges. It should be stressed that "dual-use" is not a legal term. In the ICRC's view, the nature of any object must be assessed under the definition of military objectives provided for in Additional Protocol I. Thus, it may be held that even a secondary military use may turn such an object into a military objective. However, an attack on such an object may nevertheless be unlawful if the effects on the civilian use of the object in question violate the principle of proportionality, [...].

Principle of Proportionality in the Conduct of Hostilities

In order to spare civilians and civilian property as much as possible from the effects of war, international humanitarian law prohibits disproportionate attacks. A disproportionate attack is defined as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." (Additional Protocol I, article 51 (5)(b)). This definition is generally regarded as reflecting customary international law. [...]

As far as the interpretation of the principle of proportionality is concerned the meaning of the term "concrete and direct military advantage" is crucial. It cannot be stressed enough that the advantage anticipated must be a military advantage, which generally consists in gaining ground or in destroying or weakening the enemy's armed forces. The expression "concrete and direct" was intended to show that the advantage concerned should be substantial and

relatively immediate, and that an advantage which is hardly perceptible or which would only appear in the long term should be disregarded. [...]

If the concept of military advantage were to be enlarged, it seems only logical to also consider such "knock-on effects", i.e. those effects not directly and immediately caused by the attack, but which are nevertheless the product thereof. In the ICRC's view, the same scale has to be applied with regard to both the military advantage and the corresponding civilian casualties. This means that the foreseeable military advantage of a particular military operation must be weighed against the foreseeable incidental civilian casualties or damages of such an operation, which include knock-on effects. [...]

Precautionary Measures

In order to implement the restrictions and prohibitions on targeting and to minimize civilian casualties and damage, specific rules on precautions in attack must be observed. These rules are codified in article 57 of Additional Protocol I and apply to the planning of an attack, as well as to the attack itself. They largely reflect customary international law and aim at ensuring that in the conduct of military operations constant care is taken to spare civilians and civilian objects.

Several of the obligations provided for are not absolute, but depend on what is "feasible" at the time. Thus again, a certain discretion is given to those who plan or decide upon an attack. According to various interpretations given at the time of signature or ratification of Additional Protocol I and the definitions subsequently adopted in the Mines Protocol (in its original and amended version [*See* **Document No. 8**, p. 547], [...], feasible precautions are those "which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."

In this context it is debatable what weight can be given to the understandable aim of ensuring the safety of the attacking side's armed forces ("military consideration"), when an attack is launched. It seems hardly defendable that it may serve as a justification for not taking precautionary measures at all and thereby exposing the civilian population or civilian objects to a greater risk. While under national regulations military commanders are generally obliged to protect their troops, under international humanitarian law combatants [...] may [...] be lawfully attacked by the adversary. Civilians, as long as they do not participate directly in hostilities, as well as civilian objects, must not be made the object of an attack. Thus, the provisions of international humanitarian law clearly emphasize the protection of civilians and civilian objects.

In the conduct of hostilities it is not only the attacking side that has obligations with a view to ensuring protection of the civilian population and civilians, but also the defending side. Generally speaking, the latter must take necessary precautions to protect the civilian population, individual civilians and civilian objects under its control against the dangers resulting from military operations, [...]. Under no circumstances may civilians be used to shield military objectives from attack or to shield military operations.

Given that the defending side can exercise control over its civilian population, it is sometimes suggested in scholarly writings that the defender should bear more responsibility for taking precautions. [...]

The ICRC could not support attempts to reduce the obligations on the attacking side. However, states must be encouraged to take measures necessary to reduce or eliminate the danger to the civilian population already in peacetime. In particular, the obligation to avoid locating military objectives within or near densely populated areas can often not be complied with in the heat of an armed conflict and should be fulfilled in peacetime.

In the ICRC's assessment, there is at present not much likelihood that the rules on military objectives, on the principle of proportionality or on precautions in attack, as well as other rules on the conduct of hostilities provided for in Additional Protocol I could be developed with a view to enhancing the protection of civilians or civilian objects. [...]

The Concept of Occupation

There is no doubt that the rules on occupation set forth in the Fourth Geneva Convention remain fully applicable in all cases of partial or total occupation of foreign territory by a High Contracting Party, whether or not the occupation meets with armed resistance. It is acknowledged that those rules encapsulate a concept of occupation based on the experience of the Second World War and on the Hague law preceding it. The rules provide for a notion of occupation based on effective control of territory and on the assumption that the occupying power can or will substitute its own authority for that of the previous government. They also imply that the occupying power intends to hold on to the territory involved, at least temporarily, and to administer it.

While cases corresponding to the traditional notion of occupation persist and new situations of the same kind have recently arisen, practice has also shown that there are situations where a more functional approach to occupation might be necessary in order to ensure the comprehensive protection of persons. An example would be when the armed forces of a state, even though not "occupying" foreign territory in the sense described above, nevertheless exercise complete and exclusive control over persons and/or facilities on that territory over a certain period of time and with a limited purpose, without supplanting any domestic authority (because such authority does not exist or is not able to exercise its powers).

Another issue deserving examination would be the protection of persons who find themselves in the hands of a party to the conflict due to military operations preceding the establishment of effective territorial control or in situations of military operations that do not result in occupation in the traditional sense. [...]

An entirely separate issue is the rules applicable to multinational forces present in a territory pursuant to a United Nations mandate. While the Fourth Geneva Convention will not, generally, be applicable to peacekeeping forces, practice has shown that multinational forces do apply some of the relevant rules of the law of occupation by analogy. [...]

III. NON-INTERNATIONAL ARMED CONFLICTS AND IHL

The scope and number of IHL treaty rules governing non-international armed conflicts are far less extensive than those applicable to international armed conflicts. Internal armed conflicts are covered by article 3 common to the Geneva Conventions, by Additional Protocol II to the Conventions adopted in 1977 (156 state parties to date), by a certain number of other treaties. [footnote 13: E.g. the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocols; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. [*See* **Document No. 3**, Conventions on the Protection of Cultural Property [*Cf.* A.] p. 525.] as well as by customary international law. [...]]

In the more than twenty-five years since the Protocol's adoption it has become clear that, as the result of state and international practice, many rules applicable in international armed conflicts have also become applicable in internal armed conflicts as customary international law. The forthcoming ICRC Study on Customary International Humanitarian Law Applicable in Armed Conflicts confirms this development. [*See* **Case No. 29**, p. 730.] [...]

IV. IHL AND THE FIGHT AGAINST TERRORISM

The immediate aftermath of the September 11th, 2001 attacks against the United States saw the launching of what has colloquially been called the global "war against terrorism". Given that terrorism is primarily a criminal phenomenon - like drug-trafficking, against which "wars" have also been declared by states - the question is whether the "war against terrorism" is a "war" in the legal sense. To date, there is no uniform answer. [footnote 15: By way of reminder, terrorism is not defined under international law. Work on drafting a Comprehensive Convention on Terrorism has been stalled at the United Nations for several years now.]

Proponents of the view that a "war" in the legal sense is involved essentially believe that September 11th, 2001 and ensuing events confirmed the emergence of a new phenomenon, of transnational networks capable of inflicting deadly violence on targets in geographically distant states. The transnational, rather than international, nature of such networks is evidenced by the fact that their activities, which are also geographically dispersed, are not, as a rule, imputable to a specific state under the international rules on state responsibility.

According to this point of view, the law enforcement paradigm, previously applicable to the fight against terrorist acts both internationally and domestically, is no longer adequate because the already proven and potential magnitude of terrorist attacks qualifies them as acts of war. It is said that standards of evidence required in criminal proceedings would not allow the detention or trial of a majority of persons suspected of terrorist acts and that domestic judicial systems, with their detailed rules and laborious procedures, would be overwhelmed by the number of potential cases involved. [...]

The conclusion of proponents of the arguments outlined above is that the world is faced with a new kind of violence to which the laws of armed conflict should be applicable. According to this view, transnational violence does not fit the definition of international armed conflict because it is not waged among states,

and does not correspond to the traditional understanding of non-international armed conflict, because it takes places across a wide geographic area. Thus, the law of armed conflict needs to be adapted to become the main legal tool in dealing with acts of transnational terrorism. It is claimed that, for the moment, such adaptation is taking place in practice, i.e. by means of the development of customary international humanitarian law (no treaties or other legal instruments are being proposed). Some proponents of this view argue that persons suspected of being involved in acts of terrorism constitute "enemy combatants" who may be subject to direct attack, and, once captured, may be detained until the end of active hostilities in the "war against terrorism".

The counterarguments may be, also briefly, summarized as follows: terrorism is not a new phenomenon. On the contrary, terrorist acts have been carried out both at the domestic and international levels for centuries, resulting in a series of international conventions criminalizing specific acts of terrorism and obliging states to cooperate in their prevention and punishment. The non-state, i.e. private character of this form of violence, usually pursued for ideological or political reasons rather than for private gain, has also been a regular feature of terrorism. The fact that persons or groups can now aim their violence across international borders or create transnational networks does not, in itself, justify qualifying this essentially criminal phenomenon as armed conflict.

Unfortunate confusion - pursuant to this viewpoint - has been created by the use of the term "war" to qualify the totality of activities that would be better described as a "fight against terrorism". It is evident that most of the activities being undertaken to prevent or suppress terrorist acts do not amount to, or involve, armed conflict. [...]

[...] Most importantly, expediency in dealing with persons suspected of acts of terrorism cannot be an excuse for extra-judicial killings, for denying individuals basic rights when they are detained, or for denying them access to independent and regularly constituted courts when they are subject to criminal process. [...]

As already publicly stated by the ICRC on various occasions, the ICRC believes that international humanitarian law is applicable when the "fight against terrorism" amounts to, or involves, armed conflict. Such was the case in Afghanistan, a situation that was clearly governed by the rules of international humanitarian law applicable in international armed conflicts. It is doubtful, absent further factual evidence, whether the totality of the violence taking place between states and transnational networks can be deemed to be armed conflict in the legal sense. Armed conflict of any type requires a certain intensity of violence and, among other things, the existence of opposing parties. A party to an armed conflict is usually understood to mean armed forces or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law.

The very logic underlying IHL requires identifiable parties in the above sense because this body of law - while not affecting the parties' legal status - establishes equality of rights and obligations among them under IHL (not domestic law) when they are at war. [...] The primary beneficiary of the rules are

civilians, as well as other persons who do not, or no longer take part in hostilities and whom IHL strives principally to protect.

In the case at hand, it is difficult to see how a loosely connected, clandestine network of cells - a characterization that is undisputed for the moment - could qualify as a "party" to the conflict. [...]

The principle of equality of the belligerents underlies the law of armed conflict; in other words, as a matter of law, there can be no wars in which one side has all the rights and the other has none. Applying the logic of armed conflict to the totality of the violence taking place between states and transnational networks would mean that such networks or groups must be granted equality of rights and obligations under IHL with the states fighting them, a proposition that states do not seem ready to consider.

It is submitted that [...] acts of transnational terrorism and the responses thereto must be qualified on a case-by-case basis. In some instances the violence involved will amount to a situation covered by IHL (armed conflict in the legal sense), while in others, it will not. Just as importantly, whether armed conflict in the legal sense is involved or not, IHL does not constitute the only applicable legal framework. IHL does not - and should not be used - to exclude the operation of other relevant bodies of law, such as international human rights law, international criminal law and domestic law. [...]

V. IMPROVING COMPLIANCE WITH IHL

Insufficient respect for the rules of international humanitarian law has been a constant - and unfortunate - result of the lack of political will and practical ability of states and armed groups engaged in armed conflict to abide by their legal obligations. [...]

Over the years, states, supported by other actors, have devoted considerable effort to devising and implementing in peacetime preventive measures aimed at ensuring better respect for IHL. Dissemination of IHL [...] has been reinforced, and IHL has been increasingly incorporated into military manuals and doctrine. Domestic legislation and regulations have been progressively adopted or adapted, and the necessary structures put in place to give effect to the rules contained in the relevant IHL treaties. [...]

While efforts to improve both the prevention and repression of IHL violations are fundamental and must continue, there also remains the question of how better compliance with international humanitarian law can be ensured during armed conflicts. Under article 1 common to the four Geneva Conventions, states undertook to "respect and ensure respect" for these conventions in all circumstances. This provision is now generally interpreted as enunciating a specific responsibility of third states not involved in armed conflict to ensure respect for international humanitarian law by the parties to an armed conflict. In addition, article 89 of Additional Protocol I provides for the possibility of actions of the contracting parties in cooperation with the United Nations in situations of serious violations of the Geneva Conventions and of Additional Protocol I. While these provisions have been invoked from time to time, this has not been done

consistently. It is evident, however, that the role and influence of third states, as well as of international organizations - be they universal or regional - are crucial for improving compliance with international humanitarian law.

In 2003, the ICRC, in cooperation with other institutions and organizations, organized a series of regional expert seminars to examine that issue. [...]

Scope and Obligation to "Ensure Respect" for IHL

[...] [I]t was emphasized that the common article 1 obligation provided for in the four Geneva Conventions means that states must neither encourage a party to an armed conflict to violate IHL, nor take action that would assist in such violations. Participants illustrated this negative obligation by referring to the prohibited action of, for example, transferring arms or selling weapons to a state that is known to use such arms or weapons to commit violations of IHL. [...]

Seminar participants also acknowledged a positive obligation on states not involved in an armed conflict to take action against states that are violating IHL, in particular to use their influence to stop the violations. [...] It was not considered an obligation to reach a specific result, but rather an "obligation of means" on states to take all appropriate measures possible, in an attempt to end IHL violations. [...]

The state obligation to "respect and ensure respect" for the Geneva Conventions, contained in common Article 1, was confirmed as applicable to both international and non-international armed conflicts.

Existing IHL Mechanisms and Bodies [...]

Regarding [...] existing IHL mechanisms, most seminar participants agreed that, in principle, they were not defective. While some fine-tuning might be possible and necessary, the major problem is the lack of political will by states to seize them, and in particular, the fact that the triggering of most existing IHL mechanisms depends on the consent of the parties to a conflict. [...]

Although many participants submitted ideas for new mechanisms, others forcefully voiced a preference for focusing efforts on the reform or re-invigoration of existing mechanisms, declaring that only through use of the mechanisms will they be able to prove their effectiveness. [...]

New IHL Supervision Mechanisms: *Pro et Contra*

In general, participants who supported the idea of establishing new IHL supervision mechanisms agreed that [...] any new supervision mechanism potentially adopted by states should be neutral and impartial, should be constituted in a way that would enable it to operate effectively, should be able to act without the consent of the parties in question (i.e. have mandatory powers), and should take costs and administrative burdens on states into account. Among participants there was, however, some recognition that the general international atmosphere at present is not conducive to the establishment of new mechanisms. Thus, many participants advocated for a gradual process, beginning with the creation and use of ad hoc or regional mechanisms, that

might earn trust and garner support over time, potentially leading to the creation of a new permanent universal mechanism.

Some of the new mechanisms suggested were a system of either ad hoc or periodic reporting and the institution of an individual complaints mechanism, either independently or as part of an IHL Commission (see proposal below). [...]

The idea was also put forward of creating a "Diplomatic Forum", that would be composed of a committee of states or a committee of IHL experts, similar to the UN Commission on Human Rights and its Sub-commission on the Promotion and Protection of Human Rights. According to participants, many of the above-mentioned mechanisms could be placed within an IHL Commission or an Office of a High Commissioner for IHL that would be created as "treaty body" to the Geneva Conventions and the Additional Protocols. Its functions could include examination of reports, the examination of individual complaints, issuance of general observations, etc. [...]

Participants who endorsed resort to existing mechanisms, rather than the creation of new ones, held strongly to the opinion that more mechanisms would not necessarily lead to more effectiveness. [...]

Improving Compliance in Non-International Armed Conflicts

Discussions at the regional expert seminars confirmed that improving compliance with IHL in non-international armed conflicts remains a challenging task. Among the general obstacles mentioned were that states often deny the applicability of IHL out of a reluctance to acknowledge that a situation of violence amounts to an internal armed conflict. It was emphasized that foreign interference in many internal armed conflicts also creates confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. In addition, armed groups lack sufficient incentive to abide by IHL given that implementation of their legal obligations under this body of law is usually of little help to them in avoiding punishment under domestic law. [...]

The fact that armed groups usually enjoy no immunity from domestic criminal prosecution for mere participation in hostilities (even if they respect IHL), remains an important disincentive in practice for better IHL compliance by such groups. [...]

Closing Remarks

The present Report attempted to highlight several challenges to international humanitarian law posed by contemporary armed conflicts, [...]. In the ICRC's view, the overall picture that emerges is one of a well-established and mature body of law whose basic tenets, if applied in good faith and with the requisite political will, continue to serve their initial purpose - which is to regulate the conduct of war and thereby alleviate the suffering caused by war. [...]

IV. Periodical Meetings of the States Party to the Geneva Conventions

(*See also* **Case No. 32**, ICRC, Disintegration of State Structures. p. 767.)

Document No. 37, First Periodic Meeting, Chairman's Report

[**Source:** *International Review of the Red Cross*, No. 323, 1998, pp. 366-394.]

First Periodical Meeting on International Humanitarian Law Geneva, 19-23 January 1998

Chairman's Report

I. Factual Elements

The 26th International Conference of the Red Cross and Red Crescent (1995) requested the Swiss Government, as the depositary of the Geneva Conventions, to hold periodical meetings of the States Parties to those Conventions in order to examine general problems relating to the application of international humanitarian law.

Acting under that mandate, and after consulting the States Parties, Switzerland convened the First Periodical Meeting, which took place in Geneva from 19 to 23 January 1998. It proposed that the experts consider two topics: respect for and security of the personnel of humanitarian organizations, and armed conflicts linked to the disintegration of State structures.

At a preparatory meeting in Geneva on 13 January 1998, it was agreed that the First Periodical Meeting would be held on an informal level. This approach was endorsed by the Meeting, which was attended by the representatives of 129 States and 36 observer delegations. [...]

The debates were based on two preparatory documents drafted by the International Committee of the Red Cross and two working papers submitted by the Swiss authorities.

At the close of the Meeting, the Chairman drew up and presented the conclusions detailed below. These conclusions identify the problems encountered in implementing humanitarian law in respect of the topics discussed and list possible remedies. They reflect the Chairmans personal view and are in no way binding on the delegations which participated in the First Periodical Meeting. [...]

II. Chairman's Conclusions

1. Respect for and Security of the Personnel of Humanitarian Organizations

Identification of Problems

Where civilian populations are specifically targeted by acts of violence, humanitarian assistance may be perceived as an obstacle to the very purpose of those acts;

Because they are not familiar with the concept of international humanitarian law, the persons directly participating in an armed conflict often regard humanitarian workers as friends of their enemies;

Where structures have disintegrated, there is no clear distinction between persons directly engaged in an armed conflict and civilians and no chain of command; and there is confusion about the international humanitarian law applicable among the parties to the conflict;

There is insufficient coordination between measures to restore peace and security, and measures to provide humanitarian assistance;

Humanitarian organizations do not always sufficiently coordinate their activities; they do not always observe their status of neutrality or respect local customs; and their motivation may not always be purely humanitarian;

Through lack of diligent selection, humanitarian actions are sometimes delegated to organizations that are not capable of performing them adequately;

There is insufficient observance of the duty to prosecute or extradite those who have committed acts of violence against humanitarian workers, resulting in insufficient deterrence from and prevention of such acts;

Links between political and humanitarian actions may make humanitarian workers more likely targets of attacks.

Possible Remedies

Establishment of mechanisms to prevent acts of violence against humanitarian workers, such as early warning systems for the exchange of information on situations that may lead to such acts;

Recognition that the commission of acts of violence against humanitarian workers as well as the order to commit such acts are crimes under both international and national law for which the perpetrators bear individual responsibility;

Relentless prosecution of those committing acts of violence against humanitarian workers; or extradition to another State; or, where appropriate, transferal to an independent international criminal court;

Support for and cooperation with international efforts to clear anti-personnel mines threatening the safety of humanitarian workers;

Strengthening of and increased cooperation with local providers of humanitarian assistance, in particular the National Red Cross and Red Crescent Societies;

Ratification of conventions on international humanitarian law, including conventions on anti-personnel mines, and improved implementation through national legislation;

Ratification of the United Nations Convention on the Safety of United Nations and Associated Personnel;

Fulfillment of the obligation to translate the Geneva Conventions into local languages, where necessary with the cooperation of the ICRCs advisory services;

Increased recognition of the competence of the International Humanitarian Fact-Finding Commission and, where appropriate, resort to ad hoc commissions;

Full compliance by humanitarian organizations with the principles of impartiality, of neutrality and of independence, which are the foundations of humanitarian ethics;

Adherence of all humanitarian organizations to the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, and respect by these organizations for the principles of international humanitarian law;

Acceptance of the Code of Conduct by humanitarian organizations, and coordination of their activities with those of other organizations, as a prerequisite for receiving public funds;

Establishment of a system of accreditation for humanitarian organizations;

Intensification of the ICRCs advisory services as well as of the efforts of other institutions, including those of a religious character, to disseminate international humanitarian law among armed forces and civilian populations, with special emphasis on the protection of humanitarian workers and the red cross and red crescent emblems;

Improvement of the recruitment, education and training of humanitarian personnel;

Effort by humanitarian organizations to cooperate, from the outset of their operations, with the authorities controlling the territory concerned;

Improved cooperation of humanitarian organizations in international efforts to maintain peace and security, where such cooperation does not jeopardize the effectiveness of the humanitarian assistance or the safety of its providers.

2. Armed Conflicts Linked to the Disintegration of State Structures

Identification of Problems

Situations where State structures have disintegrated in the course of an armed conflict are usually characterized by a lack of effective leadership capable of ensuring respect for international humanitarian law or of protecting the safety of humanitarian workers;

Where civilian populations are specifically targeted by acts of violence, the disintegration of State structures and of the common values of a society can have particularly serious consequences;

The distinction between persons directly participating in an armed conflict and civilians tends to blur, as members of local militias rarely wear distinctive signs and mingle with civilians.

Possible Remedies

International support for measures designed to prevent the disintegration of State structures;

Establishment of early warning mechanisms to detect signs of a State being in the process of disintegration;

Recognition that the basic humanitarian rules in common Article 3 of the Geneva Conventions are applicable in armed conflicts where State structures have disintegrated;

Establishment, among the main actors in an area of armed conflict, of a code of conduct taking into account local ethics and customs in addition to principles of international humanitarian law;

Support for measures aimed at building a lasting peace after a conflict has ended, such as disarmament, resettlement and economic development;

Reduction by States of the influx of weapons into areas of conflict and establishment of a code of ethics on the export of arms;

Integration of conflict prevention into development aid programmes;

Recognition of the necessity to strengthen the capacity of National Red Cross and Red Crescent Societies to enable them to continue to provide humanitarian assistance despite the disintegration of State structures;

Fulfillment of the obligation not to recruit children into armed forces or groups;

Promotion of the endeavour to define minimum humanitarian standards applicable in all circumstances;

Establishment of an independent international criminal court with jurisdiction over acts of violence committed by persons engaged in a conflict where State structures have disintegrated and prosecution by national authorities is no longer feasible;

Support for efforts of the United Nations and regional organizations at managing armed conflicts of an anarchic nature, including those made by the Security Council to restore conditions conducive to provision of humanitarian assistance;

Increased dissemination of humanitarian principles by the ICRC and other institutions, including National Red Cross and Red Crescent Societies and those of a religious character, with emphasis on the education of the young civilian population;

Identification of partners, within structures that may not yet have completely disintegrated or are re-emerging, in order to create the conditions rendering humanitarian assistance possible;

Cooperation and dialogue with local providers of humanitarian assistance who are familiar with local customs and conditions.

3. Follow-up

Periodical meetings, convened by the depositary of the Geneva Conventions and the Additional Protocols, pursuant to Resolution 1, paragraph 7, of the 26th International Conference of the Red Cross and Red Crescent, which shall, as part of a continuing process, examine general problems relating to the application of international humanitarian law, in conformity with common Article 1 of the Geneva Conventions;

Regular meetings of experts on questions of dissemination of international humanitarian law, organized specifically in regions of conflict;

Communication by the Chairman of his Report on the present Meeting to all the States Parties to the Geneva Conventions, to all the participants in the Meeting, to the 27th International Conference of the Red Cross and Red Crescent, and to the Standing Commission of the Red Cross and Red Crescent;

Communication by the Chairman of his Report on the present Meeting to the Secretary-General of the United Nations to assist him in his task to report to the 53rd Session of the General Assembly on the security of United Nations personnel pursuant to United Nations Resolution 52/167 of 16 December 1997.

Lucius Caflisch
Chairman
First Periodical Meeting

V. United Nations Organisations

Case No. 38, ILC, Draft Articles on State Responsibility

THE CASE

A. International Law Commission Report, A/56/10 August 2001

[**Source:** United Nations: A/56/10, http://www.un.org/law/ilc/reports/2001/2001report.htm; footnotes are partially reproduced.]

International Law Commission
Report on the work of its fifty-third session

(23 April-1 June and 2 July-10 August 2001)
General Assembly
Official Records
Fifty-fifth Session
Supplement No. 10 (A/56/10) [...]

CHAPTER IV: STATE RESPONSIBILITY [...]

E. Text of the draft articles on Responsibility of States for internationally wrongful acts [...]

2. Text of the draft articles with commentaries thereto [...]

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE [...]

CHAPTER II
ATTRIBUTION OF CONDUCT TO A STATE [...]

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary [...]

3) [...] "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State."

4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists. It is confirmed, for example, in article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, which provides that: "A Party to the conflict ... shall be responsible for all acts by persons forming part of its armed forces" this clearly covers acts committed contrary to orders or instructions. [...]

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary [...]

4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary* case. [footnote 162: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14.] The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by the Court in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by United States to Nicaraguan operatives. [footnote 163: Ibid., p. 51, para. 86.] But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. [...] [*See* **Case No. 130**, ICJ, Nicaragua v. US, [*Cf.* para. 115] p. 1365.]

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

5) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also addressed these issues. [footnote 165: Case IT-94-1, *Prosecutor v. Tadic, (1999) I.L.M.*, vol. 38, p. 1518. For the judgment of the Trial Chamber (1997), see I.L.R., vol. 112 , p. 1.] In *Prosecutor v. Tadic*, the Chamber stressed that: "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control". [footnote 166: Case IT-94-1, *Prosecutor v. Tadic, (1999) I.L.M.*, vol. 38, p. 1518, at p. 1541, para. 117 (emphasis in original) [*See* **Case No. 180**, ICTY, The Prosecutor v. Tadic [Cf. C. Appeal, Merits] p. 1804.]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was "*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations". [footnote 167: Ibid., at p. 1546, para. 145 (emphasis in original).] In the course of their reasoning, the majority considered it necessary to disapprove the International Court's approach in *Military and Paramilitary activities*. But the legal issues and the factual situation in that case were different from those facing the

International Court in *Military and Paramilitary activities*. The Tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law. [footnote 168: See the explanation given by Judge Shahabuddeen, ibid., at pp. 1614-1615.] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it. [...]

Article 9
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g., after foreign occupation.

2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces: [footnote 176: This principle is recognized as legitimate by article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land [*See* **Document No. 1**, p. 517.]] [...] and by article 4, paragraph A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War [...]] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. [...]

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Commentary [...]

2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals [...] and it is [...] not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less

possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. [...]

9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in Additional Protocol II of 1977 may be taken as a guide. Article 1, paragraph 1 refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character (article 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement". [...]

11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a government, despite the potential importance of such distinctions in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin. Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law. [...]

16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. [...]

CHAPTER IV
RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Article 16
Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Commentary [...]

9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use

of force. For instance, a State may incur responsibility if it [...] provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations. [footnote 300: *Report of the Economic and Social Council, Report of the Third Committee of the General Assembly*, draft resolution XVII, 14 December 1982, A/37/745, p. 50.] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct. [...]

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS [...]

Article 21: Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary [...]

2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph (4), of the Charter, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war. In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other. The Vienna Convention on the Law of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty ... from the outbreak of hostilities between States".

3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law. Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct. [...]

Article 25: Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

Commentary [...]

19) [...] *Subparagraph (2) (a)* concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule. [...]

21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity"[,] [...] [a] doctrine [...] which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law. [footnote 435: See e.g. art. 23 (g) of the Hague Regulations respecting the Laws and Customs of War on Land (annexed to Convention II of 1899 and Convention IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war" [...]. Similarly, art. 54 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.

Article 26: Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. [...]

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE [...]

CHAPTER I
GENERAL PRINCIPLES [...]

[N.B.: The following articles are generally concerned with the consequences of an internationally illegal act and reparation. The full text is available on http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf]

Article 28: Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Commentary [...]

3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed *to* other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. [...]

Article 33: Scope of international obligations set out in this Part [...]

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary [...]

4) [...] The Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State". [...]

CHAPTER III
SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW [...]

6) In line with this approach, despite the trial and conviction by the Nuremburg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals. As to more recent international practice, a similar approach underlies the establishment of the ad hoc tribunals for Yugoslavia and Rwanda by the United Nations Security Council. Both tribunals are concerned only with the prosecution of individuals. In its decision relating to a *subpoena duces tecum* in *Prosecutor v Blaskic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems". The Rome Statute for an International Criminal Court of 17 July 1998 likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole", but limits this jurisdiction to "natural persons" (art. 25 (1)). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law". [footnote 673: Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 25 (4). See also art. 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute" [*Cf.* **Case No. 15**, The International Criminal Court. [A. The Statute.] p. 608.]

7) Accordingly the present Articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not

peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole [footnote 674: According to the International Court of Justice, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 34. See also *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 595, at pp. 615-616, paras. 31-32.] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law.

Article 40: Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary [...]

5) [...] In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory. [footnote 684: [...] [*See* **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. [*Cf.* para. 79.] p. 896].]. [...]

Article 41: Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary [...]

2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

3) Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given

situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. [...]

14) [...] In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE [...]

CHAPTER I
INVOCATION OF THE RESPONSIBILITY OF A STATE [...]

Article 42: Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State; or

(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation. [...]

Article 48: Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: [...]

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached. [...]

Commentary [...]

4) Paragraph 1 refers to "[a]ny State other than an injured State". [...] [T]he term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. [...]

8) Under subparagraph (1) (b), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole". The provision intends to give effect to the International Court's statement in the Barcelona Traction case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole". [footnote 768: *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, and see commentary to Part Two, chapter III, paras. (2)-(6).] With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

9) [...] The Court itself has given useful guidance: in its 1970 judgment it referred by way of example to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". [footnote 769: Ibid., at p. 32, para. 34.]. [...]

CHAPTER II
COUNTERMEASURES

Article 49: Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question. [...]

Article 50: Obligations not affected by countermeasures

1. Countermeasures shall not affect:
   (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
   (b) Obligations for the protection of fundamental human rights;
   (c) Obligations of a humanitarian character prohibiting reprisals;
   (d) Other obligations under peremptory norms of general international law. [...]

Commentary [...]

6) Subparagraph (1) (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. [...]

7) In its General Comment 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present Articles, as well as

with measures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights", [footnote 805: E/C.12/1997/8, 5 December 1997, para. 1 [available on http://www.un.org]] and went on to state that:

"it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country". [footnote 806: Ibid., para. 4.]

Analogies can be drawn from other elements of general international law. For example, Additional Protocol I of 1977, article 54 (1) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited". [footnote 807: [...] See also arts. 54 (2) ("objects indispensable to the survival of the civilian population"), 75. See also Protocol II [...] art. 4.]. Likewise, the final sentence of article 1 (2) of the two United Nations Covenants on Human Rights states that "In no case may a people be deprived of its own means of subsistence". [footnote 808: Art. 1 (2) of the International Covenant on Economic, Social and Cultural Rights, United Nations, [...] and art. 1 (2) of the International Covenant on Civil and Political Rights, United Nations, [...] [available on http://www.un.org]]

8) Subparagraph (1) (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60 (5) of the Vienna Convention on the Law of Treaties. [*Cf.* **Quotation**, Chapter 13, IX., 2., c), dd), but no reciprocity, p. 301.] The subparagraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted. [...]

Article 51: Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. [...]

Article 54: Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary [...]

6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law. [...]

PART FOUR
GENERAL PROVISIONS [...]

Article 55: Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law. [...]

B. Commentary to Article 10 adopted on first reading

[**Source:** Commentary of the International Law Commission on Article 10 of the Draft Article on State Responsibility, adopted on first reading at its twenty-seventh session, para 26, Yearbook of the International Law Commission, 1975, Vol. II, p. 69.]

[...]

26) On the other hand, with regard to actions or omissions which persons with the status of State organs may have committed in their capacity as private individuals, the Commission considered that they had no connexion whatsoever with the fact that the persons in question were part of the machinery of the State and accordingly could not be attributed to the State under international law. [...] That naturally does not prevent States from sometimes assuming responsibility for such actions by treaty, as is the case for instance, of the Convention IV respecting the laws and customs of war on land (The Hague, 1907), article 3 of which attributes to the State responsibility for "all acts committed by persons forming part of its armed forces" in violation of the regulations annexed to the Convention, whether they acted as organs or as individuals. [...]

[N.B.: United Nations, International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), online: http://www.un.org/law/ilc/reports/2001/2001report.htm (hereafter: Report), pp. 29-365. The UN General Assembly took note of the Draft Articles in Resolution A/RES/56/83 of 12 December 2001.]

DISCUSSION

1. *(Art. 7 and Commentary to Art. 10 adopted on first reading)*

   Is a State responsible for all acts committed by members of its armed forces? Even if these members contravened the given orders? Even if they acted in their private capacity? Does the rule found in International Humanitarian Law (IHL) reflect the general rule or is it more constraining? (*Cf.* Art. 3 of the Hague Convention IV and Art. 91 of Protocol I.)

2. *(Art. 8)*

   a. When and in what circumstances may an individual engaged in an armed conflict against his government be considered as an agent for a foreign Sate? According to the International Court of Justice (ICJ) in the case Nicaragua v. United States (*Cf.* **Case No. 130**, ICJ, Nicaragua v. US. p. 1365.)? According to the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the

Tadic Case. (*Cf.* **Case No. 180**, ICTY, The Prosecutor v. Tadic. p. 1804.)? According to the International Law Commission (ILC)? In your opinion?

b. Did the ICTY have to answer the same question as the ICJ in the Nicaragua case? According to the ICTY? According to the ILC? What do you think? Is the fact that the ICJ considered the behaviour of a State and the ICTY that of an individual decisive?

3. *(Art. 9)*

a. Is a State whose authority disintegrates during a conflict responsible for the behaviour of groups or individuals trying to re-establish order? What are the practical consequences of such a responsibility? Are the acts committed by participants in a *levée en masse* attributable to the State? (*Cf.* Art. 2 of the Hague Regulations and Art. 4 (A) (6) of Convention III.)

b. When is a State whose authority disintegrates during a conflict responsible for violations of IHL committed by a group or individuals who are not trying to restore order? What are the practical consequences of such responsibility? Are the Draft Articles adapted to this problem?

4. *(Art. 10)*

a. In what circumstances is a State responsible for violations of IHL committed by a rebel movement? Is the rebel movement itself responsible for the violations it commits? Is the rebel movement responsible if it does not become the new government of a State? (*Cf.* Art. 3 common to the Conventions.)

b. Is it acceptable that State responsibility for violations of IHL by a rebel movement depends on that movement's success? Does it also depend on the legitimacy of its struggle?

c. When can we say that a movement is sufficiently organised for the State, of which it later becomes the government, to be responsible for the violations of IHL before obtaining power? As from what level of organisation does the movement itself become responsible for its violations? (*Cf.* Art. 3 common to the Conventions and Art. 1 of Protocol II.)

5. *(Art. 16)*

When can we consider that a State is aiding or assisting another State to commit violations of IHL? Are the obligations contained in Art. 1 common to the Conventions and to Protocol I the same as those contained in Art. 16 of the Draft Articles? Is the supplying of weapons, where the supplier knows that they will be used in violations of IHL, a violation of IHL? Is the supplying of weapons the use of which is banned by IHL a violation of IHL? Must both States be bound by the ban? Is there illegal aid if only the supplier State is subject to the ban? Is there wrongful aid if only the buyer State is subject to the ban, but not the supplier State?

6. *(Art. 21)*

May self-defence ever be a circumstance which precludes wrongfulness of a violation of IHL by a State? Is this the same for a grave breach committed by an

individual (*see also* Art. 31 (1) (c) of the ICC Statute, above, **Case No. 15**, p. 608.)?

7. *(Art. 25)*
   a. May necessity be a circumstance precluding wrongfulness for a violation of IHL by a State? If yes, in what circumstances? Why may it generally not be invoked for this? Is it because IHL implicitly excludes this possibility?
   b. What rules of IHL allow certain behaviour in cases of military necessity? Are they primary or secondary rules?
   c. May necessity be a defence for a grave breach of IHL by an individual (*see also* Art. 31 (1) (c) of the ICC Statute, above, **Case No. 15**, p. 608.)? In what circumstances? Are the answers to questions a and c the same? Are they defined by the same rules?
8. Does Art. 26 in itself not imply that Arts. 21 and 25 of the Draft Articles can never be invoked to justify a violation of IHL?
9. In case of a violation of IHL, does the responsible State have duties towards the individuals who are victims of the violation (*Cf.* also Arts. 6/6/6/7, 7/7/7/8 and 51/52/131/148 respectively of the four Conventions)? Even if the individuals are nationals of the responsible State? How can these victims invoke this responsibility? Do Art. 3 of Hague Convention IV and Art. 91 of Protocol I imply that victims may seek compensation?
10. What duties does a State have when it is responsible for a violation of IHL?
11. Are the general rules on forms and content of reparation all fully applicable in case of violations of IHL? Who must pay compensation to whom?
12. *(Arts. 40 and 41)*
   a. What violations of IHL come under Chapter III of Part Two of the Draft Articles?
   b. What is the relationship between Art. 41 (1) of the Draft Articles, Art. 1 common to the Conventions and to Protocol I and Art. 89 of Protocol I? Does this first provision mean that Art. 89 is valid also in cases of non-international armed conflicts?
   c. What are the lawful means to be used in order to put a stop to violations of IHL? Must they have been prescribed by IHL? By international law? Is it sufficient that they are not contrary to a prohibiting rule of international law? May the legality of a method also flow from the legality of counter-measures that violate rules other then IHL? Are the conditions of Arts. 49-51 of the Draft Articles applicable to counter-measures taken by third States under Art. 41 (1) of the Draft Articles? Under Art. 1 common to the Conventions and Protocol I?
   d. Is Art. 54 of the Draft Articles applicable in cases of violations covered by Chapter III of Part Two of the Draft Articles?

13. *(Arts. 42 and 48)*

a. Who is the injured State in case of a violation of IHL? In the case of a violation of IHL of non-international armed conflicts? Do Art. 1 common to the Conventions and Art 1 (1) of Protocol I mean that all States parties are injured in case of a violation of IHL?

b. If not, what violations of IHL allow States other than the injured State to invoke State responsibility? Is it all violations of IHL? Must these States act together?

c. What is the relationship between Art. 48 of the Draft Articles and Art. 1 common to the Conventions and Protocol I?

d. What is the relationship between Art. 48 (1) (b) and Art. 41 (1) of the Draft Articles?

14. *(Arts. 49-51)*

a. May a State injured by a violation of IHL take counter-measures? If yes, which ones? What are the limits?

b. May a State injured by a violation of international law (humanitarian or other) take counter-measures that consist in the temporary non-execution of its obligations under IHL? At least obligations that do not preclude their violation as reprisals? (*Cf.* Arts. 46/47/13 (3)/33 (3), respectively, of the Conventions and Arts. 20, 51 (6), 52 (1), 53 (c), 54 (4), 55 (2) and 56 (4) of Protocol I.)

c. Are reprisals that are not banned by IHL but which consist in the non-performance of obligations under IHL (for example the use of certain weapons against combatants) prohibited by Art. 50 (1) (d) of the Draft Articles?

d. Is the use of famine against a civilian population as a counter-measure prohibited? In an armed conflict, does this prohibition come from IHL or from Art. 50 (1) (b), (c) or (d) of the Draft Articles? (*Cf.* Art. 54 of Protocol I.)

15. *(Art. 54)*

a. What measures does Art. 54 allow a third State to take in case of a violation of IHL by another State? In this case are counter-measures allowed? Does it preclude counter-measures which violate international law (other than humanitarian)?

b. Is Art. 1 common to the Conventions and to Protocol I *lex specialis* in regard to Art. 54 of the Draft Articles, and as such, does it authorise counter-measures by all States in case of violations of IHL?

16. *(Art. 55)*

List some special rules of IHL on State responsibility.

Case No. 39, UN, ICRC Granted Observer Status

THE CASE

A. Resolution of the General Assembly

[**Source:** UN Doc. A/RES/45/6 (October 16, 1990); available on http://www.icrc.org]

Observer status for the International Committee of the Red Cross in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949

The General Assembly,

Recalling the mandates conferred upon the International Committee of the Red Cross by the Geneva Conventions of 12 August 1949,

Considering the special role carried on accordingly by the International Committee of the Red Cross in international humanitarian relations,

Desirous of promoting co-operation between the United Nations and the International Committee of the Red Cross,

1. *Decides* to invite the International Committee of the Red Cross to participate in the sessions and the work of the General Assembly in the capacity of observer;
2. *Requests* the Secretary-General to take the necessary action to implement the present resolution.

B. Explanatory Memorandum

[**Source:** Annex to UN Doc. A/45/191 (August 16, 1990), letter to the UN Secretary-General by the permanent representatives of 21 States asking that the question of observer status for the ICRC be included in the agenda of the UN General Assembly; available on http://www.icrc.org]

Observer status for the International Committee of the Red Cross in Consideration of the Special Role and Mandates Conferred upon it by the Geneva Conventions of 12 august 1949

Explanatory memorandum

1. The International Committee of the Red Cross (ICRC) is an independent humanitarian institution that was founded at Geneva, Switzerland, in 1863. In conformity with the mandate conferred on it by the international community of States through universally ratified international treaties, ICRC acts as a neutral intermediary to provide protection and assistance to the victims of international and non-inter-national armed conflicts.
2. The four Geneva Conventions of 12 August 1949 for the protection of war victims, to which 166 States are party, and their two Additional Protocols of 1977 explicitly establish the role of the ICRC as a neutral and impartial humanitarian intermediary. The treaties of international humanitarian law thus assign duties to

ICRC that are similar to those of a Protecting Power responsible for safeguarding the interests of a State at war, in that ICRC may act as a substitute for the Protecting Power within the meaning of the 1949 Geneva Conventions and 1977 Additional Protocol I. Moreover, the International Committee of the Red Cross has the same right of access as a Protecting Power to prisoners of war (the Third Geneva Convention) and civilians covered by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). In addition to these specific tasks ICRC, as a neutral institution, has a right of initiative deriving from a provision common to the four Geneva Conventions that entitles it to make any proposal it deems to be in the interest of the victims of the conflict.

3. The Statutes of the International Red Cross and Red Crescent Movement, as adopted by the International Conference of the Red Cross and Red Crescent, in which the States parties to the Geneva Conventions take part, require ICRC to spread knowledge and increase understanding of international humanitarian law and promote the development thereof. The Statutes also provide that ICRC shall uphold and make known the Movements fundamental principles, namely, humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

4. It was at the initiative of ICRC that the original Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted by Governments in 1864. Ever since, ICRC has endeavoured to develop international humanitarian law to keep pace with the evolution of conflicts.

5. In order to fulfill the mandate conferred on it by international humanitarian law, the resolutions of the International Conference of the Red Cross and Red Crescent and the Statutes of the Movement, ICRC has concluded with many States headquarters agreements governing the status of its delegations and their staff. In the course of its work, ICRC has concluded other agreements with States and intergovernmental organizations.

6. With an average of 590 delegates working in 48 delegations, ICRC was active in 1989 in nearly 90 countries in Africa, Asia, Europe, Latin America and the Middle East including the countries covered from its various regional delegations providing protection and assistance to the victims of armed conflicts by virtue of the Geneva Conventions and, with the agreement of the Governments concerned, to victims of internal disturbances and tension.

7. In the event of international armed conflict, the mandate of ICRC is to visit prisoners of war and civilians in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War (Third Convention), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention) and the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I). In situations of non-international armed conflict, ICRC bases its requests for access to persons deprived of their freedom on account of the conflict on Article 3 common to the Geneva Conventions and on the Protocol Additional to the Geneva

Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

8. In situations other than those covered by the Geneva Conventions and their Additional Protocols, ICRC may avail itself of its statutory right of initiative to propose to Governments that it be granted access to persons deprived of their freedom as a result of internal disturbances and tension.
9. The purpose of ICRC visits to persons deprived of their freedom is exclusively humanitarian: ICRC authorities to take steps to improve the detainees treatment and living conditions. ICRC never expresses an opinion on the grounds for detention. Its findings are recorded in confidential reports that are not intended for publication.
10. In the event of armed conflicts or internal disturbances, ICRC provides material and medical assistance, with the consent of the Governments concerned and on condition that it is allowed to assess the urgency of victims needs on the spot, to carry out surveys in the field to identify the categories and the number of people requiring assistance and to organize and monitor relief distributions.
11. The activities of the Central Tracing Agency of ICRC are based on the institutions obligations under the Geneva Conventions to assist military and civilian victims of international armed conflicts and on its right of humanitarian initiative in other situations. The work of the Agency and its delegates in the field consists in collecting, recording, centralizing and, where appropriate, forwarding information concerning people entitled to ICRC assistance, such as prisoners of war, civilian internees, detainees, displaced persons and refugees. It also includes restoring contact between separated family members, essentially by means of family messages where normal means of communication do not exist or have been disrupted because of a conflict, tracing persons reported missing or whose families have no news of them, organizing family reunification's, transfers to safe places and repatriation operations.
12. The tasks of ICRC and the United Nations increasingly complement one another and cooperation between the two institutions is closer, both in their field activities and in their efforts to enhance respect for international humanitarian law. In recent years, this has been seen in many operations to provide protection and assistance to the victims of conflict in all parts of the world.
13. ICRC and the United Nations have also cooperated closely on legal matters, with ICRC contributing to United Nations work in this field. This is also reflected in resolutions of the Security Council, the General Assembly and its subsidiary bodies and reports of the Secretary-General.
14. Participants of ICRC as an observer at the proceedings of the General Assembly would further enhance cooperation between the United Nations and ICRC and facilitate the work of ICRC.

DISCUSSION

1. a. Before having obtained observer status, which status could the ICRC have within the United Nations?
   b. Due to the fact that the ICRC fell under category II of the NGOs granted consultative status with ECOSOC under Resolution 1296 (XLIV) adopted by the Economic and Social Council, has the General Assembly created a precedent by giving the observer status to an entity which is neither a State nor an intergovernmental organization?
   c. What are the main differences between observer status and consultative status? Has this change of status conferred on the ICRC a more important role within the United Nations arena?
2. a. Does the ICRC undermine its principle of neutrality or abandon its confidential working method by accepting the observer status? What impact would the ICRC observer status have on its possible role in conflict management?
   b. Does the ICRC have international legal personality? How would you qualify the legal personality of the ICRC? Does the fact that the Conventions provide the ICRC with certain tasks necessarily imply that it is a subject of international law?
3. What impact does the ICRC have in international relations due to its status granted by the Conventions and Protocol I? What is the relationship between the right of initiative of the ICRC granted in Art. 3 common to the Conventions and Arts. 10/10/10/11 respectively of the four Conventions and the more active role of the organization within the United Nations fora? Do they contradict or reinforce each other?

Document No. 40, Minimum Humanitarian Standards

A. Turku Declaration

[**Source:** UN Doc. E/CN.4/Sub.2/1991/55 (December 2, 1990), available on www.un.org]

Declaration of Minimum Humanitarian Standards

Adopted by a meeting of experts, organised by the Human Rights Institute of Abo Akademi in Turku/Abo (Finland)

[The appropriate United Nations organ,]

Recalling the reaffirmation by the Charter of the United Nations and the Universal Declaration of Human Rights of faith in the dignity and worth of the human person;

Considering that situations of internal violence, disturbances, tensions and public emergency continue to cause serious instability and great suffering in all parts of the world;

Concerned that in such situations human rights and humanitarian principles have often been violated;

Recognizing the importance of respecting existing human rights and humanitarian norms;

Noting that international law relating to human rights and humanitarian norms applicable in armed conflicts do not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency;

Confirming that any derogations from obligations relating to human rights during a state of public emergency must remain strictly within the limits provided for by international law, that certain rights can never be derogated from and that humanitarian law does not admit of any derogations on grounds of public emergency;

Confirming further that measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments, that the imposition of a state of emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law, that measures derogating from such obligations will be limited to the extent strictly required by the exigencies of the situations, and that such measures must not discriminate on the grounds of race, colour, sex, language, religion, social, national or ethnic origin;

Recognizing that in cases not covered by human rights and humanitarian instruments, all persons and groups remain under the protection of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience;

Believing that it is important to reaffirm and develop principles governing behaviour of all persons, groups, and authorities in situations of internal violence, disturbances, tensions and public emergency;

Believing further in the need for the development and strict implementation of national legislation applicable to such situations, for strengthening cooperation necessary for more efficient implementation of national and international norms, including international mechanisms for monitoring, and for the dissemination and teaching of such norms;

Proclaims this Declaration of Minimum Humanitarian Standards.

Article 1

This Declaration affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.

Article 2

These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.

Article 3

1. Everyone shall have the right to recognition everywhere as a person before the law. All persons, even if their liberty has been restricted, are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.

2. The following acts are and shall remain prohibited:

   a) violence to the life, health and physical or mental well-being of persons, in particular murder, torture, mutilation, rape, as well as cruel, inhuman or degrading treatment or punishment and other outrages upon personal dignity;

   b) collective punishments against persons and their property;

   c) the taking of hostages;

   d) practising, permitting or tolerating the involuntary disappearance of individuals, including their abduction or unacknowledged detention;

   e) pillage;

   f) deliberate deprivation of access to necessary food, drinking water and medicine;

   g) threats or incitement to commit any of the foregoing acts.

Article 4

1. All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.

2. All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.

3. The right to an effective remedy, including habeas corpus, shall be guaranteed as a mean to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.

4. All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions.

Article 5

1. Attacks against persons not taking part in acts of violence shall be prohibited in all circumstances.

2. Whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved.

3. Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.

Article 6

Acts or threats of violence the primary purpose of foreseeable effect of which is to spread terror among the population are prohibited.

Article 7

1. The displacement of the population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased. Every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members wish to remain together must be allowed to do so. The persons thus displaced shall be free to move around in the territory, subject only to the safety of the persons involved or reasons of imperative security.
2. No persons shall be compelled to leave their own territory.

Article 8

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life.
2. In addition to the guarantees of the inherent right to life, and the prohibition of genocide, in existing human rights and humanitarian instruments, the following provisions shall be respected as a minimum.
3. In countries which have not yet abolished the death penalty, sentences of death shall be carried out only for the most serious crimes. Sentences of death shall not be carried out on pregnant women, mothers of young children or on children under 18 years of age at the time of the commission of the offence.
4. No death sentence shall be carried out before the expiration of at least six months from the notification of the final judgment confirming such death sentence.

Article 9

No sentence shall be passed and no penalty shall be executed, on a person found guilty of an offence without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations. In particular:

a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her, shall provide for a trial within a reasonable time, and shall afford the accused before and during his or her trial all necessary rights and means of defence;

b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

c) anyone charged with an offence is presumed innocent until proved guilty according to law;

d) anyone charged with an offence shall have the right to be tried in his or her presence;

e) no one shall be compelled to testify against himself or herself or to confess guilt;

f) no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure;

g) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed.

Article 10

Every child has the right to the measures of protection required by his or her condition as a minor and shall be provided with the care and aid the child requires. Children who have not yet attained the age of fifteen years shall not be recruited in or allowed to join armed forces or armed groups or allowed to take part in acts of violence. All efforts shall be made not to allow persons below the age of 18 to take part in acts of violence.

Article 11

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.

Article 12

In every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, shall be protected and treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them on any grounds other than their medical condition.

Article 13

Every possible measure shall be taken, without delay, to search for and collect wounded, sick and missing persons and to protect them against pillage and ill-treatment, to ensure their adequate care; and to search for the dead, prevent their being despoiled or mutilated, and to dispose of them with respect.

Article 14

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian missions.

2. Under no circumstances shall any person be punished for having carried out medical activities compatible with the principles of medical ethics, regardless of the person benefitting therefrom.

Article 15

In situations of internal violence, disturbances, tensions or public emergency, humanitarian organizations shall be granted all the facilities necessary to enable them to carry out their humanitarian activities.

Article 16

In observing these standards, all efforts shall be made to protect the rights of groups, minorities and peoples, including their dignity and identity.

Article 17

The observance of these standards shall not affect the legal status of any authorities, groups, or persons involved in situations of internal violence, disturbances, tensions or public emergency.

Article 18

1. Nothing in the present standards shall be interpreted as restricting or impairing the provisions of any international humanitarian or human rights instrument.
2. No restriction upon or derogation from any of the fundamental rights of human beings recognized or existing in any country by virtue of law, treaties, regulations, custom, or principles of humanity shall be admitted on the pretext that the present standards do not recognize such rights or that they recognize them to a lesser extent.

B. UN, Minimum Humanitarian Standards

[**Source:** UN Doc. E/CN.4/1998/87 (January 5, 1998) footnotes omitted.]

REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

Minimum humanitarian standards Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21

Introduction

1. In its resolution 1997/21 entitled "Minimum humanitarian standards", the Commission on Human Rights requested the Secretary-General to prepare "an analytical report on the issue of fundamental standards of humanity" for submission at its fifty-fourth session, taking into consideration in particular the issues raised in the report of the International Workshop on Minimum Humanitarian Standards held in Cape Town, South Africa in September 1996 and identifying, *inter alia*, common rules of human rights and humanitarian law that are applicable in all circumstances.

[...]

3. The Commission in resolution 1997/21 also requested the Secretary-General to seek the views of and information from Governments, United Nations bodies, in particular the Office of the United Nations High Commissioner for Refugees (UNHCR), the human rights treaty bodies and intergovernmental organizations, as well as regional organizations and non-governmental organizations. [...] To date, most of the responses received from Govern-

ments and intergovernmental organizations have indicated their support, in general terms, for the development of "minimum humanitarian standards" or fundamental standards of humanity, although they have often recommended further consideration of certain issues. The responses received to date have been carefully reviewed and many of the points raised in them are reflected in this report.

4. The Secretary-General was requested to prepare his report in coordination with the International Committee of the Red Cross (ICRC), and their comments and advice are gratefully acknowledged.

I. TERMINOLOGY

5. At the outset, it will assist the discussion if a few points are made regarding the use of particular terms and phrases. The issue under discussion had been given the designation "minimum humanitarian standards", following from a declaration with that title which was submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1991 (see E/CN.4/Sub.2/1991/55) and led to the present discussion. However, the latest Commission resolution refers explicitly to "fundamental standards of humanity", and this term is to be preferred for a number of reasons. First, the use of the qualifying word "minimum" has been criticized (including at the workshop in Cape Town), and second because the phrase "humanitarian standards" might give the impression that the exercise is solely concerned with international *humanitarian* law (the law regulating armed conflicts), whereas in fact that branch of international law is only one part of the discussion. As originally used, the phrase "humanitarian standards" was intended to include standards of both international human rights and humanitarian law, but it would seem that "standards of humanity" better serves this purpose. Also, in recent years there has been a good deal of discussion concerning *humanitarian* assistance, including criteria to guide the provision and delivery of such assistance. While this is a related point, it is not the main focus of the present discussion and, to avoid confusion, the term "standards of humanity" is therefore preferable.

6. A second issue of terminology concerns the manner in which to describe fighting and violence inside countries. Only "armed conflicts", whether of an international or non-international character, are regulated by international humanitarian law. This law provides some criteria for determining whether violence inside a country amounts to an internal armed conflict so as to come within the scope of the relevant rules. However, there is often disagreement about the application of these criteria, and this can lead to misunderstandings about the use of terms such as "internal armed conflict" or even "internal conflict". To avoid such misunderstandings, this report will generally use the term "internal violence" to describe situations where fighting and conflict, of whatever intensity, is taking place inside countries, and without prejudice to any legal characterization of the fighting for the purposes of applying international humanitarian law.

7. A third issue of terminology concerns the description of groups who have taken up arms against the Government. A number of appellations can be used: terrorist groups, guerrillas, resistance movements, etc., each of the terms carrying different connotations. In this report, the terms "armed group" or "non-State armed group" will be used to describe those who take up arms in a challenge to government authority, leaving aside the question of whether their activities and aims qualify them as "terrorists" or "freedom fighters". The choice of the more neutral term - armed group - is in no way meant to imply any legitimacy for the group or its cause; such groups can, and frequently do, engage in acts of terrorism.

II. BACKGROUND

A. Brief history of the discussion

8. The need for identifying fundamental standards of humanity arises from the observation that, at the present time, it is often situations of internal violence that pose the greatest threat to human dignity and freedom. The truth of this observation is borne out in many countries around the world. The reports prepared by or for United Nations human rights bodies repeatedly draw attention to the link between human rights abuses and ongoing violence and confrontation between armed groups and government forces, or simply between different armed groups. Although such situations frequently lead to the most gross human rights abuses, there are disagreements and doubts regarding the applicable norms of both human rights and humanitarian law. The rules of international humanitarian law are different depending on the nature and intensity of the conflict. There are disagreements concerning the point at which internal violence reaches a level where the humanitarian law rules regulating internal armed conflicts become operable. Even when these rules manifestly do apply, it is generally acknowledged that, in contrast to the rules applying in international armed conflicts, they provide only the bare minimum of protection.

9. Further, until now, the rules of international human rights law have generally been interpreted as only creating legal obligations for Governments, whereas in situations of internal violence it is also important to address the behaviour of non-State armed groups. It is also argued that some human rights norms lack the specificity required to be effective in situations of violent conflict. Finally, concern has been expressed about the possibilities for Governments to derogate from certain obligations under human rights law in these situations.

10. The discrepancy between the scale of the abuses perpetrated in situations of internal violence, and the apparent lack of clear rules, has been the inspiration for efforts to draw up "minimum humanitarian standards" or fundamental standards of humanity. The most notable effort in this regard has been the elaboration, by a group of non-governmental experts, of the Declaration on Minimum Humanitarian Standards in Turku/Åbo, Finland, in 1990 [See Part A] [...]

11. This document was considered by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-third session in 1991. At its forty-sixth session in 1994 the Sub-Commission decided to transmit the document to the Commission on Human Rights "with a view to its further elaboration and eventual adoption" (resolution 1994/26). In 1995 the Commission on Human Rights, in resolution 1995/29, taking note of the Sub-Commission's resolution, recognized the need to address principles applicable to situations of internal and related violence, disturbance, tension and public emergency in a manner consistent with international law and the Charter of the United Nations and requested that the Declaration on Minimum Humanitarian Standards be sent to Governments and inter-governmental and non-governmental organizations for their comments.

12. In considering the issue at its forty-second session in 1996, the Commission on Human Rights did not make a specific reference to any particular document, but again recognized the need to address principles applicable to situations of internal violence. It also welcomed the offer by the Nordic countries, in cooperation with the ICRC, to organize a workshop to consider the issue (resolution 1996/26). As noted, this workshop was held in Cape Town, South Africa, in September 1996, and a report of the workshop [...] was made available to the Commission on Human Rights at its last session.

13. The main issue for consideration therefore is the necessity and desirability of identifying principles or standards for the better protection of the human person in situations of internal violence. Bearing in mind the terrible toll of atrocities and suffering associated with such situations in recent years, the opportunity to address this topic is both welcome and timely.

B. A reminder

14. Before proceeding, it is worth recalling that in many situations war itself, or the recourse to violence, is a negation of human rights. As stated in the preamble to the United Nations Declaration on the Right of Peoples to Peace (General Assembly resolution 39/11 of 12 November 1984, annex)

    "[The General Assembly,]

    "*Convinced* that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations ..."

15. Measures aimed at reducing human rights abuses in situations of internal violence must not detract from efforts to prevent or end such violence. Neither must they lend weight to the argument of despair that such efforts are doomed to failure. The importance of addressing the root causes of violence and conflict must always be at the centre of United Nations efforts; in this regard, special emphasis needs to be placed on ensuring the protection of minorities, of strengthening democracy and democratic institutions, of overcoming obstacles to the realization of the right to development, and of securing respect for human rights generally.

16. This report is firmly grounded in the understanding that human rights are interdependent and interrelated. Efforts to minimize human rights abuses in situations of internal violence depend on achieving a greater awareness of and respect for all human rights. Preventing the use of starvation of civilians as a method of warfare will be easier if there is an acceptance of the right to food, and an understanding of the obligations associated with that right. At the same time, while there are no "clean" wars, recent history shows us that conflicts fought with a minimum of violence, and with greater attention to fundamental standards of humanity, lend themselves more readily to a peaceful solution and provide the conditions in which reconciliation and justice can prevail.

III. HUMAN RIGHTS ABUSES IN SITUATIONS OF INTERNAL VIOLENCE

A. Common characteristics

17. At the outset, it seems necessary to make some comments concerning the characteristics of situations of internal violence in the post-cold war world. In recent years, several reports issued to or by United Nations bodies and specialized agencies have considered the problems posed by such situations. For the purposes of this report, a number of relevant observations emerge.

18. The decrease in the number of international armed conflicts has been offset by an increase in the number of civil wars and other situations of violence inside countries. Quantifying the scale of the problem is difficult as there is no firm agreement on the factors to apply in deciding which are the most serious situations. If the factor of number of deaths is used, then, according to some researchers, in 1996 there were 19 situations of internal violence in which at least 1,000 people were killed ("high intensity conflicts") and which, cumulatively (since their beginning, in some cases many years ago), had led to between 6.5 and 8.4 million deaths. If one includes situations of internal violence which, in 1996, had de-escalated or ended, another 2 million deaths could be added. In addition, in 1996 there were approximately 40 other internal situations causing between 100 and 1,000 deaths ("low intensity conflicts"), which cumulatively have also led to thousands of deaths. Of course, the number of conflict-related deaths is but a small part of the suffering and devastation found in such situations. Whatever the number, there is no doubting the scale of the problem.

19. These situations are characterized by the existence of an armed challenge to the Government, in the form of one or more groups taking up arms in pursuit of, broadly speaking, political objectives. These objectives might include demands for more autonomy or even secession for particular ethnic, religious or linguistic minorities within the State concerned, overthrowing the existing Government, rejection of the existing constitutional order, or challenges to the territorial integrity of the State. In other situations, where an existing Government collapses or is unable or unwilling to intervene, armed groups fight among themselves; for example, for the right to establish

a new Government or to ensure the supremacy or continuation of their own particular political programme.

20. The degree of organization of these armed groups, their size, sophistication, and the extent to which they exercise actual control over territory and population vary from one situation to the next. At one extreme, such groups might resemble de facto Governments, with control over territory and population and establishing and/or maintaining public services such as schools, hospitals, forces of law and order, etc. At the other extreme, some armed groups will operate only sporadically, or in an entirely clandestine manner, and exercise no direct control over territory. Some armed groups operate under clear lines of command and control; others are loosely organized and various units might not be under effective central command.

21. In many situations of internal violence there will be a breakdown in the operation of public institutions. Schools will be closed, local government unable to function, and police and judicial institutions may suffer. Such breakdowns might be limited to particular areas of the country, or apply more generally. The functions of government often become increasingly militarized, with the armed forces assuming civilian police functions and military courts trying civilians; often the military's power is beyond the reach of civilian control. Depending on the degree and scope of the violence, there is also likely to be an impact on the livelihood of the civilian population. This impact often is felt most in rural areas (where the fighting usually takes place); farmers and others dependent on the land are particularly vulnerable.

22. There is no doubt that the ready availability of weapons is a predominant characteristic of these situations. Both government forces and armed groups appear to be well supplied with light weaponry. While the devastating impact of anti-personnel landmines has received a good deal of publicity and significant steps are now being taken to ban this weapon, a majority of civilian casualties result from the use of other weapons - such as assault rifles, light artillery (e.g., mortars), and fragmentation bombs or grenades - the indiscriminate use of which attracts little international condemnation.

23. A final common element in these situations is the link between criminal and "political" violence. While some armed groups might limit themselves to military activities, others, though allegedly contesting political power, are more reminiscent of criminal gangs, engaging in theft, extortion and banditry on a mass scale. Government forces too engage in such activities, the collapse in civil institutions creating a climate of general lawlessness in which preying on the civilian population is common and corruption rampant. Banditry and extortion are used to fund and supply the continuation of the fighting.

B. Patterns of abuse

24. In her report Ms. Machel drew attention to the "shocking" statistic of over 2 million children killed in conflicts in the last decade, the vast majority of

them in situations of internal violence and conflict. The conclusion to be drawn, according to the report, is that

"... more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink" (A/51/306, para. 3).

25. While children are the most vulnerable, other groups too are at risk of experiencing this "unregulated terror and violence". These include women, minority ethnic populations, refugees and the displaced, and those detained in connection with the violence; indeed, the civilian population generally is at risk.

26. While the statistic of 2 million dead children speaks volumes about the scale of the abuse, some further comments should be made about the nature and type of the most common human rights abuses in these situations. A comprehensive survey is beyond the scope of the present report. But again, some general observations may be made.

27. The most serious abuses involve arbitrary deprivation of the right to life. Civilians are directly or indiscriminately attacked and killed by armed forces and armed groups. Massacres of civilians are common. Often civilian deaths are the result of the indiscriminate use of weapons. Captured combatants are summarily executed, as are non-combatants whose religious or ethnic identity, or political opinion, make them suspect in the eyes of their captors. Others die from starvation or disease, when relief supplies are arbitrarily withheld from them. Those exercising their right to peaceful protest are killed when police or security forces respond with excessive force.

28. The practice of torture, or cruel, inhuman or degrading treatment or punishment, is frequently related to internal violence. Those detained in connection with the violence are tortured to extract confessions, to obtain information about opposition groups, or to brutalize or intimidate them. Captured combatants, members of political organizations who speak out, villagers and peasants in areas where fighting is taking place and suspected sympathizers of the opposing party are all at risk of being tortured. New recruits into armed forces and armed groups are beaten and ill-treated to force them into obedience. Villagers are forced to act as labourers for armed forces and armed groups, often under appalling conditions.

29. Conflicts tend to lead to displacement as people flee affected areas but deliberate interference with freedom of movement is also common. People are rounded up and moved out of their home areas against their will, and without any justification. This is done to create "security" zones, to deprive armed groups of indirect civilian support or as a means of punishing or terrorizing minority ethnic, linguistic or religious populations viewed as hostile, or to expel such populations from particular territories. Those who flee or who are expelled are denied access to safety - in their own or other countries - or are forced back to unsafe areas. When it is safe to return, they

are often prevented from doing so and condemned to a life in exile. Also, the displaced are often restricted to camps, in circumstances akin to internment or detention.

30. Children's vulnerability means they are at particular risk of suffering abuses and the attack on children's human rights in internal conflicts was also highlighted by Ms. Machel. The impact of the violence on rights associated with their education, health, and general well-being and development can be enormous. If orphaned or separated (often forcibly) from their families as a result of the fighting, these problems are exacerbated. In addition, children are recruited into the armed forces and are sent into combat, are used as a ready supply of forced labour for armed forces, and are subject to sexual abuse.

31. War is for the most part waged by men - this fact has enormous implications for the protection of women's human rights in situations of internal violence. Women and girls are raped by soldiers and members of armed groups and are abducted into forced prostitution. A majority of civilians caught up in the fighting are often women and children, including those displaced, and they therefore suffer a disproportionate share of the abuses directed at the civilian population.

32. Rights associated with arbitrary deprivation of liberty and due process are also commonly abused. Hundreds or even thousands of people might be detained in connection with the fighting; in many cases suspected members of armed groups or their supporters are detained for months and years without being charged or tried. If trials do take place, fundamental fair trial guarantees are often ignored; military courts are used to try and sentence civilians. Armed groups take people hostage, and hold "trials" of suspected political opponents or "traitors". Both government forces and armed groups take people into custody but deny they are holding them - tens of thousands of people have disappeared or gone missing in this way in recent years. Usually, they have been killed and their bodies secretly disposed of.

33. Finally, there is a widespread disregard for the protections owed to civilians. Civilian property - homes, belongings, crops, livestock - is wantonly destroyed or pillaged. Hospitals and schools are deliberately destroyed, as are religious and cultural buildings. Civilians are denied access to relief supplies, such as food and medicine, or the distribution of such supplies is subject to unwarranted interference. The protections owed to medical and religious personnel are ignored. Recognized humanitarian agencies are prevented from operating, their staff are threatened and attacked and their equipment is stolen or destroyed.

34. A recurring theme that applies to all of these human rights abuses is that, in the overwhelming majority of cases, the victims, or their families, find no justice. Those who kill, torture, rape, or attack them do so with virtual impunity, apparently confident that they will never be called to account for their misdeeds.

35. Also common to all these abuses is the difficulty, in some situations, of attributing responsibility for the violence. The existence of a situation of internal violence usually means that at least two - and often more - opposing

forces or groups have resorted to the use of force; the hostility and distrust between them gives ample scope for the dissemination of misinformation and propaganda. Allegations that one side might commit abuses in such a manner as to make the other side appear responsible cannot always be dismissed. When abuses take place in remote areas, identifying the perpetrators can be very difficult. These difficulties are further increased when the authorities place restrictions on the free flow of information and the operation of news media, including denying journalists access to conflict zones. Journalists are also threatened and killed - another means of preventing disclosure of information on abuses. United Nations investigators and human rights monitors are also denied access to places where abuses are alleged to have taken place.

36. It should be emphasized that the above is just a general overview of the human rights abuses common in situations of internal violence, and of some of the most relevant characteristics of these situations. It is by no means an exhaustive survey. It is interesting to note that a good deal of information, including from United Nations sources, is available regarding these issues - for example, in the reports of country and thematic rapporteurs and working groups of the Commission on Human Rights.

37. It might be useful, within the framework of further study, to collect information from existing sources on types of human rights abuse in situations of internal violence - including abuses committed by armed groups. The purpose would be to expand considerably on the typology set out above, and therefore gain a fuller picture of the human rights abuses that we are aiming to prevent, and the context in which they take place.

IV. OUTLINE OF THE ISSUES INVOLVED

38. Throughout the consideration by the United Nations of the issues of human rights bodies addressing principles applicable to situations of internal violence, a number of questions have repeatedly emerged. This section aims to organize and set out very briefly these questions, and the issues they raise. The following sections (V-IX) will then address the questions in more detail.

What are the problems regarding the scope of existing standards?

39. As indicated briefly above, the initiative to identify fundamental standards of humanity is based on the argument that existing standards, of both human rights and humanitarian law, do not adequately address situations of internal violence. The issue for consideration therefore is the extent to which this is the case, and to identify with some precision the problems concerning existing norms.

40. As regards human rights law, the main issues concern the possibilities for States to derogate from some of their commitments during situations of internal violence, and the extent to which, if at all, armed groups can be held accountable under international human rights law. It is further argued that

some human rights guarantees lack the specificity required to be applied effectively in situations where fighting is taking place.

41. As regards international humanitarian law, the main issue concerns the difficulties in determining in which situations the rules regulating non-international armed conflicts become operable, and the fact that some situations of internal violence fall outside of existing treaty law. In addition, there is the question of the adequacy of the existing rules even in cases where the situation meets the thresholds set out in international humanitarian law. Further, there is also the need to identify customary rules of international humanitarian law.

What would be the advantages of identifying "fundamental standards of humanity", and are there significant disadvantages?

42. Obviously, if there are significant problems regarding the scope of existing standards, then in principle finding a means to extend their scope is desirable. But, the question must involve an assessment of how, in concrete terms, a more precise statement about norms of conduct would contribute to alleviating the plight of those affected by such situations.

43. Regarding the possible disadvantages, the key question is the relationship of a statement of fundamental standards of humanity to existing international law. Would such a statement undermine or in any way detract from existing standards? [...]

What would be the nature of a statement of fundamental standards of humanity?

45. Finally, assuming the desirability of identifying and setting out fundamental standards of humanity, the question arises of the means by which this should be done.

V. INTERNATIONAL HUMAN RIGHTS LAW AND SITUATIONS OF INTERNAL VIOLENCE

46. There exists an impressive body of international law concerning the protection of human rights and fundamental freedoms. Since the advent of the United Nations, covenants, conventions and declarations, as well as resolutions adopted by competent United Nations organs, have elaborated in considerable detail the scope of human rights protection. While further standard-setting in the field of human rights protection continues, and will remain necessary to keep pace with a changing world, the breadth of the existing regulation is impressive.

47. Complementing the Universal Declaration of Human Rights, there are the two International Covenants, adopted in 1966, on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of

Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989). In addition, there are the Convention and Protocol relating to the Status of Refugees (1951 and 1967 respectively), the many conventions with human rights provisions adopted under the auspices of the International Labour Organization and several non-treaty declarations and other resolutions adopted by the General Assembly. Among the latter are the Declaration on the Right to Development (1986), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) and the Declaration on the Protection of All Persons from Enforced Disappearance (1992). These are just some of the many human rights standards developed by the United Nations and do not include any of the standards adopted at a regional level.

48. Given the scope of existing standards, the argument that there is a gap in the protection provided by international human rights law needs to be carefully examined. After all, the main human rights instruments (the Universal Declaration of Human Rights and the two International Covenants) taken together guarantee protection, at least in a general form, for the most important human rights and fundamental freedoms. This includes those rights of most immediate relevance to individuals in situations of internal violence. The two International Covenants have been ratified by a solid majority of Member States, and there is no doubt that some of their provisions have become norms of customary international law binding on all States. It is widely accepted that the Universal Declaration of Human Rights, though it is not a treaty per se, creates obligations on all States Members of the United Nations. Most importantly, as the Universal Declaration states, human rights are "inalienable", individuals are "born free and equal in dignity and rights" - it follows that we possess these rights regardless of whether the countries we live in are at war or at peace.

49. However, the argument about the inadequacies of human rights law is more complex. It rests essentially on three points: the possibility of derogation, the position of non-State armed groups vis-vis human rights obligations, and the lack of specificity of existing standards.

A. Derogation

50. Some human rights treaties allow States, in exceptional circumstances, to take measures derogating from their obligations with regard to certain human rights commitments they have undertaken. It is widely understood that a situation of internal violence *might* be of such an exceptional nature as to justify derogation. The International Covenant on Civil and Political Rights (ICCPR) provides, in article 4 (1), that

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the

present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

51. A similar provision can be found in two regional human rights treaties, the American Convention on Human Rights (article 27) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 15).

52. However, article 4 (2) of the ICCPR provides that States may not derogate from their obligations regarding several of the rights protected in the Covenant, including the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the right not to be imprisoned for failure to perform a contractual obligation, the right not to be subject to retroactive penal measures, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. Similar so-called non-derogable rights can be found in the two regional conventions mentioned above.

53. Significantly, among others, rights related to freedom of movement, equality, protection of minorities, fair trial, freedom of expression and protection from arbitrary detention or imprisonment are rights subject to derogation under these treaties. This means that, if a situation of internal violence justifies invoking the derogation clauses, there is the possibility that States may legitimately restrict the exercise of such rights.

54. On the other hand, the possibility that a situation of fighting inside a country might allow for the legitimate restriction of certain rights does not necessarily support the conclusion that there is a gap in the protection offered by international law. First, it must be emphasized that rights which are subject to derogation are not automatically thereby subject to outright suspension at the State's discretion. Article 4 of the ICCPR includes a number of qualifications which place concrete limits on a State's use of the derogation clauses. These include the requirements that no measures taken involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; and that each of the specific measures taken to restrict particular rights are only "to the extent strictly required by the exigencies of the situation". The latter stipulation is particularly important as it requires that the restriction must be proportional. A state of emergency might justify some restrictions on freedom of assembly and movement (for example, a night-time curfew), but not necessarily any restriction. Restrictions which are sweeping or general in nature will be inherently suspect. There are other requirements, such as the temporary nature of derogation, and its basis in law, which also limit a State's discretion.

55. Second, derogations must not be inconsistent with a State's other obligations under international law. Some human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the Convention on the Rights of the Child, the

International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women contain no derogation clauses, and many States that have ratified the ICCPR are also parties to these treaties.

56. Third, only the most serious internal situations justify invoking the derogation clauses. The mere existence of violence inside a country does not *ipso facto* justify derogation. The phrase "threatens the life of the nation" in article 4 clearly envisages a truly exceptional situation.

57. Taken together, these constraints on the application of derogation clauses appear to provide a solid basis in international law for ensuring these clauses are not abused. In this regard it is interesting to note the conclusions of expert meetings which have developed in some detail guidelines for applying derogation clauses in such a manner as to ensure the greatest possible protection for human rights consistent with a State's legitimate need to respond to an exceptional situation. The use of such guidelines, firmly based in the treaty law, seems a promising means of overcoming some of the problems posed by derogation clauses in situations of internal violence.

58. In sum, it is not clear that the derogation argument provides, on its own, a clear justification for developing fundamental standards of humanity. That is, even though there is no doubt that states of emergency do create serious problems for the protection of human rights, it is not clear that such problems arise primarily from the possibility for States to derogate from certain human rights obligations. It would seem that further analysis would be needed to identify the extent to which the human rights abuses which are most prevalent in situations of internal violence can be attributed to the proper and faithful application of derogation clauses set out in international treaties.

B. Non-State armed groups and human rights law

59. A second problem concerning the adequacy of human rights law arises in regard to the activities of non-State actors. It is clear that measures taken by actors other than States can have a negative impact on the enjoyment of human rights and fundamental freedoms. In particular, armed groups, operating at different levels of sophistication and organization, are often responsible for the most grave human rights abuses. Yet these groups are not, strictly speaking, legally bound to respect the provisions of international human rights treaties which are instruments adopted by States and can only be formally acceded to or ratified by States. The supervisory mechanisms established by these treaties are not empowered to monitor or take action on reports on the activities of armed groups.

60. In situations where international humanitarian law applies (discussed below), armed groups are bound by its provisions. However, in situations where that law does not apply the *international legal* accountability of such groups for human rights abuses is unclear (although clearly such acts

should be penalized under domestic criminal law). There are different schools of opinion regarding the proper standard of accountability. Some Governments argue that armed groups can commit human rights violations, and should be held accountable under international human rights law. Other Governments maintain that, while the abuses of armed groups are deserving of condemnation, they are not properly speaking human rights violations since the legal obligation which is violated is one that is only binding on Governments. This divergence of views is found also among scholars and commentators.

61. The modern concept of human rights is grounded in an understanding that these rights are held by individuals vis-vis the State and create legal obligations on the State of both a negative and positive nature to ensure the full enjoyment of those rights. Human rights protection developed as a means of checking the exercise of State power, and, particularly with regard to economic, social and cultural rights, also as legitimate demands for State intervention to ensure rights were respected (for example, as regards the right to education or the right to health). Later, with the recognition of the right to development, obligations for implementation were placed on States acting alone and in cooperation with each other.

62. And yet, this conception of human rights (while dominant, and rightly so given the scale of violations of human rights by Governments) has never provided a fully adequate description of the scope of international human rights concern. The Universal Declaration of Human Rights, as well as the two International Covenants, in their preamble paragraphs recognize duties on individuals to promote respect for human rights. The two Covenants include this statement in their preambles:

"*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant"

Such references clearly indicate the responsibility of individuals to *promote* human rights, although it is not clear whether that includes legal obligations regarding human rights violations. Early efforts to abolish the slave trade, though not explicitly framed in the language of human rights, were directed at suppressing the practice of slavery in all its forms including when the enslavement of others was carried out by non-State actors. The very first United Nations-sponsored human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, clearly applied to "constitutionally responsible rulers, public officials or *private individuals*" (emphasis added). More recently, resolutions adopted on "Human rights and terrorism" in the Sub-Commission and Commission on Human Rights have expressed concern about the "gross violations of human rights perpetrated by terrorist groups".

63. Also relevant is the fact that certain acts committed by individuals can attract international criminal responsibility regardless of whether the individual acts on behalf of a State or not. These include acts which violate human rights law. The crime of genocide, noted above, is an example, but it is just one of

several crimes against humanity which can be committed by non-State agents. [...] The discussion on the establishment of an International Criminal Court, due to be finalized at a diplomatic conference of plenipotentiaries in Rome in July 1998, includes the issue of identifying those crimes, including crimes against humanity and war crimes, which will be within the competence of the court. The results of the diplomatic conference will therefore be of particular interest and relevance to this question of determining the accountability of members of armed groups for violations of human rights law.

64. Clearly, given the divergent views on this issue, and its complexity, further study is needed. It seems beyond doubt that when an armed group kills civilians, arbitrarily expels people from their homes, or otherwise engages in acts of terror or indiscriminate violence, it raises an issue of potential international concern. This will be especially true in countries where the Government has lost the ability to apprehend and punish those who commit such acts. But very serious consequences could follow from a rushed effort to address such acts through the vehicle of existing international human rights law, not least that it might serve to legitimize actions taken against members of such groups in a manner that violates human rights. The development of international human rights law as a means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations. The challenge is to sustain that achievement and at the same time ensure that our conception of human rights remains relevant to the world around us.
[...]

C. Lack of specificity of existing human rights rules

66. A third possible problem with the application of existing human rights standards to situations of internal violence concerns the lack of specificity of some of the most relevant rights and protections. One of the great advantages of international humanitarian law is that its provisions speak in a direct and detailed manner to the abuses associated with conflict, offering potential victims relatively clear guidance regarding their rights in specific circumstances. Just as importantly, the duties and responsibilities of armed forces are also spelt out in some detail. In contrast, many human rights guarantees which are of critical importance in situations of internal violence are stated in rather general terms. [...]

[...]

VI. INTERNATIONAL HUMANITARIAN LAW AND SITUATIONS OF INTERNAL VIOLENCE

70. International humanitarian law covers a wide range of international treaties and agreements, some dating back over a hundred years. The most important instruments are the Four Geneva Conventions for the protection of victims of war of 1949, and their two Additional Protocols. [...]

71. As indicated above, the argument concerning the problems of applying international humanitarian law to situations of internal violence rests essentially on two points: first, that there are difficulties in determining in which circumstances the treaty rules regulating internal conflicts become operable, and second, that even when these rules do apply they only provide a minimum of protection. In addition, neither argument can be properly examined without also considering the scope of customary law.

72. Before examining these issues, however, one important caveat should be made. Whatever problems there might be with the scope of the existing rules, it is always important to ask ourselves whether the continuing abuses result from legal ambiguities or rather reflect other realities. That is, it would be unwise and unhelpful to focus too heavily on examining the inadequacies of the existing law if that leads to the assumption that addressing these inadequacies will in itself be sufficient. The following discussion should be read with this in mind, and it is a point returned to in the concluding paragraphs of this report.

A. Scope of application of international humanitarian law to situations of internal violence and conflict

73. When the 1949 Geneva Conventions were drafted and adopted, it was possible to spell out in considerable detail rules regarding the care of the wounded, sick and shipwrecked, the treatment of prisoners of war, and even the protection of civilians in occupied territories. But these detailed rules were only applicable in wars between States. As regards "non-international armed conflicts", only one article could be agreed. [...]

74. The importance of common article 3 should not be underestimated. It sets out in straightforward terms a number of important protections that *all* parties to a conflict must respect, and applies to any armed conflict "not of an international character". It is now considered to be part of customary international law. However, common article 3 has two shortcomings. First, it provides only a minimum of protection; for example, it is silent on issues relating to freedom of movement, does not explicitly prohibit rape, and does not explicitly address matters relating to the methods and means of warfare. Second, while common article 3 does not define "armed conflicts not of an international character", in practice this wording has left room for Governments to contest its applicability to situations of internal violence inside their countries.

75. However, efforts to improve upon the shortcomings of common article 3 have met with only limited success. The most significant of these efforts grew out of a resolution adopted at the International Conference on Human Rights, held in Tehran in 1968. Resolution XXIII specifically requested the General Assembly to invite the Secretary-General to study, *inter alia*:

"The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in *all* armed conflicts ...". (emphasis added)

This request was based on the consideration that the 1949 Geneva Conventions were "not sufficiently broad in scope to cover all armed conflicts". The studies subsequently prepared by the Secretary-General, in close consultation with the ICRC, recommended that, among other things, efforts be undertaken to considerably expand the scope of protection in internal armed conflicts. [...]

76. Protocol II sets out numerous important guarantees for the protection of those affected by non-international armed conflicts. It expands the protection offered by common article 3 to include prohibitions on collective punishments, violence to health and physical or mental well-being, acts of terrorism, rape, enforced prostitution and indecent assault, slavery and pillage. In addition, it includes provisions for the protection of children, for the protection and rights of those detained for reasons related to the conflict, and provides fair trial guarantees for those prosecuted for criminal offences related to the conflict. There are also articles dealing with the protection and care of the wounded, sick and shipwrecked and the protection of medical and religious personnel. Protocol II also prohibits attacks on the civilian population, the use of starvation as a method of war, and the arbitrary displacement of the civilian population.

77. The protections offered by Protocol II are a considerable improvement on common article 3. However, measured against the rules for inter-State wars, they are still quite basic. The most serious omissions concern the many specific protections for civilians against the effects of hostilities found in Protocol I. For example, Protocol I prohibits direct *and* indiscriminate attacks on civilians, including providing examples of specific types of prohibited indiscriminate attacks; it places fairly detailed obligations on armed forces regarding precautions to be taken to ensure the protection of the civilian population and civilian objects; and it establishes rules regarding non-defended localities and demilitarized zones. Protocol II provides only a few general rules on these matters.

78. However, the bigger difficulty with Protocol II is that the protections it offers only apply in internal conflicts meeting a certain threshold of intensity and nature. Under article 1 (1), the Protocol applies to armed conflicts:

"... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

And article 1 (2) specifically excludes from the scope of the Protocol:

> "... situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

79. This two-fold test would appear to limit the application of Protocol II to situations at or near the level of a full-scale civil war, and certainly few Governments are prepared to admit the application of the Protocol to

situations of lesser intensity. Since neither the Protocol nor any other agreement allows for an impartial outside body to decide on whether the criteria are met to apply the Protocol, it is largely left to the goodwill of the Government concerned. This goodwill is often lacking - admitting the application of the Protocol is seen as conferring international legitimacy on the opposition forces (even though such an interpretation is specifically ruled out by another provision of the Protocol), and/or an implicit admission on the Government's part of its lack of effective control in the country.

80. The result is that there are many situations of internal violence - including ones leading to thousands of deaths - where there are no clear treaty rules in place to regulate important aspects of the behaviour of the armed forces and armed groups involved. It is revealing to note that there are occasions where the Security Council has determined that an internal situation amounts to a threat to international peace and security (so as to initiate action under the Charter), but where it is unclear as to whether Protocol II would apply.

81. Clearly, from the point of view of the actual or potential victims, this is an unsatisfactory state of affairs. Civilians and civilian objects should be clearly protected against direct and indiscriminate attack in all circumstances. Weapons or methods of warfare the use of which is prohibited in international armed conflicts should also generally be prohibited in situations of internal violence and conflict. Likewise, obligations on armed forces to take precautions in attack so as to reduce the risk of civilian casualties, and detailed rules regarding facilitating and protecting the work of humanitarian agencies providing relief to the civilian population should apply regardless of the nature or scale of the conflict. It seems illogical, and indeed morally indefensible, to suggest that armed forces are free to engage in behaviour against citizens of their own country which would be outlawed were they involved in military operations abroad. Likewise, why should armed groups be held internationally accountable for arbitrarily expelling people from their homes, for example, only when the conflict they are engaged in meets the high threshold established in Protocol II? [...]

83. The key question [...] is whether it is feasible to further develop the rules regulating internal violence in such a way as to ensure protection to all who need it whenever they need it. Given past difficulties, it would seem unrealistic to assume that the problems can be overcome by redrafting or updating existing treaties. Moreover, in this regard it is important to point out the importance of customary rules of international humanitarian law - rules separate from treaty law and which are of cardinal importance when it comes to overcoming the problems of applying international humanitarian law in situations of internal violence. As discussed in the next section, there are a number of developments regarding the identification of customary rules which could assist in identifying fundamental standards of humanity.

B. Customary international humanitarian law

84. The above analysis has been restricted to existing rules found in international treaties. It needs to be stressed that separate from treaty rules, internal armed conflicts are still regulated by the rules of customary international law. As far back as 1907, States have seen fit when drafting international agreements concerning the law of war to explicitly indicate that in situations not covered by treaty rules, both combatants and civilians:

"... remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

This clause, known as the Martens clause, is found also in the Preamble to Protocol II:

"*Recalling* that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."

85. Like common article 3, the importance of the Martens clause should not be underestimated. It shows a concrete recognition and acceptance by States that rules of customary international law above and beyond existing treaty rules can apply to fighting inside countries. To date, the problem has been in determining, both in general and as regards any specific case, what is prohibited by the "principles of humanity and the dictates of the public conscience". Does this mean, for example, that weapons the use of which is prohibited in international conflicts cannot generally be used in internal conflicts? Does it mean that prohibitions on arbitrary displacement and on the use of starvation as a method of war apply at all times, and not just in internal conflicts meeting the high threshold of Protocol II? Or does it also mean that indiscriminate attacks are prohibited at all times and not just in international conflicts? [...]

VII. ADVANTAGES AND DISADVANTAGES OF IDENTIFYING FUNDAMENTAL STANDARDS OF HUMANITY

89. The question of weighing the desirability of a statement of fundamental standards of humanity turns on a full analysis of whether existing standards are sufficient. As set out above, there are some problems with the scope and application of existing law, but more analysis is needed to identify precisely where further elaboration and clarification are needed, and to see how developments elsewhere assist in that regard.

90. Separate from the legal point, however, a key issue is the more practical point as to the impact a statement of fundamental standards of humanity would have on actually reducing or preventing abuses. In other words, such a statement should not be viewed as an end in itself.

91. Insofar as there is confusion about the application of existing rules, a statement of fundamental standards of humanity would provide a useful reference for those advocating greater respect for human rights in situations

of internal violence. This applies especially to those engaged in education and training programmes with members of armed forces. It is also likely that a statement of fundamental standards of humanity would be useful to the work of humanitarian workers involved in situations of internal violence.

92. As regards education or training programmes, the view has been expressed that a statement of fundamental standards of humanity would be an extremely useful document for explaining the basic principles of protecting human rights in situations of internal violence. The idea is that if this statement set out principles in a simple and straightforward manner, it would facilitate the process of making these principles known, rather than trying to explain all the complexities of existing law. This point might be of particular relevance as regards seeking to influence the behaviour of armed groups.

93. However, to ensure the rules are not only known but also respected is the key challenge. It seems likely that a statement of principles would depend on existing bodies for its implementation. [...]

94. The potential disadvantages of identifying fundamental standards of humanity centre on the fear that a statement of such standards might undermine existing international standards. This fear is based on a number of factors. In particular, because the original proposal involved identifying a set of *minimum* standards there was the possibility that, by implication, rights not included would be somehow diminished. Also, there is always the risk that when any new text is agreed upon it might fall below or somehow undermine existing rules. On the other hand, it is possible to guard against such results or interpretations through including specific clauses in the new text, as has been done in numerous human rights instruments. Also, there are other examples where the development of codes of conduct or statements of principles have been agreed to which do not undermine, but rather support, treaty rules. If work does proceed on identifying fundamental standards of humanity, there will be a need to ensure it does not pose a risk to existing treaty law. [...]

VIII. WHAT ARE THE FUNDAMENTAL STANDARDS OF HUMANITY?

[...]

97. [...] [T]o recognize the complexity of the task is not to cast doubt on its usefulness. Certainly, developing a compilation of existing norms, whether treaty based or customary, that apply in situations of internal violence would be a worthwhile undertaking. It would be the best means of reaching definitive conclusions on the adequacy of the existing standards. But, as indicated by the discussion above, given relevant ongoing developments in both human rights law (as regards the elaboration of crimes against humanity) and international humanitarian law (as regards the identification of customary rules and the international criminalization of some acts), it would seem that coming up with a conclusive and authoritative list at the present time would be premature. Still, a number of points can be made.

98. First, it is clear that to effectively address human rights abuses in situations of internal violence, at a minimum standard dealing with the abuses set out

in section II.B would need to be included, namely: deprivation of the right to life; torture and cruel, inhuman or degrading treatment; freedom of movement; the rights of the child; women's human rights; arbitrary deprivation of liberty and due process; and protection of the civilian population. Also, the standards would need to be stated in a way that was specific enough to be meaningful in actual situations, and yet at the same time be clear and understandable.

99. Second, the need to find rules *common* to both branches of relevant law points to one of the most interesting aspects of the whole problem - namely, the need, where appropriate, to consider a fusion of the rules. For too long, these two branches of law have operated in distinct spheres, even though both take as their starting point concern for human dignity. Of course, in some areas there are good reasons to maintain the distinctness - particularly as regards the rules regulating international armed conflicts, or internal armed conflicts of the nature of a civil war. But in situations of internal violence - where there is considerable overlap and complementarity - this distinctness can be counter-productive. One must be careful not to muddle existing mandates, or to undermine existing rules, but within these constraints there is still considerable scope for building a common framework of protection.

IX. NATURE OF A STATEMENT OF FUNDAMENTAL STANDARDS OF HUMANITY

100. This report has left open the question of the form an eventual statement of fundamental standards of humanity might take. The Sub-Commission resolution in 1994 which forwarded the Turku/Åbo Declaration on Minimum Humanitarian Standards to the Commission on Human Rights recommended its "... further elaboration and eventual adoption". To date, the resolutions adopted by the Commission have only recognized "the desirability of identifying principles", without indicating in what manner such principles might be agreed upon and adopted.

101. Previous sets of principles and standards in the human rights field have normally been developed in working groups established by the Commission on Human Rights, and then forwarded to the General Assembly for adoption through a General Assembly resolution. However, there might be other options for developing a statement of fundamental standards of humanity. Given the close relationship with issues of international humanitarian law and the ICRC's acknowledged expertise in this field, there is no doubt that the ICRC should be closely involved in any efforts to develop these standards. [...]

X. CONCLUSIONS AND SUGGESTIONS FOR FURTHER STUDY

103. The aim of this report has been to set out the various issues involved in the possible identification of fundamental standards of humanity. Where possible, tentative conclusions on certain points have been put forward; elsewhere, issues have been identified as deserving of further consultation and analysis.

104. Of necessity, an analysis of whether an elaboration of standards is required must consider the legal questions involved. To the non-lawyer this exercise

might seem a bit abstract. In concluding, therefore, it is appropriate first to reiterate and emphasize the starting point for the discussion, namely the horrific impact on the lives of millions of individuals of the many situations of internal violence which continue to plague our world. Most of the country-specific resolutions adopted by the Commission on Human Rights concern countries in which there is some degree of internal violence, and such countries figure prominently also in the reports of the Commission's various thematic rapporteurs and working groups. There is clearly a close relationship between the existence of these conflicts and human rights abuse. It is therefore timely and appropriate to look again at the tools we have at hand to prevent these abuses.

105. One of these tools is international law, and as regards internal violence we have legal standards from both human rights and humanitarian law. The picture that emerges from this initial report is that there are some problems with both branches of law. The extent to which international human rights law creates obligations on non-State armed groups is unclear, and it can be argued that some of the most important rights - for example, the right to life - as set out in international instruments lack the specificity to give them real impact in internal conflicts. On the other hand, international humanitarian law can be applied to non-State armed groups, and its rules are specific and detailed, but its application in many internal situations is hampered by troublesome threshold tests and the absence - in the treaty law - of some important protections.

106. Insofar as the development of fundamental standards of humanity can overcome these problems, it is an initiative that deserves serious attention and support. Clearly, however, the initiative needs to proceed with close attention to ongoing developments in both branches of law. Further study and activity might, among other issues, focus on the following:

(a) Examining the international legal accountability of non-State armed groups for abuses, including views as to whether a statement of fundamental standards of humanity would be an appropriate means of holding these groups accountable;

(b) Examining how relevant provisions of human rights law could be made more specific so as to ensure respect for them in situations of internal violence, and considering whether this could be accomplished through a statement of fundamental standards of humanity;

(c) Following closely developments regarding the identification of crimes against humanity and customary rules of international humanitarian law relevant to the protection of human dignity in situations of internal violence, and assessing how these developments relate to the identification of fundamental standards of humanity;

(d) Soliciting views from Governments and other relevant actors concerning the issues set out in this report, and engaging in consultations for this purpose. [...]

Document No. 41, UN, Guiding Principles on Internal Displacement

[**Source:** *Report of the Representative of the Secretary-General on Internally Displaced persons: Guidelines of Principles*, UN Doc. E/CN.4/1998/53/Add.2 (May 1998); available on http://www.ohchr.org]

Guiding Principles on Internal Displacement

INTRODUCTORY NOTE TO THE GUIDING PRINCIPLES

1. Internal displacement, affecting some 25 million people worldwide, has become increasingly recognized as one of the most tragic phenomena of the contemporary world. Often the consequence of traumatic experiences with violent conflicts, gross violations of human rights and related causes in which discrimination features significantly, displacement nearly always generates conditions of severe hardship and suffering for the affected populations. It breaks up families, cuts social and cultural ties, terminates dependable employment relationships, disrupts educational opportunities, denies access to such vital necessities as food, shelter and medicine, and exposes innocent persons to such acts of violence as attacks on camps, disappearances and rape. Whether they cluster in camps, escape into the countryside to hide from potential sources of persecution and violence or submerge into the community of the equally poor and dispossessed, the internally displaced are among the most vulnerable populations, desperately in need of protection and assistance.

2. In recent years, the international community has become increasingly aware of the plight of the internally displaced and is taking steps to address their needs. In 1992, at the request of the Commission on Human Rights, the Secretary-General of the United Nations appointed a Representative on internally displaced persons to study the causes and consequences of internal displacement, the status of the internally displaced in international law, the extent of the coverage accorded them within existing international institutional arrangements and ways in which their protection and assistance could be improved, including through dialogue with Governments and other pertinent actors.

3. Accordingly, the Representative of the Secretary-General has focused the activities of his mandate on developing appropriate normative and institutional frameworks for the protection and assistance of the internally displaced, undertaking country missions in an ongoing dialogue with Governments and others concerned, and promoting a systemic international response to the plight of internally displaced populations.

4. Since the United Nations initially drew international attention to the crisis of internal displacement, many organizations, intergovernmental and non-governmental, have broadened their mandates or scope of activities to address more effectively the needs of the internally displaced. Governments have become more responsive by acknowledging their primary responsibility of protecting and assisting affected populations under their control, and when they cannot discharge that responsibility for lack of capacity, they are

becoming less reticent to seek assistance from the international community. On the other hand, it is fair to say that the international community is more inclined than it is prepared, both normatively and institutionally, to respond effectively to the phenomenon of internal displacement.

5. One area in which the mandate of the Secretary-General's Representative has made significant progress has been in the development of a normative framework relating to all aspects of internal displacement. Working in close collaboration with a team of international legal experts, the Representative prepared a "Compilation and Analysis of Legal Norms" relevant to the needs and rights of the internally displaced and to the corresponding duties and obligations of States and the international community for their protection and assistance. The Compilation and Analysis was submitted to the Commission on Human Rights by the Representative of the Secretary-General in 1996 (E/CN.4/1996/52/Add.2).

6. It is important to note that the Office of the United Nations High Commissioner for Refugees (UNHCR) has developed a manual, based on the Compilation and Analysis, for the practical use of its staff, especially in field operations. There are also indications that other organizations and agencies will follow the example of UNHCR in making use of the document.

7. The Compilation and Analysis examines international human rights law, humanitarian law, and refugee law by analogy, and concludes that while existing law provides substantial coverage for the internally displaced, there are significant areas in which it fails to provide an adequate basis for their protection and assistance. Besides, the provisions of existing law are dispersed in a wide variety of international instruments which make them too diffused and unfocused to be effective in providing adequate protection and assistance for the internally displaced.

8. In response to the Compilation and Analysis and to remedy the deficiencies in existing law, the Commission on Human Rights and the General Assembly requested the Representative of the Secretary-General to prepare an appropriate framework for the protection and assistance of the internally displaced (see resolutions 50/195 of 22 December 1995 and 1996/52 of 19 April 1996, respectively). Accordingly, and in continued collaboration with the team of experts that had prepared the Compilation and Analysis, the drafting of guiding principles was undertaken. The Commission on Human Rights, at its fifty-third session in April 1997, adopted resolution 1997/39 in which it took note of the preparations for guiding principles and requested the Representative to report thereon to the Commission at its fifty-fourth session. The Guiding Principles on Internal Displacement, completed in 1998, are annexed to the present document.

9. The purpose of the Guiding Principles is to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection. The Principles reflect and are consistent with international human rights law and international humanitarian law. They restate the relevant principles applicable to the internally displaced, which are now widely spread out in existing instruments, clarify any grey areas that

might exist, and address the gaps identified in the Compilation and Analysis. They apply to the different phases of displacement, providing protection against arbitrary displacement, access to protection and assistance during displacement and guarantees during return or alternative settlement and reintegration. [...]

11. The Guiding Principles will enable the Representative to monitor more effectively situations of displacement and to dialogue with Governments and all pertinent actors on behalf of the internally displaced; to invite States to apply the Principles in providing protection, assistance, reintegration and development support for them; and to mobilize response by international agencies, regional intergovernmental and non-governmental organizations on the basis of the Principles. The Guiding Principles are therefore intended to be a persuasive statement that should provide not only practical guidance, but also an instrument for public policy education and consciousness-raising. By the same token, they have the potential to perform a preventive function in the urgently needed response to the global crisis of internal displacement.

12. The preparation of the Guiding Principles has benefited from the work, experience and support of many institutions and individuals. [...]

[...]

ANNEX

GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

INTRODUCTION: SCOPE AND PURPOSE

1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.

2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:

   (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;

   (b) States when faced with the phenomenon of internal displacement;

   (c) All other authorities, groups and persons in their relations with internally displaced persons; and

(d) Intergovernmental and non-governmental organizations when addressing internal displacement.

4. These Guiding Principles should be disseminated and applied as widely as possible.

SECTION I - GENERAL PRINCIPLES

Principle 1

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

Principle 2

1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.
2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

Principle 3

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.
2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

Principle 4

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

SECTION II - PRINCIPLES RELATING TO PROTECTION FROM DISPLACEMENT

Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
   (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
   (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
   (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
   (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
   (e) When it is used as a collective punishment.
3. Displacement shall last no longer than required by the circumstances.

Principle 7

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.
3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:
   (a) A specific decision shall be taken by a State authority empowered by law to order such measures;
   (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
   (c) The free and informed consent of those to be displaced shall be sought;

(d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;
(e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and
(f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

Principle 8

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

SECTION III - PRINCIPLES RELATING TO PROTECTION DURING DISPLACEMENT

Principle 10

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:
   (a) Genocide;
   (b) Murder;
   (c) Summary or arbitrary executions; and
   (d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:
   (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;
   (b) Starvation as a method of combat;
   (c) Their use to shield military objectives from attack or to shield, favour or impede military operations;
   (d) Attacks against their camps or settlements; and
   (e) The use of anti-personnel landmines.

Principle 11

1. Every human being has the right to dignity and physical, mental and moral integrity.

2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:
   (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;
   (b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children; and
   (c) Acts of violence intended to spread terror among internally displaced persons.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

Principle 12

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.
3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.
4. In no case shall internally displaced persons be taken hostage.

Principle 13

1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.
2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

Principle 14

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

Principle 15

Internally displaced persons have:
   (a) The right to seek safety in another part of the country;
   (b) The right to leave their country;
   (c) The right to seek asylum in another country; and

(d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Principle 16

1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.
2. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.
3. The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.
4. Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

Principle 17

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.
4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

Principle 18

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
   (a) Essential food and potable water;
   (b) Basic shelter and housing;
   (c) Appropriate clothing; and
   (d) Essential medical services and sanitation.

3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

Principle 19

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.

2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.

3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

Principle 20

1. Every human being has the right to recognition everywhere as a person before the law.

2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.

3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

Principle 21

1. No one shall be arbitrarily deprived of property and possessions.

2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
   (a) Pillage;
   (b) Direct or indiscriminate attacks or other acts of violence;
   (c) Being used to shield military operations or objectives;
   (d) Being made the object of reprisal; and
   (e) Being destroyed or appropriated as a form of collective punishment.

3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

Principle 22

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:
   (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
   (b) The right to seek freely opportunities for employment and to participate in economic activities;
   (c) The right to associate freely and participate equally in community affairs;
   (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
   (e) The right to communicate in a language they understand.

Principle 23

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

SECTION IV - PRINCIPLES RELATING TO HUMANITARIAN ASSISTANCE

Principle 24

1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.
2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

Principle 25

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an

offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

Principle 26

Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

Principle 27

1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.

2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

SECTION V - PRINCIPLES RELATING TO RETURN, RESETTLEMENT AND REINTEGRATION

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Principle 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent

possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

Principle 30

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

Document No. 42, UN, Guidelines for UN Forces

A. Press Release

[**Source:** *ICRC News*, 96/19, May 15, 1996.]

ICRC-UN, Guidelines for UN Forces

On 10 May in New York ICRC President Cornelio Sommaruga handed over to UN Secretary-General Boutros Boutros-Ghali a document entitled Guidelines for UN forces regarding respect for international humanitarian law. The document specifies the principles and rules of the 1949 Geneva Conventions and their 1977 Additional Protocols applicable to UN forces deployed in areas affected by armed conflicts. Until now the situation was ill-defined since it is the States, not the UN, that are party to the humanitarian law treaties. Thanks to the new guidelines, it should be possible in future to ensure than UN military operations do not have adverse consequences for war victims or certain categories of prisoners.

The guidelines, which are the result of a series of meetings of legal experts organized by the ICRC, were drafted in close cooperation with the UN services concerned and must be observed by all UN contingents, whatever the mandate involved. Their main purpose, as that of international humanitarian law as a whole, is to preserve human dignity.

The rules applicable to UN forces are essentially those prohibiting attacks on civilian property, those prohibiting or restricting certain means or methods of warfare and those stipulating that only the urgency of a wounded person's medical condition should determine the order in which he is treated.

The guidelines also stress that in all circumstances the ICRC must be notified without delay of all persons captured or detained by UN forces so that those persons can be visited by ICRC delegates and their families informed of their whereabouts.

B. Guidelines for UN Forces Regarding Respect for International Humanitarian Law

[**Source:** UN Doc. ST/SGB/1999/13 (August 6, 1999).]

Secretary-General's Bulletin
Observance by United Nations forces of international humanitarian law

The Secretary-General, for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control, promulgates the following:

Section 1: Field of application

1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.

Section 2: Application of national law

The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation.

Section 3: Status-of-forces agreement

In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement.

Section 4: Violations of international humanitarian law

In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.

Section 5: Protection of the civilian population

5.1 The United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.

5.2 Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

5.3 The United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property.

5.4 In its area of operation, the United Nations force shall avoid, to the extent feasible, locating military objectives within or near densely populated areas, and take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations. Military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives.

5.5 The United Nations force is prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscrimininate manner, as well as operations that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

5.6 The United Nations force shall not engage in reprisals against civilians or civilian objects.

Section 6: Means and methods of combat

6.1 The right of the United Nations force to choose methods and means of combat is not unlimited.

6.2 The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare; bullets which explode, expand or flatten easily in the human body; and certain explosive projectiles. The use of certain conventional weapons, such as non-detectable fragments, anti-personnel mines, booby traps and incendiary weapons, is prohibited.

6.3 The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.

6.4 The United Nations force is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering.

6.5 It is forbidden to order that there shall be no survivors.

6.6 The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. In its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage. Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited.

6.7 The United Nations force is prohibited from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies.

6.8 The United Nations force shall not make installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, the object of military operations if such operations may cause the release of dangerous forces and consequent severe losses among the civilian population.

6.9 The United Nations force shall not engage in reprisals against objects and installations protected under this section.

Section 7: Treatment of civilians and persons *hors de combat*

7.1 Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely and without any adverse distinction based on race, sex, religious convictions or any other ground. They shall be accorded full respect for their person, honour and religious and other convictions.

7.2 The following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: violence to life or physical integrity; murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishment; reprisals; the taking of hostages; rape; enforced prostitution; any form of sexual assault and humiliation and degrading treatment; enslavement; and pillage.

7.3 Women shall be especially protected against any attack, in particular against rape, enforced prostitution or any other form of indecent assault.

7.4 Children shall be the object of special respect and shall be protected against any form of indecent assault.

Section 8: Treatment of detained persons

The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the

Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*. In particular:

(a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families;
(b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone;
(c) They shall be entitled to receive food and clothing, hygiene and medical attention;
(d) They shall under no circumstances be subjected to any form of torture or ill-treatment;
(e) Women whose liberty has been restricted shall be held in quarters separated from men's quarters, and shall be under the immediate supervision of women;
(f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families;
(g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

Section 9: Protection of the wounded, the sick, and medical and relief personnel

9.1 Members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and receive the medical care and attention required by their condition, without adverse distinction. Only urgent medical reasons will authorize priority in the order of treatment to be administered.

9.2 Whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the search for and identification of the wounded, the sick and the dead left on the battlefield and allow for their collection, removal, exchange and transport.

9.3 The United Nations force shall not attack medical establishments or mobile medical units. These shall at all times be respected and protected, unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the United Nations force.

9.4 The United Nations force shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel.

9.5 The United Nations force shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units.

9.6 The United Nations force shall not engage in reprisals against the wounded, the sick or the personnel, establishments and equipment protected under this section.

9.7 The United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems. These emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross or Red Crescent emblems is prohibited.

9.8 The United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives. To this end, the force shall facilitate the work of the ICRC Central Tracing Agency.

9.9 The United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel, vehicles and premises involved in such operations.

Section 10: Entry into force

The present bulletin shall enter into force on 12 August 1999.

(*Signed*)

Kofi A. **Annan**

Secretary-General

Document No. 43, UN, The "Brahimi" Report

[**Source:** United Nations Document A/55/305-S/2000/809, *Comprehensive review of the whole question of peacekeeping operations in all their aspects*, 21 August 2000, http://www.un.org]

UNITED NATIONS - A/55/305-S/2000/809
GENERAL ASSEMBLY - SECURITY COUNCIL

21 August 2000 [...]

COMPREHENSIVE REVIEW OF THE WHOLE QUESTION OF PEACEKEEPING OPERATIONS IN ALL THEIR ASPECTS [...]

REPORT OF THE PANEL ON UNITED NATIONS PEACE OPERATIONS [...]

Executive Summary

[...] The Secretary-General has asked the Panel on United Nations Peace Operations, composed of individuals experienced in various aspects of conflict prevention, peacekeeping and peace-building, to assess the shortcomings of the existing system and to make frank, specific and realistic recommendations for change. Our recommendations focus not only on politics and strategy but also and perhaps even more so on operational and organizational areas of need.

For preventive initiatives to succeed in reducing tension and averting conflict, the Secretary-General needs clear, strong and sustained political support from Member States. Furthermore, as the United Nations has bitterly and repeatedly discovered over the last decade, no amount of good intentions can substitute for the fundamental ability to project credible force if complex peacekeeping, in particular, is to succeed. But force alone cannot create peace; it can only create the space in which peace may be built. Moreover, the changes that the Panel recommends will have no lasting impact unless Member States summon the political will to support the United Nations politically, financially and operationally to enable the United Nations to be truly credible as a force for peace.

Each of the recommendations contained in the present report is designed to remedy a serious problem in strategic direction, decision-making, rapid deployment, operational planning and support, and the use of modern information technology. [...]

I. THE NEED FOR CHANGE

1. The United Nations was founded, in the words of its Charter, in order "to save succeeding generations from the scourge of war." Meeting this challenge is the most important function of the Organization, and, to a very significant degree, the yardstick by which it is judged by the peoples it exists to serve. [...]

6. The recommendations that the Panel presents balance principle and pragmatism, while honouring the spirit and letter of the Charter of the United Nations and the respective roles of the Organization's legislative bodies. They are based on the following premises: [...]

   (e) The essential importance of the United Nations system adhering to and promoting international human rights instruments and standards and international humanitarian law in all aspects of its peace and security activities; [...]

II. DOCTRINE, STRATEGY AND DECISION-MAKING FOR PEACE OPERATIONS [...]

D. Implications for peace-building strategy

35. The Security Council and the General Assembly's Special Committee on Peace-keeping Operations have each recognized and acknowledged the importance of peace-building as integral to the success of peacekeeping operations. [...]

41. [...] The human rights components within peace operations have not always received the political and administrative support that they require, however, nor are their functions always clearly understood by other components. Thus, the Panel stresses the importance of training military, police and other civilian personnel on human rights issues and on the relevant provisions of international humanitarian law. In this respect, the Panel commends the Secretary-General's bulletin of 6 August 1999 entitled "Observance by

United Nations forces of international humanitarian law" (ST/SGB/1999/13). [*See* **Document No. 42**, UN, Guidelines for UN Forces. [*Cf.* B.] p. 861.] [...]

E. Implications for peacekeeping doctrine and strategy [...]

49. [...] Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-forstroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect and, in particularly dangerous situations, should not force United Nations contingents to cede the initiative to their attackers.

50. Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement. In some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so. Genocide in Rwanda went as far as it did in part because the international community failed to use or to reinforce the operation then on the ground in that country to oppose obvious evil. The Security Council has since established, in its resolution 1296 (2000), that the targeting of civilians in armed conflict and the denial of humanitarian access to civilian populations afflicted by war may themselves constitute threats to international peace and security and thus be triggers for Security Council action. If a United Nations peace operation is already on the ground, carrying out those actions may become its responsibility, and it should be prepared. [...]

F. Clear, credible and achievable mandates

56. As a political body, the Security Council focuses on consensus-building, even though it can take decisions with less than unanimity. But the compromises required to build consensus can be made at the expense of specificity, and the resulting ambiguity can have serious consequences in the field if the mandate is then subject to varying interpretation by different elements of a peace operation, or if local actors perceive a less than complete Council commitment to peace implementation that offers encouragement to spoilers. [...] Rather than send an operation into danger with unclear instructions, the Panel urges that the Council refrain from mandating such a mission. [...]

58. The Panel believes that the Secretariat must be able to make a strong case to the Security Council that requests for United Nations implementation of ceasefires or peace agreements need to meet certain minimum conditions before the Council commits United Nations-led forces to implement such

accords, including [...] that any agreement be consistent with prevailing international human rights standards and humanitarian law; [...]

62. Finally, the desire on the part of the Secretary- General to extend additional protection to civilians in armed conflicts and the actions of the Security Council to give United Nations peacekeepers explicit authority to protect civilians in conflict situations are positive developments. Indeed, peacekeepers - troops or police - who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with "the perception and the expectation of protection created by [an operation's] very presence" (see S/1999/1257). [...]

ANNEX III SUMMARY OF RECOMMENDATIONS

1. Preventive action

(a) The Panel endorses the recommendations of the Secretary-General with respect to conflict prevention contained in the Millennium Report and in his remarks before the Security Council's second open meeting on conflict prevention in July 2000, in particular his appeal to "all who are engaged in conflict prevention and development - the United Nations, the Bretton Woods institutions, Governments and civil society organizations - [to] address these challenges in a more integrated fashion";

(b) The Panel supports the Secretary-General's more frequent use of fact-finding missions to areas of tension, and stresses Member States' obligations, under Article 2(5) of the Charter, to give "every assistance" to such activities of the United Nations.

2. Peace-building strategy

[*See supra* D.]

(a) A small percentage of a mission's first-year budget should be made available to the representative or special representative of the Secretary-General leading the mission to fund quick impact projects in its area of operations, [...];

(b) The Panel recommends a doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments;

(c) The Panel recommends that the legislative bodies consider bringing demobilization and reintegration programmes into the assessed budgets of complex peace operations for the first phase of an operation in order to facilitate the rapid disassembly of fighting factions and reduce the likelihood of resumed conflict; [...]

4. Clear, credible and achievable mandates

[*See supra* F.] [...]

(b) The Security Council should leave in draft form resolutions authorizing missions with sizeable troop levels until such time as the Secretary-General has firm commitments of troops and other critical mission support elements, including peace-building elements, from Member States;

(c) Security Council resolutions should meet the requirements of peacekeeping operations when they deploy into potentially dangerous situations, especially the need for a clear chain of command and unity of effort;

(d) The Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates, and countries that have committed military units to an operation should have access to Secretariat briefings to the Council on matters affecting the safety and security of their personnel, especially those meetings with implications for a mission's use of force.

5. Information and strategic analysis

The Secretary-General should establish an entity, referred to here as the ECPS Information and Strategic Analysis Secretariat (EISAS), which would support the information and analysis needs of all members of ECPS; [...]

6. Transitional civil administration

The Panel recommends that the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that have transitional administration mandates, to evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use by such operations pending the reestablishment of local rule of law and local law enforcement capacity.

7. Determining deployment timelines

The United Nations should define "rapid and effective deployment capacities" as the ability, from an operational perspective, to fully deploy traditional peacekeeping operations within 30 days after the adoption of a Security Council resolution, and within 90 days in the case of complex peacekeeping operations.

8. Mission leadership

(a) The Secretary-General should systematize the method of selecting mission leaders, [...]

(b) The entire leadership of a mission should be selected and assembled at Headquarters as early as possible in order to enable their participation in key aspects of the mission planning process, for briefings on the situation in the mission area and to meet and work with their colleagues in mission leadership;

(c) The Secretariat should routinely provide the mission leadership with strategic guidance and plans for anticipating and overcoming challenges to mandate implementation; [...]

9. Military personnel

(a) Member States should be encouraged, where appropriate, to enter into partnerships with one another, within the context of the United Nations Standby Arrangements System (UNSAS), to form several coherent brigade-size forces, with necessary enabling forces, ready for effective deployment within 30 days of the adoption of a Security Council operation and within 90 days for complex peacekeeping operations;

(b) The Secretary-General should be given the authority to formally canvass Member States participating in UNSAS regarding their willingness to contribute troops to a potential operation, once it appeared likely that a ceasefire accord or agreement envisaging an implementing role for the United Nations, might be reached;

(c) The Secretariat should, as a standard practice, send a team to confirm the preparedness of each potential troop contributor to meet the provisions of the memoranda of understanding on the requisite training and equipment requirements, prior to deployment; those that do not meet the requirements must not deploy; [...]

10. Civilian police personnel

(a) Member States are encouraged to each establish a national pool of civilian police officers that would be ready for deployment to United Nations peace operations on short notice, within the context of the United Nations Standby Arrangements System;

(b) Member States are encouraged to enter into regional training partnerships for civilian police in the respective national pools, to promote a common level of preparedness in accordance with guidelines, standard operating procedures and performance standards to be promulgated by the United Nations; [...]

(e) The Panel recommends that parallel arrangements to recommendations (a), (b) [...] above be established for judicial, penal, human rights and other relevant specialists, who with specialist civilian police will make up collegial "rule of law" teams.

11. Civilian specialists

(a) The Secretariat should establish a central Internet/Intranet-based roster of pre-selected civilian candidates available to deploy to peace operations on short notice. [...]

12. Rapidly deployable capacity for public information

Additional resources should be devoted in mission budgets to public information and the associated personnel and information technology required to get an operation's message out and build effective internal communications links.

13. Logistics support and expenditure management

(a) The Secretariat should prepare a global logistics support strategy to enable rapid and effective mission deployment within the timelines

proposed and corresponding to planning assumptions established by the substantive offices of DPKO; [...]

14. Funding Headquarters support for peacekeeping operations

(a) The Panel recommends a substantial increase in resources for Headquarters support of peacekeeping operations, and urges the Secretary- General to submit a proposal to the General Assembly outlining his requirements in full;

(b) Headquarters support for peacekeeping should be treated as a core activity of the United Nations, and as such the majority of its resource requirements for this purpose should be funded through the mechanism of the regular biennial programme budget of the Organization; [...]

15. Integrated mission planning and support [...]

16. Other structural adjustments in DPKO [...]

17. Operational support for public information

A unit for operational planning and support of public information in peace operations should be established. [...]

18. Peace-building support in the Department of Political Affairs

(a) The Panel supports the Secretariat's effort to create a pilot Peace-building Unit within DPA. [...]

19. Peace operations support in the Office of the United Nations High Commissioner for Human Rights

The Panel recommends substantially enhancing the field mission planning and preparation capacity of the Office of the United Nations High Commissioner for Human Rights, with funding partly from the regular budget and partly from peace operations mission budgets.

20. Peace operations and the information age

(a) Headquarters peace and security departments need a responsibility centre to devise and oversee the implementation of common information technology strategy and training for peace operations, residing in EISAS. Mission counterparts to the responsibility centre should also be appointed to serve in the offices of the special representatives of the Secretary-General in complex peace operations to oversee the implementation of that strategy; [...]

(c) Peace operations could benefit greatly from more extensive use of geographic information systems (GIS) technology, which quickly integrates operational information with electronic maps of the mission area, for applications as diverse as demobilization, civilian policing, voter registration, human rights monitoring and reconstruction;

(d) The IT needs of mission components with unique information technology needs, such as civilian police and human rights, should

be anticipated and met more consistently in mission planning and implementation;

(e) The Panel encourages the development of web site co-management by Headquarters and the field missions, in which Headquarters would maintain oversight but individual missions would have staff authorized to produce and post web content that conforms to basic presentational standards and policy.

Document No. 44, UN, Report on Threats, Challenges and Change

[**Source:** United Nations, http://www.un.org/secureworld/report.pdf; Highlights in the original]

UNITED NATIONS, GENERAL ASSEMBLY,
DOCUMENT A/59/565,
2 DECEMBER 2004,

FIFTY-NINTH SESSION, AGENDA ITEM 55,
FOLLOW-UP TO THE OUTCOME
OF THE MILLENNIUM SUMMIT

NOTE BY THE SECRETARY-GENERAL

[...]

2. I asked Anand Panyarachun, former Prime Minister of Thailand, to chair the High-level Panel on Threats, Challenges and Change [...].

3. I asked the High -level Panel to assess current threats to international peace and security; to evaluate how our existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century.

[...]

A more secure world: our shared responsibility

Report of the High-level Panel on Threats, Challenges and Change

[...]

PART ONE
TOWARDS A NEW SECURITY CONSENSUS

[...]

II. The case for comprehensive collective security

[...]

B. The limits of self-protection

24. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats. Every State requires the cooperation of other States to make itself secure. [...]

C. Sovereignty and responsibility

29. [...] Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. [...]

D. Elements of a credible collective security system

31. To be credible and sustainable a collective security system must be effective, efficient and equitable. [...]

PART TWO
COLLECTIVE SECURITY AND THE CHALLENGE OF PREVENTION

[...]

IV. Conflict between and within States

[...]

C. Meeting the challenge of prevention

1. Better international regulatory frameworks and norms

[...]

90. In the area of legal mechanisms, there have been few more important recent developments than the Rome Statute creating the International Criminal Court. In cases of mounting conflict, early indication by the Security Council that it is carefully monitoring the conflict in question and that it is willing to use its powers under the Rome Statute might deter parties from committing crimes against humanity and violating the laws of war. **The Security Council should stand ready to use the authority it has under the Rome Statute to refer cases to the International Criminal Court.**

91. More legal mechanisms are necessary in the area of natural resources, fights over which have often been an obstacle to peace. Alarmed by the inflammatory role of natural resources in wars in Sierra Leone, Angola and the Democratic Republic of the Congo, civil society organizations and the Security Council have turned to the "naming and shaming" of, and the imposition of sanctions against, individuals and corporations involved in illicit trade, and States have made a particular attempt to restrict the sale of "conflict diamonds". [...]

92. **The United Nations should work with national authorities, international financial institutions, civil society organizations and the private sector**

to develop norms governing the management of natural resources for countries emerging from or at risk of conflict. [...]

VI. Terrorism

[...]

B. Meeting the challenge of prevention

[...]

2. Better counter-terrorism instruments

[...]

152. However, the Security Council must proceed with caution. The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions. **The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists.** [...]

4. Defining terrorism

[...]

158. Since 1945, an ever stronger set of norms and laws - including the Charter of the United Nations, the Geneva Conventions and the Rome Statute for the International Criminal Court - has regulated and constrained States' decisions to use force and their conduct in war - for example in the requirement to distinguish between combatants and civilians, to use force proportionally and to live up to basic humanitarian principles. Violations of these obligations should continue to be met with widespread condemnation and war crimes should be prosecuted.

159. The norms governing the use of force by non -State actors have not kept pace with those pertaining to States. This is not so much a legal question as a political one. Legally, virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes. Legal scholars know this, but there is a clear difference between this scattered list of conventions and little-known provisions of other treaties and the compelling normative framework, understood by all, that should surround the question of terrorism. The United Nations must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force. Lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations image. Achieving a comprehensive convention on terrorism, including a clear definition, is a political imperative.

[...]

163. **Nevertheless, we believe there is particular value in achieving a consensus definition within the General Assembly**, [...].

164. **That definition of terrorism should include the following elements**:

(a) **Recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity**;

(b) **Restatement that acts under the 12 preceding anti -terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols;**

[...]

(d) **Description of terrorism as "any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act".**

[...]

PART THREE
COLLECTIVE SECURITY AND THE USE OF FORCE

[...]

IX. Using force: rules and guidelines

[...]

A. The question of legality

[...]

1. Article 51 of the Charter of the United Nations and self-defence

188. The language of this article is restrictive: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security". However, a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent* , no other means would deflect it and the action is proportionate.
[...]

192. **We do not favour the rewriting or reinterpretation of Article 51.**

2. Chapter VII of the Charter of the United Nations and external threats

[...]

3. Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect

[...]

203. **We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.**

B. The question of legitimacy

[...]

207. **In considering whether to authorize or endorse the use of military force, the Security Council should always address - whatever other considerations it may take into account - at least the following five basic criteria of legitimacy:**

(a) ***Seriousness of threat.*** **Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force? In the case of internal threats, does it involve genocide and other large -scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?**

(b) ***Proper purpose.*** **Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?**

(c) ***Last resort.*** **Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?**

(d) ***Proportional means.*** **Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?**

(e) ***Balance of consequences.*** **Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?**

208. **The above guidelines for authorizing the use of force should be embodied in declaratory resolutions of the Security Council and General Assembly.**

[...]

X. Peace enforcement and peacekeeping capability

[...]

211. Discussion of the necessary capacities has been confused by the tendency to refer to peacekeeping missions as "Chapter VI operations" and peace enforcement missions as "Chapter VII operations" - meaning consent -based or coercion -based, respectively. [...]

212. Both characterizations are to some extent misleading. There is a distinction between operations in which the robust use of force is integral to the mission from the outset (e.g., responses to cross-border invasions or an explosion of violence, in which the recent practice has been to mandate multinational forces) and operations in which there is a reasonable expectation that force may not be needed at all (e.g., traditional peacekeeping missions monitoring and verifying a ceasefire or those assisting in implementing peace agreements, where blue helmets are still the norm).

213. But both kinds of operation need the authorization of the Security Council (Article 51 self-defence cases apart), and in peacekeeping cases as much as in peace-enforcement cases it is now the usual practice for a Chapter VII mandate to be given (even if that is not always welcomed by troop contributors). This is on the basis that even the most benign environment can turn sour [...] and that it is desirable for there to be complete certainty about the mission's capacity to respond with force, if necessary. On the other hand, the difference between Chapter VI and VII mandates can be exaggerated: there is little doubt that peacekeeping missions operating under Chapter VI (and thus operating without enforcement powers) have the right to use force in self-defence - and this right is widely understood to extend to "defence of the mission".

[...]

XII. Protecting civilians

231. In many civil wars, combatants target civilians and relief workers with impunity. Beyond direct violence, deaths from starvation, disease and the collapse of public health dwarf the numbers killed by bullets and bombs. Millions more are displaced internally or across borders. Human rights abuses and gender violence are rampant.

232. Under international law, the primary responsibility to protect civilians from suffering in war lies with belligerents - State or non -State. International humanitarian law provides minimum protection and standards applicable to the most vulnerable in situations of armed conflict, including women, children and refugees, and must be respected.

233. **All combatants must abide by the provisions of the Geneva Conventions. All Member States should sign, ratify and act on all treaties relating to the protection of civilians, such as the Genocide Convention, the Geneva Conventions, the Rome Statute of the International Criminal Court and all refugee conventions**.

234. Humanitarian aid is a vital tool for helping Governments to fulfil this responsibility. Its core purpose is to protect civilian victims, minimize their suffering and keep them alive during the conflict so that when war ends they have the opportunity to rebuild shattered lives. The provision of assistance is a necessary part of this effort. Donors must fully and equitably fund humanitarian protection and assistance operations.

235. The Secretary-General, based in part on work undertaken by the United Nations High Commissioner for Refugees and strong advocacy efforts by

non-governmental organizations, has prepared a 10-point platform for action for the protection of civilians in armed conflict. The Secretary - General's 10-point platform for action should be considered by all actors - States, NGOs and international organizations - in their efforts to protect civilians in armed conflict.

236. From this platform, particular attention should be placed on the question of access to civilians, which is routinely and often flagrantly denied. United Nations humanitarian field staff, as well as United Nations political and peacekeeping representatives, should be well trained and well supported to negotiate access. Such efforts also require better coordination of bilateral initiatives. The Security Council can use field missions and other diplomatic measures to enhance access to and protection of civilians.

237. Particularly egregious violations, such as occur when armed groups militarize refugee camps, require emphatic responses from the international community, including from the Security Council acting under Chapter VII of the Charter of the United Nations. Although the Security Council has acknowledged that such militarization is a threat to peace and security, it has not developed the capacity or shown the will to confront the problem. **The Security Council should fully implement resolution 1265 (1999) on the protection of civilians in armed conflict.**

238. Of special concern is the use of sexual violence as a weapon of conflict. The human rights components of peacekeeping operations should be given explicit mandates and sufficient resources to investigate and report on human rights violations against women. Security Council resolution 1325 (2000) on women, peace and security and the associated Independent Experts' Assessment provide important additional recommendations for the protection of women. **The Security Council, United Nations agencies and Member States should fully implement its recommendations.**

[...]

Case No. 45, UN, Secretary-General's Report on the Protection of Civilians in Armed Conflict

THE CASE

[**Source:** United Nations, S/2001/331, 30 March 2001, this report and other UN documents cited are available on http://www.un.org/documents]

REPORT OF THE SECRETARY-GENERAL TO THE SECURITY COUNCIL ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT

I. Towards a culture of protection [...]

2. [...] Recruitment and use of child soldiers, the proliferation of small arms, the indiscriminate use of landmines, large-scale forced displacement and ethnic

cleansing, the targeting of women and children, the denial of even the most basic human rights, and widespread impunity for atrocities are still all too familiar features of war. The growing number of threats to the lives of local and international staff members of international organizations and other aid groups has added one more shameful characteristic to the reality of today's conflicts.

3. The context is therefore clear: as internal armed conflicts proliferate, civilians have become the principal victims. It is now conventional to say that, in recent decades, the proportion of war victims who are civilians has leaped dramatically, to an estimated 75 per cent, and in some cases even more. I say "conventional" because the truth is that no one really knows. Relief agencies rightly devote their resources to helping the living rather than counting the dead. Whereas armies count their losses, there is no agency mandated to keep a tally of civilians killed. The victims of today's atrocious conflicts are not merely anonymous, but literally countless. To some extent, this can be explained by changes in the nature of conflict. The decline of inter-State warfare waged by regular armies has been matched by a rise in intra-State warfare waged by irregular forces. Furthermore, and particularly in conflicts with an element of ethnic or religious hatred, the affected civilians tend not to be the incidental victims of these new irregular forces; they are their principal object.

4. In September 2000, all the States Members of the Organization pledged, in the United Nations Millennium Declaration (General Assembly resolution 55/2), to expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law. Yet just as Member States have too often failed to address the calamitous impact of modern warfare on civilians, so, too, has the United Nations often been unable to respond adequately to their need for protection and assistance. My hope now is to move beyond an analysis of our past failures and to identify ways in which the international system can be strengthened to help meet the growing needs of civilians in war. [...]In the present report, I wish to focus on additional steps which Member States must take to strengthen their own capacity to protect the civilian victims of war more effectively, and on initiatives that the Security Council and other organs of the United Nations can take to complement these efforts.

5. I believe that Member States, supported by the United Nations and other actors, must work towards creating a culture of protection. In such a culture, Governments would live up to their responsibilities, armed groups would respect the recognized rules of international humanitarian law, the private sector would be conscious of the impact of its engagement in crisis areas, and Member States and international organizations would display the necessary commitment to ensuring decisive and rapid action in the face of crisis. [...]

II. Parameters of protection [...]

7. The primary responsibility for the protection of civilians rests with Governments, as set out in the guiding principles on humanitarian assistance adopted by the General Assembly in its resolution 46/182 of 19 December 1991. At

the same time, armed groups have a direct responsibility, according to Article 3 common to the four Geneva Conventions of 1949 and to customary international humanitarian law, to protect civilian populations in armed conflict. International instruments require not only Governments but also armed groups to behave responsibly in conflict situations, and to take measures to ensure the basic needs and protection of civilian populations. Where Governments do not have resources and capacities to do this unaided, it is incumbent on them to invoke the support of the international system. Protection efforts must be focused on the individual rather than the security interests of the State, whose primary function is precisely to ensure the security of its civilian population. [...]

III. Measures to enhance protection

A. Prosecution of violations of international criminal law

9. Internationally recognized standards of protection will be effectively upheld only when they are given the force of law, and when violations are regularly and reliably sanctioned. The establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda, and the adoption of the Rome Statute to establish a permanent International Criminal Court are important steps in this direction. Safe havens for mass murderers and torturers are disappearing. These developments are complemented by significant advances in international criminal law through the jurisprudence of the two ad hoc tribunals and by the rapidly growing number of ratifications of the Rome Statute. This emerging paradigm of international criminal justice confronts perpetrators of grave violations with the real possibility of prosecution for past, present and future crimes.

1. Denial of amnesty for serious crimes

10. The recent arrest, indictment and eventual sentencing of former or current heads of State or Government has allowed prosecutors to further penetrate the shield of immunity. Courts are increasingly willing to send the message that nobody is above the law. Let me therefore be clear: the granting of amnesties to those who committed serious violations of international humanitarian and criminal law is not acceptable. [...]

2. Impact of criminal justice

11. The fair prosecution and trial of individual suspects can help significantly to build confidence and facilitate reconciliation in post-conflict societies, by removing collective attributions of guilt. Well - publicized prosecutions can deter crimes in current and future conflicts. [...] Establishing courts without secure and sustained funding, and without follow-up efforts to rebuild national criminal justice systems, can do a disservice to victims of large-scale violence and undermine their confidence in justice. [...]

3. Importance of national jurisdictions

12. Despite the important role that international prosecution plays in encouraging compliance with international law, consistent enforcement depends primarily on the commitment and cooperation of national jurisdictions. The prosecution of individuals is, first and foremost, a responsibility of the State concerned. International justice can only complement those efforts when States are genuinely unable or unwilling to investigate and prosecute. In particular, a growing number of States have started to apply the principle of universal jurisdiction. The most publicized examples were the arrest by the United Kingdom of Great Britain and Northern Ireland of the former President of Chile, Augusto Pinochet, on charges of torture, at the request of Spanish authorities, and the arrest of the former President of Chad, Hissein Habré, by Senegal on similar charges. The application of this principle can be an essential stimulus for justice and reconciliation in the country of origin of the perpetrator. Its successful exercise requires closer cooperation between States, however, notably on issues of evidence and extradition. States therefore need to adapt their national legislation to the recognized standards of international humanitarian and criminal law and to ensure that they have a fair and credible judiciary.

4. Truth and reconciliation efforts

13. The experiences of Rwanda and other places have shown, however, that neither international nor national judicial systems command the necessary resources to prosecute the suspected perpetrators of conflict-related crimes, who may number in the thousands. Truth and reconciliation efforts, considered exceptional only a few years ago, have become an accepted method of overcoming a violent past. [...] Truth and reconciliation, however, should not become a substitute for individual prosecution. The objective of such efforts should be to combine the search for truth, accounting for past abuses, promotion of national reconciliation and the bolstering of an emerging democratic order. [...]

Recommendations

1. **I urge the Security Council and the General Assembly to provide, from the outset, reliable, sufficient and sustained funding for international efforts, whether existing or future international tribunals, arrangements established in the context of United Nations peace operations, or initiatives undertaken in concert with individual Member States, to bring to justice perpetrators of grave violations of international humanitarian and human rights law.**

2. **I recommend that the Security Council consider the establishment of arrangements addressing impunity and, as appropriate, for truth and reconciliation, during the crafting of peacekeeping mandates, in particular where this response has been triggered by widespread and systematic violations of international humanitarian and human rights law.**

3. **I encourage Member States to introduce or strengthen domestic legislation and arrangements providing for the investigation, prosecution and trial of those responsible for systematic and widespread violations of international criminal law. To this end, I endorse efforts aimed at supporting Member States in building capable and credible judicial institutions that are equipped to provide fair proceedings.**

B. Access to vulnerable populations

14. In many conflicts, safe and unhindered access to vulnerable civilian populations is granted only sporadically, and is often subject to conditions, delayed, or even bluntly denied. The consequences for those populations are often devastating: entire communities are deprived of even basic assistance and protection. The agony of civilians in such isolated circumstances is further exacerbated as, in modern warfare, particularly internal conflicts, civilians are often targeted as part of a political strategy. [...]
15. Because of the internal nature of most conflicts, United Nations agencies, the International Committee of the Red Cross and non-governmental organizations have increasingly had to negotiate to ensure access to those in need. [...] Common ground rules would help to make access negotiations more predictable and effective, and reduce the risk of mistakes or of agencies being played off against each other by warring parties.

1. Obtaining meaningful access

16. As a general rule, access negotiations should always have a clear objective, namely, humanitarian space providing unimpeded, timely, safe and sustained access to people in need. Access must be obtained, managed and maintained throughout a conflict by keeping the parties continuously engaged. [...]

2. Complexities on the ground

17. Despite the Security Council's repeated reaffirmation of the importance of safe and unimpeded access [...], gaining safe and regular access is a daily struggle marked by a plethora of practical concerns, including demands of conditionality - warring parties requesting their share of aid before granting access to vulnerable populations; the deliberate starving of civilians to attract food aid in order to feed combatants; or the delivery of dual- purpose items that could also serve the war effort. Under international law, displaced persons and other victims of conflict are entitled to international protection and assistance where this is not available from national authorities. However, negotiations on the ground often revolve around the practical implications: for example, the failure of warring parties to admit the delivery of certain food items because they are perceived as jeopardizing the objectives of their war effort.
18. The approach to these challenges often defines the credibility and effectiveness of the humanitarian effort. Strengthening access negotiations thus requires the development of common policies and common criteria for

engagement among aid agencies. These criteria should address clearance procedures, monitoring of delivery to minimize diffusion of goods to combatants, and efficient coordination.

3. Engaging the parties to a conflict

19. In a multi-faction conflict, such as that in the Democratic Republic of the Congo, experience has shown that, in order to gain meaningful and regular access to vulnerable populations within different combat zones, where front lines are shifting from day to day, the consent of many parties has to be obtained at the local, regional, national and international levels. [...] In most intra-State conflicts, armed groups exercise de facto control of parts of a country and the civilian population living there. Negotiating and obtaining access to those populations therefore requires the engagement of those groups.

20. Whereas Governments are sometimes concerned that such engagements might legitimize armed groups, these concerns must be balanced against the urgent need for humanitarian action. It is the obligation to preserve the physical integrity of each and every civilian within their jurisdiction, regardless of gender, ethnicity, religion or political conviction, that should guide Governments in exercising their sovereign responsibility. Where Governments are prevented from reaching civilians because they are under the control of armed groups, they must allow impartial actors to carry out their humanitarian task. Such a loss of control does not release Governments from their responsibility for all civilians within their jurisdiction.

21. Engaging armed groups in a constructive dialogue is also of vital importance for guaranteeing the security of humanitarian operations in a conflict area. Often, combatants perceive the provision of humanitarian assistance and protection to vulnerable populations as being not a neutral but rather a politically motivated act. [...] [H]umanitarian agencies, although pursuing neutral objectives enshrined in international law, are frequently perceived as partisan, and therefore become targets themselves. [...]

4. Internally displaced persons

22. Meaningful access is particularly important when reaching out to the estimated 20 to 25 million people who are displaced within the borders of their country. The plight of this exceptionally vulnerable group has gained urgency in the 1990s as their number has dramatically increased in the wake of the numerous internal armed conflicts of that decade. Forced to leave their homes, they regularly suffer from severe deprivation, lack of shelter, insecurity and discrimination. Their protection is, first and foremost, a responsibility of the relevant national authorities.

23. In many cases, however, national authorities fail to provide the necessary protection and assistance to such people or to provide safe and meaningful access for international organizations. As a result, and because there is no established system of international protection and assistance for internally displaced persons, the response to their needs has often been inconsistent and ineffective. [...]

5. Coordinated approach

25. Developing a coordinated approach to access negotiations can therefore be a matter of life and death, both for vulnerable populations and for humanitarian workers. Often, the large number of domestic and international aid agencies in a conflict area poses a challenge in itself. Driven by differing mandates and interests, international agencies often negotiate access independently, thereby diminishing the effectiveness of their own and other agencies' response. [...] It is therefore essential to develop more coordinated and creative approaches to access negotiations, for example, by pooling agency interests consistent with their mandates, and agreeing on mutually complementary sectoral negotiations. [...]

Recommendations

4. **Recalling the Security Council's recognition, in its resolution 1265 (1999), of the importance of gaining safe and unimpeded access of humanitarian personnel to civilian populations in need, I urge the Council to actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operations, and to demonstrate its willingness to act where such access is denied.**

5. **I encourage the Security Council to conduct more frequent fact-finding missions to conflict areas with a view to identifying the specific requirements for humanitarian assistance, and in particular obtaining safe and meaningful access to vulnerable populations.**

C. Separation of civilians and armed elements

28. [...] [M]assive movements of displaced populations across international borders, most frequently prompted by civil wars in the region, have altered delicate ethnic balances in neighbouring States and thereby destabilized the recipient societies. Furthermore, there is a grave risk that the movement of people - sometimes in their hundreds of thousands - alongside armed elements will undermine the security of entire subregions or regions, and thereby internationalize an initially local conflict.

29. [...] It is therefore a matter of utmost urgency to preserve, at the earliest stage possible, the civilian character of camps and settlements for displaced persons - both refugees and internally displaced - by separating civilians from armed elements that move alongside them. Such separation can prevent further aggravation of conflict, and ensure that persons fleeing persecution or war get the protection and assistance they require.

1. Impact of the mixing of displaced populations and armed elements

30. Failure to separate armed elements from civilians has led to devastating situations in and around camps and settlements. As the example of West Timor (Indonesia) shows, not separating combatants from civilians allows armed groups to take control of a camp and its population, politicizing their situation and gradually establishing a military culture within the camp. The

impact on the safety and security of both the refugees and the neighbouring local population is severe. Entire camp populations can be held hostage by militias that operate freely in the camps, spread terror, press-gang civilians, including children, into serving their forces, sexually assault and exploit women, and deliberately prevent displaced people from returning home. In addition, humanitarian aid and supplies are often diverted to these armed elements, depriving the intended civilian beneficiaries. Finally, blurred lines between the civilian and military character of camps expose civilians inside to the risk of attack by opposing forces, where camps are perceived to serve as launching pads for renewed fighting.

2. Constraints of response

31. And yet, for practical and political reasons, the response to this phenomenon has been inadequate. Host countries, which have the primary responsibility for ensuring the security of refugees on their territory, feel increasingly overburdened by the logistical, and material challenge of accommodating large influxes of population. [...] In fact, in order to avoid such strain, and in fear of being drawn into the conflict, potential host countries increasingly deny asylum by closing their borders, thereby further exacerbating the situation of displaced civilians within the conflict area. While recognizing the genuine interest of host States in preserving their neutrality in the conflict, we must be clear that it is the responsibility of States to grant asylum to distressed and persecuted populations and to ensure their protection and the provision of relief and assistance to them.

32. Humanitarian agencies, often the first and only presence on the ground in these situations, cannot identify, intern, disarm and demobilize armed elements present in refugee camps. They have neither the mandate nor the means to do so. Already, the identification of armed elements leads to enormous problems. Legally, international humanitarian law does not define fighters in internal conflicts, because Member States are reluctant to confer a formal status on those whom they consider insurgents or rebels. Practically, militia and armed elements, often attempting to hide among fleeing civilian populations, do not necessarily wear military uniforms or otherwise identify themselves. [...] The existence of part- time combatants - farmer by day, fighter by night - and the provision by civilians of basic help and shelter to combatants further obscure the issue. As a result, humanitarian operations are increasingly threatened by the lack of security in refugee camps. The murders of aid workers in West Timor (Indonesia) and Guinea are distressing illustrations. As a result, operations have had to withdraw from camps, and often an entire area, further aggravating the distress of the civilian camp population. [...]

3. Development of a toolkit

34. The potential for large population flows, mixed with armed elements, to destabilize entire regions and, eventually, to ignite an international conflict has been sadly demonstrated by events in West Africa and the Great Lakes region. I therefore believe that it is within the purview of the Security Council

to deter threats to international peace and security deriving from such population movements by supporting host States in taking appropriate and timely measures to separate civilians and armed elements. [...]

36. In addition, Member States should support the efforts of host States by providing bilateral assistance to their law and order authorities in establishing adequate security arrangements in camps, so as to deter infiltration by armed elements. As a first step, assistance in locating refugee camps and settlements at a significant distance from the border would help to prevent militarization. [...]

Recommendation

6. **I encourage the Security Council to further develop the concept of regional approaches to regional and subregional crises, in particular when formulating mandates.**

7. I **further encourage the Security Council to support the development of clear criteria and procedures for the identification and separation of armed elements in situations of massive population displacement.**

D. Media and information in conflict situations

38. The misuse of information can have deadly consequences in armed conflicts, just as information correctly employed can be life-saving. The "hate media" that were used to incite genocide in Rwanda are an extreme example of the way information can be manipulated to foment conflict and incite mass violence. Hate speech, misinformation and hostile propaganda continue to be used as blunt instruments against civilians, triggering ethnic violence and forcing displacement. Preventing such activities and ensuring that accurate information is disseminated, is thus an essential part of the work of protecting civilians in armed conflict. Impartial information on conflicts, zones of combat, the location of minefields and the availability of humanitarian assistance, can be as vital a requirement for distressed populations caught in areas of violent upheaval as shelter, food, water and medical services.

1. Countering hate media used to incite violence [...]

40. The best antidote to hate speech and incitement to violence is the development of free and independent media serving the needs of all parts of society. [...]

2. Use of media and information in support of humanitarian operations

42. In the global information age, giving victims a voice is essential for mobilizing the support necessary to preserve and improve the quality of human life. While recognizing that at times massive media campaigns can distort policy priorities, reliable media accounts and adequate information management are an essential basis for decisions by Governments, donors, international organizations and non-governmental organizations.

43. The awareness of even distant events allows informed assessments and helps, in particular, humanitarian agencies to shape an appropriate response before going into a conflict area. Concrete and verified information about massive displacements of people, security conditions, and violations of international humanitarian and human rights law can be vital for distressed populations and international aid workers alike. [...]

3. Protection of journalists

45. Many initiatives rely on the courage and commitment of journalists in conflict areas. Their protection from harassment, intimidation and threats must therefore be of concern to all. [...]

Recommendation

8. **I recommend that the Security Council make provision for the regular integration in mission mandates of media monitoring mechanisms that would ensure the effective monitoring, reporting and documenting of the incidence and origins of "hate media". Such mechanisms would involve relevant information stakeholders from within the United Nations and other relevant international organizations, expert non-governmental organizations, and representatives of independent local media.**

IV. Entities providing protection

46. [...] [T]he number of actors involved in rendering assistance and protection has significantly expanded: new actors have entered the stage and previously overlooked actors have gained greater importance. Although often profoundly differing in their resources, mandates, philosophies and interests, they can enhance our capacity to respond to violent conflict by providing additional resources, new approaches and comparative advantages. Faced with the increasingly opaque web of local and global politics, economic interests and criminal activity that characterizes many of today's conflicts, we must make the best use of organizations' limited resources by engaging all relevant actors in our work to improve the protection of civilians.

A. Entities bearing primary responsibility

1. Governments

47. International efforts to protect civilians can only complement the efforts of Governments. [...] Where a Government is prevented from protecting its civilians, for lack of either resources or de facto control over part of its territory, it may need to seek the support of the international system, which has been established for precisely this purpose. Regrettably, in times of conflict, many Governments are unwilling to live up to this responsibility; in fact, they often constitute the major impediment to any meaningful humanitarian assistance and protection. This interface between national responsibility and international support continues to pose a major challenge to the international community.

2. Armed groups

48. The recent prevalence of civil wars has drawn increasing attention to the potential role of armed groups that are parties to the conflict in protecting civilian populations. In most intra-State conflicts armed groups have gained control over part of a country's territory and the population living there. Again and again, however, we see them misuse their power by attacking defenceless civilians, in blatant disregard of international humanitarian law. I would therefore like to recall the prohibition against targeting civilians and conducting indiscriminate attacks on civilians, enshrined in customary international humanitarian law, which is binding not only on States and their Governments but equally and directly so on armed groups that are parties to the conflict, as stated in article 3 common to the Geneva Conventions of 1949. The practice of the two ad hoc tribunals and the statute of the International Criminal Court have underlined the principle of direct responsibility of armed groups for violations of international humanitarian law.

49. Experience has shown, however, that many armed groups deliberately operate outside the recognized normative and ethical framework in furtherance of their objectives. In order to promote respect for international humanitarian and human rights law in these situations and to facilitate the necessary provision of humanitarian assistance and protection to vulnerable populations, it is indispensable to engage these groups in a structured dialogue. In this respect, I welcome the growing tendency of the Security Council to address all parties to armed conflicts (see resolution 1261 (1999)). It is important that aid agencies reaffirm the fundamental principles of international humanitarian and human rights law in their codes of conduct and in any agreements they conclude with actors on the ground. Contacts with armed groups should be neutral and should not affect their legitimacy or the legitimacy of their claims. [...]

Recommendations

9. **In its resolutions the Security Council should emphasize the direct responsibility of armed groups under international humanitarian law. Given the nature of contemporary armed conflict, protecting civilians requires the engagement of armed groups in a dialogue aimed at facilitating the provision of humanitarian assistance and protection.**

10. **Many armed groups have neither developed a military doctrine nor otherwise incorporated the recognized principles of international humanitarian law in their mode of operation. I therefore urge Member States and donors to support efforts to disseminate information on international humanitarian and human rights law to armed groups and initiatives to enhance their practical understanding of the implications of those rules.**

B. Complementarity of other entities

51. While the primary responsibility for the protection of civilians rests with Governments, in places where the Government is unable or unwilling to fulfil its obligations the international community is coming to accept its own

responsibilities. The United Nations, including in particular the Security Council, needs to strengthen its role in this regard by more actively engaging a range of relevant actors. [...]

Recommendation

11. **I recommend that the Security Council develop a regular exchange with the General Assembly and other organs of the United Nations on issues pertaining to the protection of civilians in armed conflict. I suggest that the President of the General Assembly use the monthly meeting with the President of the Security Council to alert the Council to situations in which action might be required.**

1. Civil society

(a) Non-governmental organizations

53. Recent years have seen a considerable growth in the number and influence of national and transnational non-governmental organizations. Thanks to the global reach of the media and the possibilities of information technology, above all the Internet, non-governmental organizations are now better placed to form coalitions, organize and mobilize cohesive support on a global scale. In particular, non-governmental organizations have proved that they can make a significant impact on public policy and international law. In many conflicts non-governmental organizations are among the first to bear witness to violations of international humanitarian and human rights law, to conduct rigorous assessments of the humanitarian situation on the ground, and to solicit a coherent international response. By doing so, they often succeed in raising public awareness of a conflict, and thereby make political leaders act decisively in the face of crisis.

54. On the ground, non-governmental organizations are the daily and indispensable partners of the United Nations in providing humanitarian relief and assistance to vulnerable people. Their presence among the local population often imparts a measure of protection, not least in areas where minorities are living. Just like United Nations personnel, however, their national and international staff have more and more become the target of attack. [...] Finally, non-governmental organizations play an important and active role in negotiating humanitarian corridors and access to distressed populations, and, in some cases, in bringing warring parties to the negotiation table.

55. It is essential that Member States, the United Nations and other international organizations and non- governmental organizations, better understand each other's comparative advantages as a first step towards working more effectively together. [...]

56. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, of 1997, and the Rome Statute establishing an International Criminal Court a year later are examples of the power of international civil society to work with Governments to achieve a legislative goal which can help to protect civilians in armed conflict.

(b) Domestic civil society

57. Domestic civil society represents the basic source of protection, especially when all other layers of protection fail. Civil society in this context refers not only to local non-governmental organizations and human rights groups, but also to religious congregations, charities, universities, trade unions, legal associations, independent activists and human rights defenders, families, clans and more. We must continue to reach out and build partnerships with these actors, and employ their knowledge of the local context, their skill at operating in conflict zones, and their sensitivity to the needs of local populations and to local cultural norms. The funding and training of these actors is therefore an important investment. In particular, partnerships between international and domestic civil society must be strengthened in negotiating access, monitoring abuse, especially where international monitoring is not possible, and facilitating dialogue with political actors on the ground. Finally, domestic civil society actors are often best equipped to promote awareness of and respect for international law within the conflict zone.

58. International actors must make sure that displaced communities are given a say in decisions that affect them. Displaced communities are not passive. [...]

(c) Women, children and youth

59. Tragically, women and children are the principal victims of armed conflict. Women are vulnerable to sexual violence, trafficking and mutilation, whether at home, in flight or in camps for displaced populations. Yet women also play a prominent role in rebuilding war-torn societies. Women's roles as mediators and as a primary force of economic activity during armed conflict are still underexamined and underutilized. [...]

60. Children too, besides being victimized as child soldiers and in many other ways during armed conflict, have a role to play in building a more stable future for war-torn countries. [...] Both UNICEF and my Special Representative for Children and Armed Conflict have spoken repeatedly of the need to ensure the participation of adolescents in humanitarian responses and peace-building activities. [...]

(d) Private sector

61. With almost 96 per cent of the private sector engaged in the manufacturing of civilian goods and services, the private sector has a vested interest in peace-building and economic stability, and in complementing rather than obstructing humanitarian efforts. Not all businesses, however, seek to be helpful or socially responsible. The negative role of foreign businesses in the diamond industry in Angola and Sierra Leone demonstrates this fact. The impact of the pursuit of economic interests in conflict areas has come under increasingly critical scrutiny. Corporations have been accused of complicity with human rights abuses, and corporate royalties have continued to fuel wars. It has become common knowledge that by selling diamonds and other valuable minerals, belligerents can supply themselves with small arms and light weapons,

thereby prolonging and intensifying the fighting and the suffering of civilians. It is therefore of critical importance that the United Nations continues to promote the exercise of responsible investment in crisis areas, by building upon and expanding its partnership with the private sector.

Recommendations

12. **I encourage the Security Council to continue investigating the linkages between illicit trade in natural resources and the conduct of war and to urge Member States and regional organizations to take appropriate measures against corporate actors, individuals and entities involved in illicit trafficking in natural resources and small arms that may further fuel conflicts.**

13. **I urge Member States to adopt and enforce executive and legislative measures to prevent private sector actors within their jurisdiction from engaging in commercial activities with parties to armed conflict that might result in or contribute to systematic violations of international humanitarian and human rights law.**

2. Regional organizations

62. In recent years, the United Nations has increasingly been engaged in building partnerships, on issues pertaining to the protection of civilians, with regional and intergovernmental organizations, including the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of African Unity, the Economic Community of West African States, the Southern African Development Community, the Association of Southeast Asian Nations, the League of Arab States, the Organization of the Islamic Conference, and the Inter-American Commission on Human Rights. [...]

Recommendation

14. **I encourage the Security Council to establish a more regular cooperation with regional organizations and arrangements to ensure informed decision-making, the integration of additional resources, and the use of their comparative advantages. Such cooperation should include the establishment of a regular regional reporting mechanism, and briefings, for the Security Council. Future high-level consultations between the United Nations and regional organizations will provide a welcome opportunity to further develop cooperation on strengthening the protection of civilians in armed conflict.**

V. Final observations

64. The instruments, political and legal, now available for the protection of civilians in armed conflict are in urgent need of updating. They were developed in a world where State actors were overwhelmingly dominant, and they reflect that fact. Similarly, the practice of the United Nations was, at its inception, almost exclusively focused on the interaction of Member States.

65. New mechanisms and strategies are required to deal with changed circumstances. The forms of conflict most prevalent in the world today are internal - communal violence, ethnic cleansing, terrorism, private wars financed by the international trade in diamonds or oil - and involve a proliferation of armed groups. These circumstances reflect, to varying degrees, the erosion of the central role of the State in world affairs. While civilians have been the principal victims of these changes, it is wrong to say that the new order is entirely hostile to the protection of civilians. There are opportunities which can be seized, such as the global reach of the media and of new information technologies; the growing influence of civil society organizations and non-governmental organizations; the inter-dependence of the global economy; and the reach of international commerce.

66. Whether we are able to establish the culture of protection to which I referred at the beginning of this report will largely depend on the extent to which the United Nations, and the international community at large, are able to engage with the changed world. Is there enough will to strengthen the criminal justice system - both internationally and within national jurisdictions? Is there willingness to engage with armed groups, as the majority of armed conflicts occur within the borders of States? Will we be able to harness the potential of the media and the Internet? Will we build effective partnerships with civil society, non- governmental and regional organizations, and the private sector? These are not abstract questions; they are questions which emerge daily in the struggle to reduce the suffering of civilians in conflict and which, if they are to be answered in the affirmative, will at a minimum require Member States to take the specific steps enumerated in this and my previous report.

67. To this end, I would like to draw the Council's attention to a matter of particular concern. The present report is the second in a series. Some 18 months have passed since I submitted my first report on the protection of civilians in armed conflict. I regret to note that only a few of its 40 recommendations are so far being implemented. Nevertheless, the present report adds a further set of 14 recommendations whose implementation I consider essential if a real improvement in protection is to be achieved. Reports and recommendations are no substitute for effective action. The primary responsibility for the protection of civilians falls on Governments and armed groups involved in conflict situations. Where they do not honour these responsibilities, it is up to the Security Council to take action. [...] I urge the members of the Security Council to review progress in implementing the recommendations made in this and the previous report. Further reports can have meaning when there is clear evidence that their recommendations are effecting real progress towards their goal. By shifting the focus to implementation of recommendations already agreed upon, it should be possible to ensure that future efforts will be more effective in bringing genuine relief and protection to civilians in armed conflict. [...]

DISCUSSION

[Though some references to Geneva Conventions and Additional Protocols are mentioned below, you also may find information to answer these questions within, among others, the Statute of the International Criminal Court, **Case No. 15**, p. 608, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, available on http://www.unhcr.ch, and the Optional Protocol on the Involvement of Children in Armed Conflict, **Document No. 16**, p. 636.]

1. How would you describe "today's conflicts" mentioned by the Secretary-General in paragraph 2 of his Report? Are today's conflicts more deadly than conflicts of the past? Or more unacceptable because of the increasing proportion of civilian casualties? Does this unacceptable proportion of civilian casualties only concern internal and/or ethnic-oriented conflicts?

2. a. From the point of view of international law, what is the status of armed groups? Are they subjects of international law? At least of international humanitarian law (IHL)? Does such status confer any legitimacy upon them? Do negotiations or talks with armed groups confer on them a specific legal status or provide them with some kind of legitimacy? What does IHL say about the legal status of armed groups? (*Cf.* Art. 3 common to the Conventions and Art. 3 of Protocol II.)

   b. Can they be subjects of international law, and, thus, parties to treaties (peace treaties, IHL treaties, etc.)? How can they be bound by rules of international law? Does IHL explicitly contain rules directly applicable to armed groups? What are the obligations under IHL binding armed groups in non-international armed conflicts? What is the importance of customary International Humanitarian Law concerning the law of non-international armed conflicts? How can an armed group express its intention to comply with the rules of IHL in international or non-international armed conflicts? (*Cf.* Art. 3 common to the Conventions and Art. 96 (3) of Protocol I.)

3. a. Do you agree with the Secretary-General that the prosecution of war criminals is a good method to protect the civilian population? Especially during non-international armed conflicts, do you believe that people responsible for grave breaches of IHL think of and/or fear potential future judicial consequences for their acts? Is prosecution in post-conflict situations a good method to prevent future violations of IHL during a conflict? To promote reconciliation?

   b. Is amnesty foreseen by IHL? In what circumstances? Is amnesty acceptable for grave breaches of IHL? If not, then for what type of crimes? How would you classify illegal behaviour that can be granted amnesty and that that cannot? (*Cf.* Art. 6 (5) of Protocol II.)

   c. Isn't it contradictory to set up, within one post-conflict situation, both a judicial prosecution system and a truth and reconciliation commission? How should the two institutions interact? How do you determine those who should be prosecuted and those who should be heard before the truth and reconciliation

commission? What is the best system for the protection of civilians? For conflict prevention? For the status of the victims, their interests and their rights?

4. a. What are the rules of IHL concerning the civilian population's right to receive humanitarian assistance? What are the specific rules concerning the access of humanitarian organizations to vulnerable populations? The protection of humanitarian staff and vehicles? In case of international armed conflict? In case of non-international armed conflict? (*Cf.* Arts. 19-26, 33-37, 39-43 and 53-54 of Convention I; Arts. 22-27, 34 and 36-43 of Convention II; Arts. 18, 21-23, 55-56 and 59 of Convention IV; Arts. 12-16, 18, 21-23 and 69-70 of Protocol I; Arts. 9-12 and 18 (2) of Protocol II.)

   b. What is the importance of neutrality for a humanitarian organization? Is the ICRC the only neutral and independent organization? What are the differences between the ICRC and other international or non-governmental humanitarian organizations? What are the advantages and shortcomings of the multiplication of humanitarian organizations, at the international and national or local levels?

   c. What do you think about the complexities of humanitarian operations on the ground as described in this Report (para. 17)? Should humanitarian organizations accept conditions such as giving a certain part of the aid to a warring party? If yes, is this behaviour not fuelling the conflict and a breach of neutrality? If no, is this behaviour not equivalent to abandoning the starving population?

   d. Is the deliberate starving of civilians forbidden by IHL? In international armed conflicts? In non-international armed conflicts? Is it a war crime? A crime against humanity? (*Cf.* Art. 54 of Protocol I and Art. 14 of Protocol II.)

5. a. How does IHL protect internally displaced persons (IDP) and refugees? Are the rules the same for international and non-international armed conflicts? Can a fighter be granted refugee status? A fighter who never committed violations of IHL? Who is responsible for granting refugee status? (*Cf.* Arts. 23 and 35-46 of Convention IV and Arts. 70 and 73 of Protocol I.)

   b. Who is responsible for the separation of civilians from armed elements in refugee camps? In IDP camps? The UNHCR, the international community (peace forces, etc.), the country of origin, the country of asylum, the ICRC, other organizations? Is this separation a rule of international law? Of refugee law? Of IHL?

   c. Is there an obligation for a third country to grant asylum to civilians fleeing a conflict in their country of origin? Might it not be a threat to that neighbouring country's security? Is there an obligation for the international community and/or the UNHCR to help the country of asylum to cope with the arrival of refugees?

6. Taking into account the important role of certain media in warfare, would you consider media infrastructures as legitimate military targets? Only if that media is spreading hate and inciting violence? Who can decide if media is "hate media"? What about the staff working in "hate media" inciting the commission of acts of violence? Are they legitimate targets? What about genuine journalists who are

doing their job in a conflict situation? What is the status of those journalists, in general, under IHL? Is their protection under IHL sufficient? (*Cf.* Art. 4 (A) (4) of Convention III and Arts. 52 and 79 of Protocol I.)

7. What protection is provided by IHL to women and children? In international and non-international armed conflict? What are the specific rules concerning child recruitment and child soldiers? What kind of rules could increase their protection? (*Cf.* Art. 12 of Convention I; Art. 12 of Convention II; Arts. 14, 25, 88, 97 and 108 of Convention III; Arts. 14, 16-17, 21-27, 38, 50, 76, 82, 85, 89, 91, 94, 97, 124, 127 and 132 of Convention IV; Arts. 70 and 75-78 of Protocol I; Arts. 4, 5 (2) and 6 (4) of Protocol II.)

8. a. What is the responsibility of private companies which finance the conflict indirectly through the trade of diamonds, for instance, or directly facilitate it by providing weapons to warring parties? What commercial activities with parties to armed conflict result in or contribute to violations of IHL? Every activity facilitating the continuation of the conflict? At least if the company engaged knows that violations of IHL are committed in that conflict? Or must the commercial activity itself be related to violations of IHL? Must the company know about the violations and have intent to contribute to them?

   b. Could the personnel of such companies engage their individual criminal responsibility and be prosecuted for war crimes committed by armed groups they are supporting?

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion

THE CASE

[**Source:** Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep. 1996, p. 226; available on http://www.icj-cij.org]

"THE COURT [...]

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been requested is set forth in resolution 49/75 K adopted by the General Assembly of the United Nations [...] on December 15, 1994. [...], the English text of which [...] reads as follows:

   "The General Assembly, [...]

   Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?"' [...]

13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a "legal question" within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions

> "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character" (*Western Sahara, Advisory Opinion*, I.C.J. *Reports 1975*, p. 18, para. 15).

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law. [...]

15. [...] Certain States have however expressed the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write "scenarios", to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation. [...]

* * *

24. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights. [...]

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." [...]

25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary

deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. [...]

27. [...] [S]ome States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"; and the Convention of May 18, 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have "widespread, long-lasting or severe effects" on the environment (Art. 1). [...]

28. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof.

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. [...] The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

"Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law". Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution "*[a]ppeals* to all States that have not yet done so to consider becoming parties to the relevant international conventions." [...]

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

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34. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seized, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

* *

35. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons.

The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its

very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

* * *

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and use of force. [...]

39. [...] A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.

40. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self defence. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (I.C.J. Reports 1986*, p. 94, para. 176): "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law". [...]

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be

lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States [...] contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality. [...]

51. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons per se; it will then examine the question put to it in the light of the law applicable in armed conflict proper, *i.e.* the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

* *

52. [...] State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.

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53. The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect.

54. In this regard, the argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. In that case, they would be prohibited under:

    a) the Second Hague Declaration of July 29, 1899, which prohibits "the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases";

    (b) Article 23 *(a)* of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of October 18, 1907, whereby "it is especially forbidden: ...to employ poison or poisoned weapons"; and

    (c) The Geneva Protocol of June 17, 1925 which prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices".

55. The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by "poison or poisoned weapons" and that different interpretations exist on the issue. Nor does the 1925

Protocol specify the meaning to be given to the term "analogous materials or devices". The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

56. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments.[...]. Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction. [...]

62. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:

(a) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);

(b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and

(c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

63. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court moreover notes the signing, even more recently, on December 15, 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, and on April 11, 1996, at Cairo, of a treaty on the creation of a nuclear-weapons-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

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64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be "looked for primarily in the actual practice and opinio juris of States" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgement, I.C.J. Reports 1985*, p. 29, para. 27).

65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. [...] [T]he Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of November 24, 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. [...]

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.

71. Examined in their totality, [...] several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions;[...] they [...] fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons. [...]

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of

resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

* *

74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" - as they were traditionally called - were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has - without calling into question the longstanding principles and rules of international law - rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing "non-detectable fragments", of other types of "mines, booby traps and other devices", and of "incendiary weapons", was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on "mines, booby traps

and other devices" have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.

77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable". The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

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

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgement of April 9, 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or

not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (International Military Tribunal, *Trial of the Major War Criminals*, November 14, 1945 - October 1, 1946, Nuremberg, 1947, Vol. 1, p. 254).

81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated: [...]

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of August 12, 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945."

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States. [...]

84. Nor is there any need for the Court elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise. [...]

86. [...] [N]uclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons

aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. [...]

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

"Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons" (Russian Federation, CR 95/29, p. 52);

"So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*" (United Kingdom, CR 95/34, p. 45); and

"The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons - just as it governs the use of conventional weapons" (United States of America, CR 95/34, p. 85.)

87. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons. [...]

90. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial. [...]

94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict - at the heart of which is the overriding consideration of humanity - make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to

which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

[...]

105. For these reasons,

THE COURT,

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion; [...]

(2) *Replies* in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Shahabuddeen, Weeramantry, Koroma.

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

IN FAVOUR: *President* Bedjaoui; *Judges* Ranjeva, Herczegh, Shi, Fleischhauer, Vereschetin, Ferrari Bravo;

AGAINST: *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

DISCUSSION

1. *paras. 74-87:* Is IHL applicable to the use of nuclear weapons? Are there any exceptions?
   a. Do the rules of customary IHL simply "indicate the normal conduct and behaviour expected from States" (para. 82) or are they binding on States? Even for the use of nuclear weapons?
   b. Are the Geneva and Hague Conventions applicable to the use of nuclear weapons only insofar as they are customary?
   c. Can you imagine a specific use of nuclear weapons not prohibited by the principles referred to in para. 78 nor by the treaties qualified as customary in para. 79, but which becomes unlawful because of the Martens clause? Is it

because of the Martens clause that IHL covers the use of nuclear weapons, although no specific provision on those weapons exists?

d. Is Protocol I applicable to the use of nuclear weapons? Why should it not be? Are only the rules of Protocol I that are customary applicable to the use of nuclear weapons? Only the rules which were already customary in 1977, when Protocol I was adopted? Or also those which have become customary in the meantime? Has customary IHL developed since 1977? Are those new rules of customary IHL applicable to the use of nuclear weapons? Even the rules which became customary under the influence of Protocol I?

2. *paras. 94-97, 105 (2) E:* Does IHL prohibit the use of nuclear weapons in every circumstance? Does the Court answer this question?

a. Is the Court unable to conclude definitively due to doubts on the law or doubts on the facts (*i.e.*, because it cannot exclude the possibility of a situation arising in which nuclear weapons are so clearly directed at a military objective and their effects limited to that objective - or in which the civilian collateral damage is not disproportionate - that their use conforms to all rules of IHL)?

b. Does the Court consider that nuclear weapons may be used "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"?

aa. Has the Court doubts whether they may be used in that circumstance? If the Court holds that the use of nuclear weapons "would generally be contrary to" IHL, but that it cannot exclude that it is lawful in that extreme circumstance, is not the court, in fact, admitting that violations of IHL may be lawful in that extreme circumstance? Do such acts under that extreme circumstance become lawful under IHL or does *ius ad bellum* then override *ius in bello*?

bb. May a belligerent torture prisoners of war, execute wounded on the battlefield, or transport weapons in ambulances marked with the red cross emblem "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"? Does IHL have to be respected in self-defence? Does IHL have to be respected even "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"? Has the International Court of Justice doubts that the answer is affirmative? What would be the consequences of a negative answer for IHL?

cc. Who decides whether there is "an extreme circumstance of self-defence, in which the very survival of a State is at stake"? What is the likely reaction of the adversary of a State violating IHL "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"?

c. How do you explain the Court's division in answering the core question in *para. 105 (2) E* and that it seems to confuse *ius ad bellum* and *ius in bello* in its answer? What would the consequences for the Court and for IHL have been if the Court had given a positive or a negative answer? Would it have been better for IHL if the Court had concluded that the use of nuclear weapons may be lawful under IHL rather than concluding that it is generally

unlawful but may be justified "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"?

3. *para. 25:* Is the right to life protected in armed conflicts only by IHL or also by International Human Rights Law? Is not the right to life non-derogable under International Human Rights Law while IHL admits "the right to kill" combatants on the battlefield? Can the right to life be invoked against a specific belligerent act in an armed conflict before the UN Human Rights Committee (called upon to monitor the implementation of the UN Covenant on Civil and Political Rights) (See the Commission on Human Rights web page, http://www.ohchr.org)?

4. *paras. 27-33:* Is international environmental law applicable in armed conflicts?
   a. Are the general treaties and customary rules on the protection of the environment applicable in armed conflicts?
   b. Is the prohibition contained in Art. 35 (3) of Protocol I simply "properly to be taken into account" when "assessing whether an action is in conformity with the principles of necessity and proportionality", or must it be respected in all circumstances? Even in the exercise of the right of self-defence?
   c. Are the principles of necessity and proportionality mentioned in para. 30 those of IHL? Or does this paragraph only concern *ius ad bellum*? Or does it mix up *ius ad bellum* and *ius in bello*?

5. *para. 43:* Is the principle of proportionality referred to in para. 43 (and the values to be taken into account) the same as in Art. 51 (5) (b) of Protocol I?

6. *para. 55:* Why are nuclear weapons not poisonous in the sense of the prohibition of poisonous weapons in IHL? Because poison operates through a chemical process and radioactivity is a physical process?

7. *paras. 64-73:* Does the fact that nuclear weapons have never been used since 1945 prove a customary law prohibition of the use of nuclear weapons, particularly when many armed conflicts have been fought since then, including those in exercise of the right to self-defence, some of which were lost by States possessing nuclear weapons?

8. Which aspects of this Advisory Opinion are helpful or harmful to IHL or to the victims of armed conflicts? Would it have been preferable if this opinion had never been requested? Does this opinion show a general direction in which contemporary international law is developping, and what does this direction mean for IHL?

VI. National Legislation

Case No. 47, Switzerland, Military Penal Code

THE CASE

A. The Code

[**Source:** *Recueil systématique du droit fédéral*, 321.0 at the following website: http://www.admin.ch/ch/f/rs/321_0/index.html; unofficial translation.]

MILITARY PENAL CODE

Federal Law of 13 June 1927 (as of June 1, 2004)

[...]

Article 2

The following shall be subject to military penal law:

1. Persons required to perform military service

   [...]

9. Civilians who, during an armed conflict, are guilty of violations of international law (Articles 108 to 114).

   [...]

Article 3

In the case of active service, the following shall also be subject to military penal law by decision of the Federal Council and to the extent determined by the latter:

[...]

4. Military internees of belligerent States who belong to the latter's armed forces, militias or volunteer corps, including members of organized resistance movements; civilian internees and refugees under the army's responsibility;

   [...]

Article 4

In wartime, the following shall be subject to military penal law in addition to the persons referred to in Articles 2 and 3:

1. Persons who service the armed forces without directly forming part thereof.

   [...]

3. Prisoners of war, in respect of offences set out in the present Code and committed either in Switzerland or abroad, in wartime and prior to the commencement of their

captivity, against the Swiss State or army or against persons belonging to the Swiss army;

4. Enemy negotiators and persons who accompany them, where they abuse their position in order to commit an offence;

5. Civilian internees in war zones or occupied territory.

[...]

Article 9

4. Conditions regarding the *locus delicti*

1. This code shall apply to offences committed in Switzerland and to those which have been committed abroad.

1bis [adopted on 19 December 2003 and entered into force on 1 June, 2004] It shall apply to the persons referred to in Article 2, paragraph 9, who are aliens and who have committed violations of international law (Articles 108 to 114) abroad, in the course of an armed conflict, when they:

(a) Are present in Switzerland;

(b) Have a close connection with Switzerland;

(c) Cannot be extradited or handed over to an international criminal tribunal.

[...]

Chapter VI: Violations of international law committed in the event of armed conflict

Article 108: Scope

1. The provisions of this Chapter shall apply in situations of declared war or other armed conflicts between two or more States; these shall include violations of neutrality and the use of force to counter such violations.

2. Violations of international agreements shall also be punishable where said agreements provide for a more extensive field of application.

Article 109: Violation of the laws of war

1. Any person who contravenes the stipulations of international treaties on the conduct of hostilities and on the protection of persons and property, any person who violates other recognized laws and customs of war, shall, except where more stringent provisions apply, be punished by imprisonment. In serious cases the penalty shall be long-term imprisonment.

2. Lesser offences shall be punished by disciplinary measures.

Article 110: Misuse of an international emblem

Any person who misuses the emblem of the red cross, the red crescent or the red lion and sun or the shield marking cultural property, or wrongfully avails himself of the protection afforded by said emblem or shield, in order to prepare or commit hostile acts shall be punished by imprisonment. In serious cases the penalty shall be long-term imprisonment.

Article 111: Hostile acts against persons and objects protected by an international organization

1. Any person who engages in hostile acts against persons placed under the protection of the red cross, the red crescent, the red lion and sun or the shield marking cultural property, or who prevents such persons from discharging their functions, any person who destroys or damages objects placed under the protection of the red cross, the red crescent or the red lion and sun, any person who unlawfully destroys or damages cultural property or objects placed under the protection of the shield marking cultural property, shall be punished by imprisonment. In serious cases the penalty shall be long-term imprisonment.

2. Lesser offences shall be punished by disciplinary measures.

Article 112: Failure to discharge duties towards enemies

Any person who kills or injures an enemy who has surrendered or otherwise ceased to defend himself, any person who mutilates the dead body of an enemy, shall be punished by imprisonment. In serious cases the penalty shall be long-term imprisonment.

[...]

Article 114: Offences committed against a negotiator

Any person who ill-treats, abuses or holds without due cause an enemy negotiator or a person accompanying the latter shall be punished by imprisonment.

[...]

B. Explanations given to the National Council by Samuel Schmid, Federal Councillor, on 15 December 2003

[**Source:** *Bulletin officiel*, Conseil National (National Council), 2003, pp. 1987-1988; unofficial translation.]

What I am describing in more substantial detail and what has already been discussed in particular in the Commission, are some examples of what is understood by this [term]. First, any person who is resident in, or whose life centres on, Switzerland has a close connection with Switzerland. That much is clear. These people include inter alia asylum-seekers, asylum-seekers whose application has been rejected and refugees. These persons have intentionally entered Switzerland in order to seek refuge here. They ought to be covered by the scope of the law. Likewise, persons whose close relatives, such as parents, partners or children, live in Switzerland and who have regular contact with these relatives, have a sufficiently close connection. This is also true, for example, of people who are staying in Switzerland for the purpose of medical in-patient treatment. People who, for example, possess real estate in Switzerland, even if they have no other relationship with Switzerland, have a close connection with Switzerland within the meaning of the proposed provisions. A bit of Switzerland belongs to them and this provides the requisite connection.

Persons who have an account with a Swiss bank do not have a sufficiently close connection, for they can run such an account from anywhere in the world. Similarly, persons who are only travelling through our country, or staying in it for a

fairly short time and who intend to leave it, or to continue their journey forthwith, do not have a close connection in this sense.

DISCUSSION

1. a. Do the aforementioned provisions fulfill Switzerland's obligations to establish its (universal) jurisdiction over persons alleged to have committed grave breaches? Are there gaps? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions; Art. 85 of Protocol I.)
   b. Does Switzerland also establish its (universal) jurisdiction over violations of IHL not qualified as grave breaches? (*Cf.* Arts. 50/51/130/147, respectively, of the four Conventions; Arts. 11 and 85 of Protocol I.)
2. a. Is Article 9 (1*bis*) introduced in 2004 compatible with the obligation foreseen in Arts. 49/50/129/146, respectively, of the four Conventions? Do those provisions oblige Switzerland to establish jurisdiction even over persons not found on its territory? Over persons who are on its territory, but have no close connection with Switzerland? Over persons who could be transferred to the ICC? Is Art. 9 (1*bis*) (c) compatible with the complementarity of the ICC to national criminal jurisdictions (*See* **Case No. 15**, The International Criminal Court, p. 608, Preambular para. 10, Arts. 1 and 17)?
   b. Can you explain, based upon Document B., why Switzerland introduced Art. 9 (1*bis*)?
3. Do Arts. 108-114 of the Code cover all grave breaches foreseen by IHL? Where do they go beyond? Do they permit punishment of violations of customary IHL? Do they permit punishment of violations of the law of non-international armed conflicts?
4. What are the advantages and disadvantages of such a generic clause as Art. 109 of the Code? Does a punishment for a grave breach of Protocol I under Art. 109, which was adopted in 1968, violate the principle *nullum crimen sine lege*?

Case No. 48, Germany, International Criminal Code

THE CASE

[**Source:** Germany, Act to Introduce the Code of Crimes against International Law of 26 June 2002; available in German on http://bundesrecht.juris.de/bundesrecht/vstgb/index.html; also available on http://www.icrc.org/ihl; footnotes are partially reproduced.]

Act to Introduce the Code of Crimes against International Law of 26 June 2002

The Federal Parliament has passed the following Act:

ARTICLE 1: CODE OF CRIMES AGAINST INTERNATIONAL LAW (CCAIL)

PART 1: GENERAL PROVISIONS

Section 1: Scope of application

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany. [...]

Section 3: Acting upon orders

Whoever commits an offence pursuant to Sections 8 to 14 in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful.

Section 4: Responsibility of military commanders and other superiors

(1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. [...]

Section 5: Non-applicability of statute of limitations

The prosecution of serious criminal offences pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.

PART 2: CRIMES AGAINST INTERNATIONAL LAW

Chapter 1: Genocide and crimes against humanity

Section 6: Genocide

(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group

1. kills a member of the group,
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code, [Footnote 4: paragraph 226 of the German Code of Crimes addresses grave injury that causes the following damage: loss of sight in one or both eyes, of hearing, speech or the capacity to reproduce; loss of an important limb and definitive loss of its use or definitive disfigurement, becoming disabled, paralysed, psychically ill or handicapped. (unofficial translation)]
3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
4. imposes measures intended to prevent births within the group,
5. forcibly transfers a child of the group to another group shall be punished with imprisonment for life. [...]

Section 7: Crimes against humanity

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population,

1. kills a person,
2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,
4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
7. causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
   (a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or
   (b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,
8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,
9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or
10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law

shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 9 to 10, with imprisonment for not less than three years. [...]

Chapter 2: War crimes

Section 8: War crimes against persons

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. kills a person who is to be protected under international humanitarian law,
2. takes hostage a person who is to be protected under international humanitarian law,
3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,
6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law,
7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,
8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health
   (a) by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,
   (b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognised medical principles and the person concerned has previously not given his or her voluntary and express consent, or
   (c) by using treatment methods that are not medically recognised on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent, or
9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner

shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for

not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed hors de combat shall be punished with imprisonment for not less than three years.

(3) Whoever in connection with an international armed conflict

1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,
2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,
3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the forces of a hostile Power or
4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country

shall be punished with imprisonment for not less than two years. [...]

(6) Persons who are to be protected under international humanitarian law shall be

1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions [...], namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;
2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;
3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

Section 9: War crimes against property and other rights

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years.

(2) Whoever in connection with an international armed conflict and contrary to inter-national law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or

inadmissible in a court of law shall be punished with imprisonment from one to ten years.

Section 10: War crimes against humanitarian operations and emblems

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or
2. directs an attack against personnel, buildings, material, medical units and trans-port, using the distinctive emblems of the Geneva Conventions in conformity with international humanitarian law

shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the Geneva Conventions, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

Section 11: War crimes consisting in the use of prohibited methods of warfare

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,
2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces,
3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,
4. uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,

5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of inter-national humanitarian law,
6. orders or threatens, as a commander, that no quarter will be given, or
7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party

shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year. [...]

(3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall military advantage anticipated shall be punished with imprisonment for not less than three years.

Section 12: War crimes consisting in employment of prohibited means of warfare

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. employs poison or poisoned weapons,
2. employs biological or chemical weapons or
3. employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

shall be punished with imprisonment for not less than three years. [...]

Chapter 3: Other crimes

Section 13: Violation of the duty of supervision

(1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.

(2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it. [...]

Section 14: Omission to report a crime

(1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of

any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years. [...]

ARTICLE 3: AMENDMENT TO THE CODE OF CRIMINAL PROCEDURE

The Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette I page 1074, 1319), as last amended by Article 3 of the Act of 21 June 2002 (Federal Law Gazette I page 2144), shall be amended as follows: [...]

5. The following section 153f shall be inserted after section 153e:

Section 153 f

(1) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, [footnote 9: paragraph 153c (1) of the code of criminal procedure looks at the exceptions to the principal of legality of prosecution applied in Germany.] the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.

(2) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if

1. there is no suspicion of a German having committed such offence,
2. such offence was not committed against a German,
3. no suspect in respect of such offence is present in Germany and such presence is not to be anticipated and
4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended.

(3) If in the cases referred to under subsection (1) or (2) public charges have already been preferred, the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings. [...]

DISCUSSION

1. a. Is this Code of Crimes against International Law (CCAIL) an application of the so-called principle of "universal jurisdiction," or of the obligation to prosecute

international crimes? Is such a law consistent with international humanitarian law (IHL)? Are States obliged to enact "universal jurisdiction" laws to prosecute war criminals under IHL? Are such laws subject to the exigency of precision required by criminal law? Are the provisions of IHL not sufficiently precise? (*Cf.* Arts. 49/50/129/146, respectively, of the four Geneva Conventions and Art. 85 of Additional Protocol I; *see also* Chapter 13.X. Violations by Individuals, p. 303.)

b. Compare the German CCAIL and the Belgian law (BL) of universal jurisdiction (in particular, Arts. 1.1 and 3 CCAIL and Art. 7 BL; Art. 1.3 CCAIL and Art. 5 BL; Arts. 1.4 and 1.13-14 CCAIL and Arts. 4 and 5.3 BL; Art. 1.5 CCAIL and Art. 8 BL; Art. 1.6 CCAIL and Art. 1.1 BL; Art. 1.7 CCAIL and Art. 1.2 BL; Arts. 1.8-12 CCAIL and Art. 1.3 BL). What are the differences between the two laws, and their respective strengths and weaknesses? (*Cf.* **Case No. 52**, Belgium, Law on Universal Jurisdiction, p. 937.)

c. Is there a law similar to the German CCAIL in your State? Why is such legislation relatively rare, even today?

2. How do you interpret the first paragraph of the CCAIL, in particular the "relation to Germany," in view of the modification of paragraph 153f of the German Code of Criminal Procedure?

3. a. To what extent does the CCAIL draw its inspiration from the Statute of the International Criminal Court (ICC)? Does it go further than the latter, or is it more cautious? In terms of excluding criminal responsibility? In the definition of crimes? (*Cf.* Arts. 5-8 and 30-33 of the ICC Statute, **Case No. 15**, The International Criminal Court [A. The Statute], p. 608.)

b. With regard to crimes against humanity - persecution in particular - what differences are there between the CCAIL and the ICC Statute? Given that certain acts defined as crimes against humanity in Art. 7 of the ICC Statute are not listed as such in the CCAIL and vice versa, what are the consequences in terms of prosecutions? Especially concerning persecution?

4. What is the legal basis for the non-applicability of statutory limitations in IHL? What link is there between the non-applicability of statutory limitations and the fact that crimes under IHL are not subject to amnesty? Is this a customary rule of IHL? (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968 (available at http://www.icrc.org/ihl); Art. 29 of the ICC Statute.)

5. What is your opinion concerning the possibility that "International Criminal Code" laws will increase in number around the world? Do you think they are indispensable to ending the impunity of war criminals?

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act

THE CASE

[**Source:** "Crimes Against Humanity and War Crimes Act.", in Annual Statutes of Canada 2000, Chapter 24, http://laws.justice.gc.ca/en/2000/24/6002.html.]

[...] An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts [*Assented to 29th June, 2000*] [...]

INTERPRETATION

2. (1) The definitions in this subsection apply in this Act. [...]

"conventional international law" means any convention, treaty or other international agreement

(a) that is in force and to which Canada is a party; or

(b) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved. [...]

(2) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.

HER MAJESTY

3. This Act is binding on Her Majesty in right of Canada or a province.

OFFENCES WITHIN CANADA

4. (1) Every person is guilty of an indictable offence who commits

(a) genocide;

(b) a crime against humanity; or

(c) a war crime.

(1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

(2) Every person who commits an offence under subsection (1) or (1.1)

(a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and

(b) is liable to imprisonment for life, in any other case.

(3) The definitions in this subsection apply in this section.

"crime against humanity" [...]

"genocide" [...]

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

5. (1) A military commander commits an indictable offence if
   (a) the military commander
      (i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or
      (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;
   (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
   (c) the military commander subsequently
      (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
      (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

   (2) A superior commits an indictable offence if
   [identical to section 5(1) a) and b)]
   (c) the offence relates to activities for which the superior has effective authority and control; and
   (d) [identical to section 5(1)c)]

   (2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

   (3) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

   (4) The definitions in this subsection apply in this section.
   "military commander" includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander.
   "superior" means a person in authority, other than a military commander.

OFFENCES OUTSIDE CANADA

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada
   (a) genocide,
   (b) a crime against humanity, or

(c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

[sections 6 (1.1)-6 (4) are identical to sections 4 (1.1)-4(4)]

(5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:

(a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

(b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

7. (1) A military commander commits an indictable offence if [identical to section 5(1)]

(2) A superior commits an indictable offence if [identical to section 5(2)]

(2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

(3) A person who is alleged to have committed an offence under subsection (1), (2) or (2.1) may be prosecuted for that offence in accordance with section 8.

(4) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

(5) Where an act or omission constituting an offence under this section occurred before the coming into force of this section, subparagraphs (1)(a)(ii) and (2)(a)(ii) apply to the extent that, at the time and in the place of the act or omission, the act or omission constituted a contravention of customary international law or conventional international law or was criminal according to the general principles of law recognized by the community of nations, whether or not it constituted a contravention of the law in force at the time and in the place of its commission. [...]

8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

(a) at the time the offence is alleged to have been committed,

(i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,

(ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,

(iii) the victim of the alleged offence was a Canadian citizen, or

(iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

(b) after the time the offence is alleged to have been committed, the person is present in Canada.

PROCEDURE AND DEFENCES

9. (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.
   (2) For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply.
   (3) No proceedings for an offence under any of sections 4 to 7, 27 and 28 may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, [...]
   (4) No proceedings for an offence under section 18 may be commenced without the consent of the Attorney General of Canada.
10. Proceedings for an offence alleged to have been committed before the coming into force of this section shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

DEFENCES

11. In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the *Criminal Code*, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings.
12. (1) If a person is alleged to have committed an act or omission that is an offence under this Act, and the person has been tried and dealt with outside Canada in respect of the offence in such a manner that, had they been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict* or pardon, the person is deemed to have been so tried and dealt with in Canada.
   (2) Despite subsection (1), a person may not plead *autrefois acquit*, *autrefois convict* or pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court
      (a) were for the purpose of shielding the person from criminal responsibility; or
      (b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.
13. Despite section 15 of the *Criminal Code*, [N.B.: Section 15 of the Criminal code states: "No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs."] it is not a justification, excuse or

defence with respect to an offence under any of sections 4 to 7 that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

14. (1) In proceedings for an offence under any of sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior - whether military or civilian - to perform the act or omission that forms the subject-matter of the offence, unless
    (a) the accused was under a legal obligation to obey orders of the government or superior;
    (b) the accused did not know that the order was unlawful; and
    (c) the order was not manifestly unlawful.
    (2) For the purpose of paragraph (1) (c), orders to commit genocide or crimes against humanity are manifestly unlawful.
    (3) An accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group. [...]

PROCEEDS OF CRIME

27. (1) No person shall possess any property or any proceeds of property knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of
    (a) an act or omission in Canada that constituted genocide, a crime against humanity or a war crime, as defined in section 4;
    (b) an act or omission outside Canada that constituted genocide, a crime against humanity or a war crime, as defined in section 6; [...]
    (2) Every person who contravenes subsection (1)
    (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or
    (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term of not more than two years.
    (3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under this section by reason only that they possess property or the proceeds of property mentioned in subsection (1) for the purpose of an investigation or otherwise in the execution of the peace officer's duties. [...]

COMING INTO FORCE

[Law in force the 23 October 2000, see Order of the Governor in Council Nr. TR/2000-95]

DISCUSSION

1. What relationship is there between this law and the Statute of the International Criminal Court (ICC)?

2. Does this law meet the requirements of the Geneva Conventions and Protocol I? Does it allow the prosecution of any grave breach of IHL? Of any war crime? (*Cf.* Arts. 49/50/129/146, respectively, of the four Geneva Conventions and Arts. 11 (4) and 85 of Protocol I.)

3. Does the law apply to violations of IHL occurring in non-international armed conflicts?

4. On issues relating to jurisdiction:
   a. Does Canada's jurisdiction as laid down in Art. 8 of the law meet the requirements of IHL? Does it go further than required by IHL? Does it go further than allowed by public international law? (*Cf.* Arts. 49/50/129/146, respectively, of the four Geneva Conventions.)
   b. Before this law was adopted, the Canadian Criminal Code laid down that any crime which may constitute a war crime or a crime against humanity committed abroad must also constitute, in Canada, an infringement of Canadian law. This was a condition for the Canadian courts to have the jurisdiction to try the crime. How does the present law improve the prospects of having a case heard by the Canadian courts? Consider the question from the standpoint of cases involving the use of chemical weapons, perfidy or the misuse of the red cross or red crescent emblems (*Cf.* Art. 6 of this law).

5. Does a person charged with an offence necessarily have to be in Canada to be prosecuted? In what cases is this presence necessary? Is this compatible with the obligation to prosecute on the basis of the principle of universal jurisdiction, as laid down in IHL? (*Cf.* Arts. 49 (2)/50 (2)/129 (2)/146 (2), respectively, of the four Geneva Conventions.)

6. a. Does the command responsibility provided for in Arts. 5.1-2 and 7.1-2 correspond to the command responsibility stipulated by IHL? By the ICC Statute? Does it go further? (*Cf.* Art. 86 (2) of Protocol I and Art. 28 of the ICC Statute [*See* **Case No. 15**, The International Criminal Court [A. The Statute], p. 608].)
   b. Are the limitations provided for under Art. 7 (5) compatible with IHL? Are they required by public international law?

7. a. Is the stipulation that no proceedings may be commenced without the consent of Canada's Attorney General, as provided for under Art. 9 (3)-(4), compatible with IHL? Can you imagine why these provisions have been included? Are there similar provisions in your country's law? (*Cf.* Arts. 49 (2)/50 (2)/129 (2)/146 (2), respectively, of the four Geneva Conventions.)
   b. In what circumstances could Canada's Attorney General deny his consent to proceedings against a person accused of war crimes without any violation of IHL by Canada? (*Cf.* Arts 49 (2)/50 (2)/129 (2)/146 (2), respectively, of the four Geneva Conventions.)

8. a. Does Art. 14 (1) lay down cumulative or alternative conditions? Does this provision correspond to the rule of IHL? To that of the ICC Statute? (*Cf.* Art. 33

of the ICC Statute [*See* **Case No. 15**, The International Criminal Court [A. The Statute], p. 608].)

b. Why did the Canadian government feel itself obliged to withdraw from the accused the right to a "mistake of law" defence when his belief is based on hate propaganda? Does this rule correspond to that of the ICC Statute? (*Cf.* Art. 32 of the ICC Statute [*See* **Case No. 15**, The International Criminal Court [A. The Statute], p. 608].)

9. Does Art. 27 go beyond the provisions of Chapter VII of the ICC Statute (*See* **Case No. 15**, The International Criminal Court [A. The Statute], p. 608) which concern confiscation of the proceeds of crime?

Case No. 50, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross"

THE CASE

[**Source:** Law No. 97-2 of 10 January 1997 on the protection of the red cross emblem and name; Official Gazette of the Republic of Cameroon, 1st February 1997, pp. 63-66; available on http://www.icrc.org/ihl-nat.]

The National Assembly deliberated and adopted,

The President of the Republic promulgates the law that holds as follows:

PART I: GENERAL PROVISIONS

Section 1

Without prejudice to the relevant provisions of the conventions relating to the application of international humanitarian law duly ratified by the Republic of Cameroon, particularly the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977, this law shall govern the use and protection of the Red Cross emblem and name.

Section 2

(1) The Red Cross emblem shall be a red cross with four arms of equal length on a white background. The cross shall have an upright and a transverse shaft intersecting at their middles. The cross shall not reach the edge of the flag or escutcheon.

(2) The red cross shall be the dominant element of the emblem. No inscription or pattern may appear on the cross or white background.

(3) In time of conflict, the emblem for purposes of protection shall be a red cross on a white background as defined in (1) and (2) above. It shall be as large as possible to afford the greatest visibility.

(4) The emblem used for purposes of identification purposes shall be in miniature. It may be used solely to identify the Cameroon Red Cross

PART II: USE OF THE RED CROSS EMBLEM AND NAME

Section 3

The Red Cross emblem may be used for two purposes: identification and protection

Chapter I: Use of the Emblem for Identification Purposes

Section 4

(1) The emblem identifying the Cameroon Red Cross shall be used together with the name "Cameroon Red Cross" or the initials "CRC".
(2) The emblem shall be in miniature and shall show that the person or the property displaying it is linked to the Cameroon Red Cross.
(3) In time of conflict, the emblem must not be displayed on armbands or rooftops to avoid confusion with the emblem used for protection purposes.
(4) Persons or property displaying the emblem of the Cameroon Red Cross for identification purposes may not, in time of conflict, benefit from the special protection conferred by international humanitarian law.

Section 5

(1) The identification emblem of the Cameroon Red Cross shall be its exclusive property.
(2) It may be in the from of medallions, badges, stickers, scarfs, flags, standards, gadgets or any sign or medium used for the promotion of the Cameroon Red Cross.

Section 6.- (1) The president of the Cameroon Red Cross alone shall be empowered to authorize any person to wear the identification emblem of the said Red Cross.

(2) He shall inform the competent authorities thereon.

Chapter II: Use of the Emblem for Purposes of Protection

Section 7

(1) The protective Red Cross emblem shall be the symbol of the protection conferred by international humanitarian law to persons and property, particularly buildings, means of transportation by land, sea or air, in time of international conflict.
(2) However, the protective emblem may be used in peacetime to identify first-aid workers at events attended by large crowds.

Section 8

The following persons may use the protective emblem in time of international or internal armed conflict:

- medical personnel of the Cameroon Red Cross made available to the army medical services;

- civilian medical personnel involved in relief and medical assistance operations;
- civilian medical personnel and national and international workers of humanitarian organizations involved in relief and medical assistance operations;
- personnel of the army medical services.

Section 9

The following medical units, establishments and means of transportation may display the protective Red Cross emblem:

- medical units, establishments and means of transportation of the Cameroon Red Cross, particularly: hospitals, ambulances, ship-borne hospitals, ordinary or motorized boats, aircraft and warehouses;
- civilian medical units involved in search, evacuation, diagnosis or treatment, first-aid and disease prevention operations;
- medical units and transportation equipment of army medical services.

PART III: PROTECTION OF THE RED CROSS EMBLEM AND NAME

Section 10

The Red Cross emblem and name shall be protected by the instruments in force relating to registered trademarks and patterns.

Section 11

(1) The Cameroon Red Cross shall have the exclusive right to use the Red Cross identification emblem and name throughout the national territory.
(2) It shall be the sole institution empowered to:
   - order the printing or production of the Red Cross emblem;
   - issue diplomas, certificates, cards and attestations bearing the Red Cross emblem.

Section 12

In the event of internal armed conflict or strife, the President of the Cameroon Red Cross and the competent authorities shall jointly define the conditions for using the protective emblem and supervise compliance therewith.

Section 13

(1) The use of the emblem for protective and identification purposes by the members and first-aid workers of the Cameroon Red Cross shall be subject to a membership identity card and a first-aid worker's identity card bearing the signature of the National President of the Cameroon Red Cross or of any other person duly empowered to that end by the said National President.
(2) The membership or first-aid worker's identity card of the Cameroon Red Cross must be presented upon request. It shall be strictly personal and may

not be transferred or lent. It may neither be used as a pass in peacetime or in time of internal strife or conflict, nor as an access card for public events.

Section 14

(1) It shall be strictly forbidden for any natural person or corporate body other than those upon whom such right is conferred by virtue of the Geneva Conventions of 12 August 1949, their Additional Protocols I and II of 8 June 1977 and the present law to use the Red Cross emblem and name.
(2) It shall equally be forbidden to use a sign or an appellation constituting an imitation of the Red Cross emblem and name.

PART IV: MISCELLANEOUS AND FINAL PROVISIONS

Section 15

Delegates of the international bodies of the International Red Crescent Movement may use the Red Cross emblem at all times, within the limits fixed by the Geneva Conventions of 12 August 1949.

Section 16

Offences established in relation to the use of the Red Cross emblem and name shall be punished in accordance with Section 330 of the Penal Code.

Section 17

This law shall be registered, published according to the procedure of urgency and inserted in the *Official Gazette* in English and French.

Yaoundé, 10 January 1997

The President of the Republic
Paul Biya

DISCUSSION

1. Who may use the emblem of the red cross or red crescent? In what circumstances? (*Cf.* Art. 23 (1) (f) of the Hague Regulations; Arts. 38-44 and 53 of Convention I; Arts. 41-43 of Convention II; Art. 18 of Convention IV; Arts. 8 and 18 of Protocol I; Art. 12 of Protocol II.)
2. Why do the Conventions contain detailed provisions concerning the use of the emblem? What problems are the Conventions attempting to resolve?
3. What issues is Art. 44 of Convention I attempting to clarify?
4. What is the difference between the protective and indicative uses of the emblem? Are authorized uses of the emblem different in time of armed conflict and in time of peace? (*Cf.* Art. 44 of Convention I.)

5. Why does Convention I clarify to a large extent the use of the emblem by National Red Cross and Red Crescent Societies?
6. Under what conditions may a National Society use the emblem? When may it use the emblem as a protective device? And as an indicative device?
7. When may the ICRC and the International Federation of Red Cross and Red Crescent Societies use the emblem? Are they also obliged to abide by the provisions governing the protective and indicative uses of the emblem? (*Cf.* Art. 44 of Convention I.)
8. Why must States (in this case, Cameroon) adopt legislation on the use of the emblem? Is this necessary even where international treaties are considered part of national law under a country's constitutional system? In your opinion, is Cameroonian law totally in line with international humanitarian law? (*Cf.* Arts. 44 and 54 of Convention I.)
9. Does this law provide additional guarantees against any misuse of the emblem in time of armed conflict? Or is it limited to specifying the property and persons that may display and use the emblem in time of peace and in time of armed conflict?
10. How does Protocol I clarify Arts. 39, 42 and 44 of Convention I and Art. 18 of Convention IV? Why is this clarification given? (*Cf.* Arts. 8, 18, 37, 38 and 85 of Protocol I; Art. 18 of Protocol II.)
11. Will Cameroon need to amend this law in the event that it becomes party to any Protocol III additional to the Geneva Conventions? (*Cf.* **Case No. 31**, ICRC, The Question of the Emblem [A. Draft Protocol III, additional to the Geneva Conventions], p. 761.)

Case No. 51, Ghana, National Legislation Concerning the Emblem

THE CASE

[**Source:** N.R.C.D. Red Cross Emblem (Control) Decree (1973) p. 216.]

RED CROSS EMBLEM (CONTROL) DECREE, 1973

Whereas the Geneva Conventions of the 12th day of August 1949, contain some provisions which seek to confer protection on certain persons, organisations and agencies by the use of the Red Cross Emblem and other similar emblems.

And whereas the Government of Ghana acceded to the said Conventions on the 2nd day of August, 1958:

And whereas all parties to the said Conventions are obliged to make appropriate laws prohibiting the abuse of the Red Cross Emblem, similar emblems and the arms of Switzerland:

And whereas it is decided to give effect to the said Conventions so far as they relate to the protection of the Red Cross Emblem, similar emblems and the arms

of Switzerland, to provide so far as necessary that the appropriate provisions of the said Conventions shall have the force of law in Ghana, and to make provisions prohibiting the abuse or misuse of the Red Cross Emblem, similar emblems and the arms of Switzerland:

Now, therefore, in pursuance of the National Redemption Council (Establishment) Proclamation, 1972 this Decree is hereby made: [...]

2. The emblem may, in time of war and in the field of operations, be used by the parties to the armed conflict, to designate establishments, units, personnel (including chaplains), materials, vehicles, hospitals, ships and other craft, of the medical services of the respective parties, and those of Ghana Red Cross and other relief societies authorised by the National Redemption Council to aid military medical services.
3. The National Redemption Council, may in time of war, authorise by writing or by a notice published in the *Gazette*, the use of the emblem to designate the establishments and employees of civilian hospitals, hospital zones, and localities reserved for the wounded and the sick; and trains, ambulances and other vehicles, vessels or aircraft used for the transport of wounded, sick and infirm civilians, and maternity cases.
4. The National Redemption Council may, in peace time, authorise by writing or by a notice published in the *Gazette*, the use of the emblem on vehicles in use as ambulances, and on relief posts whose sole object is to give first aid free of charge to injured or sick persons.
5. (1) The International Red Cross agencies and their authorised personnel are entitled, at all time, to use the emblem.
   (2) The Ghana Red Cross Society may, subject to any law for the time being in force, at all times, use the emblem in its activities which conform to the principles prescribed by the International Red Cross Conferences, and its own statutes.
   (3) The Ghana Red Cross Society may, with the prior approval of the Commissioner responsible for Internal Affairs, make bye-laws regulating its own use of the emblem.
6. Any person, who, before the commencement of this Decree, has acquired any right under any enactment to the use of the emblem generally or for a particular purpose, shall not use the emblem after the expiry of three years from such commencement for any purpose whatsoever.
7. (1) Any person who contravenes any of the provisions of this Decree, shall be guilty of an offence, and shall on summary conviction, be liable to a term of imprisonment not exceeding 3 months or to a fine not exceeding C100 or to both.
   (2) Where the offence is committed by a body of persons then
      (a) in the case of a body corporate (other than a partnership) every director or officer of that body corporate shall be deemed to be guilty of that offence; and
      (b) in the case of a firm or partnership, every partner shall be deemed to be guilty of that offence;

Provided that no such person shall be deemed to be guilty of the offence if he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence. [...]

10. In this Decree unless the context otherwise requires "Red Cross Emblem" includes the arms of the Federation of Switzerland [sic], the red cross, the red crescent, or the red lion and sun emblem, or the words "Red Cross" or "Geneva Cross" or any designation, sign or mark constituting an imitation or likely to be confused with any of the said emblems or words describing any of the said emblems.
11. This Decree shall come into force on the 1st day of October, 1973.

DISCUSSION

1. Who may use the red cross and the red crescent emblems? And under which circumstances? (*Cf.* Art. 23 (f) of the Hague Regulations, Arts. 38-44 and 53 of Convention I, Arts. 41-43 of Convention II, Art. 18 of Convention IV, Arts. 8 (1) and 18 of Protocol I and Art. 12 of Protocol II.)

2. Why have the Conventions prescribed detailed provisions on the use of the emblem? What problems did the Conventions try to overcome?

3. Which issues has Art. 44 of Convention I tried to clarify?

4. What is the difference between the protective and the indicative uses of the emblem? Does the usage of the emblem vary in time of armed conflict and in peacetime? (*Cf.* Art. 44 of Convention I.)

5. Why has Convention I clarified extensively the usage of the emblem by National Red Cross and Red Crescent Societies?

6. Under which conditions may National Societies use the emblem? When are they entitled to use the emblem for protection? And for indicative use?

7. When may the ICRC and the International Federation of Red Cross and Red Crescent use the emblem? Do they also have to comply with the provisions on the protective and indicative uses of the emblem? (*Cf.* Art. 44 of Convention I.)

8. Why does a country, in this case Ghana, have to adopt legislation on the use of the emblem? If the constitutional system of a country makes international treaties part of the law of the land, is legislation on the issue of the emblem nevertheless necessary? Are there any points in the Ghanaian legislation which may be perceived as incompatible with IHL? (*Cf.* Art. 44 of Convention I.)

9. Does this legislation provide another safeguard against the abuse of the emblem in time of armed conflict? Or does this legislation limit in precise terms the objects and the persons who are entitled to carry and use the emblem in time of peace or armed conflict?

10. Why and on which issues has Protocol I clarified Arts. 39, 42 and 44 of Convention I and Art. 18 of Convention IV? (*Cf.* Arts. 8, 18, 37, 38 and 85 of Protocol I and Art. 12 Protocol II.)

11. On which aspects should Ghana have modified its legislation after it became a party to the Protocols? (*Cf.* Arts. 8, 18, 37, 38 and 85 of Protocol I and Art. 12 of Protocol II.)

Case No. 52, Belgium, Law on Universal Jurisdiction

THE CASE

A. 2003 Criminal Code

[**Source:** Available in French on http://www.moniteur.be, unofficial translation.]

New section I (a) of the Criminal Code (L. 5 August 2003, Article 5)

Article 136 (a)

(L. 5 August 2003, Article 6) The crime of genocide, as defined below, whether it is committed in time of peace or of war, constitutes a crime under international law and shall be punished in accordance with the provisions of this Act. In accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and without prejudice to the penal rules applicable to breaches committed by negligence, the crime of genocide shall mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

Article 136 (b)

(L. 5 August 2003, Article 7) Crimes against humanity, as defined below, whether committed in time of peace or of war, constitute a crime under international law and shall be punished in accordance with the provisions of this Act. In accordance with the Statute of the International Criminal Court, a crime against humanity shall mean any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or any other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in Articles 136 (a), 136 (b) and 136 (c);
9. Enforced disappearance of persons;
10. The crime of apartheid;
11. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 136 (c)

(L. 5 August 2003, Article 8) (1) War crimes referred to in the Conventions adopted in Geneva on 12 August 1949 and in Protocols I and II additional to those Conventions, adopted in Geneva on 8 June 1977, by the laws and customs applicable to armed conflicts, as defined in Article 2 of the Conventions adopted in Geneva on 12 August 1949, in Article 1 of Protocols I and II adopted in Geneva on 8 June 1977 additional to those Conventions, and in Article 8 (2) (f) of the Statute of the International Criminal Court, and listed below constitute crimes under international law and shall be punished in accordance with the provisions of this section, when the crimes undermine, by act or omission, the protection of persons and property that is guaranteed by the Geneva Conventions, the Additional Protocols, laws and customs, without prejudice to the penal rules applicable to breaches caused by negligence:

1. Wilful killing;
2. Torture or other inhuman treatment, including biological experiments;
3. Wilfully causing great suffering or serious injury to body or health;
4. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence constituting a grave breach of the Geneva Conventions or a serious violation of Article 3 common to those Conventions;
5. Other outrages upon personal dignity, in particular humiliating and degrading treatment;
6. Compelling prisoners of war, civilians protected by the Convention on the Protection of Civilian Persons in Time of War or other persons protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949 to serve in the armed forces or armed groups of the enemy power or the hostile party;

7. Conscripting or enlisting children under the age of fifteen years into armed forces or armed groups or using them to participate actively in hostilities;

8. Depriving prisoners of war, civilians protected by the Convention on the Protection of Civilian Persons in Time of War or persons likewise protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949 of the right to a fair and regular trial, in accordance with the stipulations of those instruments;

9. Unlawful deportation, transfer or displacement, unlawful confinement of civilians protected by the Convention relative to the Protection of Civilian Persons in Time of War or persons likewise protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949;

10. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

11. The taking of hostages;

12. Destroying or seizing the enemy's property, in the case of an international armed conflict, or that of an adversary, in the case of a non-international armed conflict, unless such destruction or seizure be imperatively demanded by the necessities of war;

13. Extensive destruction and appropriation of property, not justified by military necessity as defined under human rights and carried out unlawfully and wantonly;

14. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

15. Intentionally directing attacks against buildings, material, medical units or vehicles and staff using, in accordance with international law, the distinctive signs provided for under international humanitarian law;

16. Utilizing the presence of a civilian or another person protected by international humanitarian law to render certain points, areas or military forces immune from military operations;

17. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

18. Acts and omissions for which there is no legal justification and which are likely to compromise the health of and cause bodily or mental harm to persons protected under international humanitarian law, particularly any medical treatment which is not justified by the state of health of those persons or which would not be in keeping with the generally acknowledged rules of the medical profession;

19. Unless it is justified by the conditions provided for under No. 18, treatment which subjects the persons stipulated under No. 18, even with their consent, to physical mutilation, medical or scientific experiments or the removal of tissue or organs for the use in transplant operations, except in the case of blood being donated for transfusions or skin for grafts, provided that those donations are voluntary, willingly given and intended for therapeutic purposes;

20. Intentionally attacking the civilian population or civilians not taking direct part in hostilities;

21. Intentionally launching attacks against places where the sick and wounded are gathered, unless those places are military objectives;

22. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated, without prejudice to the criminal nature of the attack of which the harmful effects, even if they are proportionate to the military advantage anticipated, would be incompatible with the principles of the law of nations, as they result from the usages established, from the laws of humanity, and the dictates of the public conscience;

23. Launching an attack against buildings or installations containing dangerous forces in the knowledge that such attack will cause loss of human life, injury to civilian persons or damage to civilian ojects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to criminal nature of an attack of which the harmful effects, even if they are proportionate to the military advantage anticipated, would be incompatible with the principles of the law of nations, as they result from the usages established, from the laws of humanity, and the dictates of the public conscience.;

24. Attacking or bombarding, by whatever means, demilitarized zones, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

25. Pillaging a town or place, even when taken by assault;

26. Attacking a person in the knowledge that such person is no longer involved in the fighting, provided that that attack leads to death or injury;

27. Treacherously killing or wounding members of the enemy nation or army or an enemy combatant;

28. Declaring that no quarter will be given;

29. Making improper use of the distinctive emblem of the red cross or red crescent or other protective signs recognized by international humanitarian law, resulting in death or serious personal injury;

30. Making inappropriate use of the flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, resulting in the loss of human life and serious personal injury;

31. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies;

32. Delaying without justification the repatriation of prisoners of war or civilians;

33. Indulging in apartheid or other inhumane and degrading treatment based on racial discrimination and resulting in outrages upon personal dignity;

34. Directing attacks against historic monuments, works of art or clearly recognized places of worship which constitute a national cultural and spiritual heritage and which

have been granted special protection by virtue of a special arrangement even though there is no evidence of the enemy violating the prohibition of utilizing such objects to support the military effort and those objects are not located in the immediate vicinity of military objectives;

35. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments and hospitals, provided they are not military objectives;

36. Employing poison or poisoned weapons;

37. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

38. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

39. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

40. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Statute of the International Criminal Court.

(2) Serious violations of Article 3 common to the Conventions signed in Geneva on 12 August 1949, in the case of armed conflict defined by common Article 3, and listed below, constitute crimes under international law and shall be punished in accordance with the provisions of this Act, when such violations undermine, by act or omission, the protection of persons that is guaranteed by those Conventions, without prejudice to the penal provisions applicable to breaches committed out of negligence:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2. Outrages upon personal dignity, in particular humiliating and degrading treatment;

3. Taking of hostages;

4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(3) The serious violations defined in Article 15 of Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted in The Hague on 26 March 1999, committed during armed conflict, as defined in Article 18, paragraphs 1 and 2, of the Hague Convention of 1954 and in Article 22 of the aforementioned Second Protocol, and listed below, constitute crimes under international law and shall be punished in accordance with the provisions of this Act when such breaches undermine, by act or omission, the protection of property

guaranteed by those Conventions and the Protocol, without prejudice to the penal provisions applicable to breaches committed out of negligence:

1. Making cultural property under enhanced protection the object of attack;
2. Using cultural property under enhanced protection or its immediate surroundings in support of military action;
3. Extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol.

Article 136 (d)

(L. 5 August 2003, Article 9) The breaches listed in Articles 136 (a) and 136 (b) shall be punished by life imprisonment.

The breaches listed under Nos. 1, 2, 15, 17, 20 to 24 and 26 to 28 of paragraph 1 of Article 136 (c) shall be punished by life imprisonment.

The breaches listed under Nos. 3, 4, 10, 16, 19, 36 to 38 and 40 of the same paragraph of the same Article shall be punished by prison sentences of 20 to 30 years. They shall be punished by life imprisonment if they resulted in the death of one or more persons.

The breaches listed under Nos. 12 to 14 and 25 of the same paragraph of the same Article shall be punished by prison sentences of 15 to 20 years. The same breach and that referred to in Nos. 29 and 30 of the same paragraph of the same Article shall be punished by prison sentences of 20 to 30 years if they resulted in an apparently incurable illness, the permanent incapacity to work or the loss of use of an organ or serious mutilation. They shall be punished by life imprisonment if they resulted in the death of one or more persons.

The breaches listed under Nos. 6 to 9, 11 and 31 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. In the case of aggravating circumstances stipulated in the preceding paragraph, they shall be punished by the sentences provided for in that paragraph, as is appropriate to the case in question.

The breaches listed under Nos. 5 and 32 to 35 shall be punished by prison sentences of 10 to 15 years, without prejudice to the application of the more severe penal provisions repressing outrages upon human dignity.

The breach stipulated in No. 18 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. It shall be punished by prison sentence of 15 to 20 years when it resulted in serious consequences for public health.

The breach listed under No. 39 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years.

The breach listed under No. 1 of paragraph 2 of Article 136 (c) shall be punished by life imprisonment.

The breaches listed under Nos. 2 and 4 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years, without prejudice to the application of the severer penal provisions repressing outrages upon human dignity.

The breach listed under No. 3 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. The same breach shall be punished by prison sentences of 20 to 30 years if it resulted in an apparently incurable illness, permanent incapacity to work, the loss of use of an organ, or serious mutilation. It shall be punished by life imprisonment if it resulted in the death of one or more persons.

The breaches listed under Nos. 1 to 3 of paragraph 3 of Article 136 (c) shall be punished by prison sentences of 15 to 20 years.

Article 136 (e)

(L. 5 August 2003, Article 10) Anyone making, being in possession of or transporting any kind of instrument, device or object, erecting a construction or converting an existing construction in the knowledge that such instrument, device, or object, such construction or conversion is intended to commit one of the breaches provided for in Articles 136 (a), 136 (b) and 136 (c) or to facilitate the perpetration of such breaches shall be punished by the sentence stipulated for the breach which they have allowed or facilitated.

Article 136 (f)

(L. 5 August 2003, Article 11) The sentence stipulated for a breach that has been committed shall be applied to the following:

1. Orders, even if they are without effect, to commit one of the breaches stipulated in Articles 136 (a), 136 (b) and 136 (c);
2. Proposing or offering to commit such a breach and the acceptance of such proposal or offer;
3. Incitement to commit such a breach, even if it does not actually take place;
4. Participating, within the meaning of Articles 66 and 67, in such a breach, even if it does not actually take place;
5. Failure to do what could have been possible on the part of people who were aware of orders given with a view to committing such a breach or of acts beginning its perpetration, and who could have prevented its being carried out or have stopped it;
6. Attempting, within the meaning of Articles 51 to 53, to commit such a breach.

Article 136 (g)

(L. 5 August 2003, Article 12) paragraph 1. Without prejudice to the exceptions listed under Nos. 18, 22 and 23 of Article 136 (c), paragraph 1, no interest, no political, military or national necessity can justify the breaches defined in Articles 136 (a), 136 (b), 136 (c), 136 (e) and 136 (f), even if they were committed as reprisals.

Paragraph 2. The fact that the accused acted on the orders of his government or a superior does not free him from his responsibility if, in the given circumstances, the order could clearly have led to one of the breaches targeted in Articles 136 (a), 136 (b) and 136 (c) being committed.

B. 2003 Code of Criminal Procedure

[**Source:** Available in French on http://www.moniteur.be; unofficial translation.]

New provisions in the first section of the Code of Criminal Procedure

Article 1 (a)

(L. 5 August 2003, Article 13)

(1) In accordance with international law, legal action shall not be taken against:

- Foreign heads of State, heads of government and foreign ministers, during their term of office, as well as other persons whose immunity is recognized by international law;

- Persons with a total or partial immunity based on a treaty that is binding on Belgium.

(2) In accordance with international law, for the duration of their stay no pressure to initiate legal action may be exerted with regard to anyone who has been officially invited to reside in the territory of the Kingdom by the Belgian authorities or by an international organization established in Belgium and with which Belgium has concluded a headquarters agreement. [...]

Article 10, 1 (a)

(L. 5 August 2003, Article 16 (2))

Except for [certain cases], a foreigner may be tried in Belgium who, outside the Kingdom of Belgium, has committed: [...]

A serious violation of international humanitarian law as stipulated in Part II, section I (a) of the Criminal Code, [...] against a person who, at the time of the occurrence, is a Belgian national or a person whose actual place of normal and legal residence has been in Belgium for at least three years.

Legal action, including the investigation, may be initiated only at the request of the federal prosecutor who assesses any charges that may have been brought. There is no channel through which to appeal against that decision. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (see the decision in French, online: http://www.arbitrage.be.).]

If a charge has been submitted to the federal prosecutor in application of the preceding paragraphs, he must instruct the examining magistrate to investigate that charge unless:

1. The charge is manifestly unfounded; or

2. The facts cited in the charge cannot be deemed to be one of the breaches stipulated in Part II, section I (a), of the Criminal Code; or

3. That charge cannot lead to an admissible public action; or

4. The actual circumstances of the case show that, in the interest of justice being fairly administered and respecting Belgium's international obligations, that case should be brought either before international courts or before the courts in the place where the acts were committed, or before the courts of the State of which the perpetrator is a national or those of the place where he may be found, provided that those courts demonstrate independence, impartiality and equity, as may arise, in particular, from the relevant international commitments between Belgium and that State.

If the federal prosecutor deems a case to be closed, he shall notify the Minister of Justice, indicating the points which are listed in the previous paragraph and on which he bases that classification. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (see the decision in French, online: http://www.arbitrage.be.).]

If a case is classified as closed solely on the basis of points No. 3 and No. 4 above or solely on the basis of point No. 4 above and when those acts were committed after 30 June 2002, the Minister of Justice shall inform the International Criminal Court accordingly. [...]

Article 12 (a) new

(L. 5 August 2003, Article 18)

Apart from the cases referred to in Articles 6 to 11, the Belgian courts are also authorized to take cognisance of breaches committed outside the territory of the Kingdom and stipulated in international treaty or customary law which is binding on Belgium, when that rule requires it, in whatever manner, to submit the matter to its competent authorities to take legal action.

Legal action, including the investigation, may be initiated only if requested by the federal prosecutor who assesses any charges that may have been brought. There is no channel through which to appeal against that decision. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (see the decision in French, online: http://www.arbitrage.be.).]

If a charge has been submitted to the federal prosecutor in application of the preceding paragraphs, he must instruct the examining magistrate to investigate that charge unless:

1. The charge is manifestly unfounded; or
2. The facts cited in the charge cannot be deemed to be one of the breaches stipulated in Part II, section I (a), of the Criminal Code; or
3. That charge cannot lead to an admissible public action; or
4. The actual circumstances of the case show that, in the interest of justice being fairly administered and respecting Belgium's international obligations, that case should be brought either before international courts or before the courts in the place where the acts were committed, or before the courts of the State of which the perpetrator is a national or those of the place where he may be found, provided that those courts demonstrate independence, impartiality and equity, as may arise, in particular, from the relevant international commitments between Belgium and that State.

If the federal prosecutor deems the case to be closed, he shall notify the Minister of Justice to that effect, referring to the points listed in the preceding paragraph on which that classification is based.

If a case is classified as closed solely on the basis of points No. 3 and 4 above or solely on the basis of point 4 above and when those acts were committed after 30 June 2002, the Minister of Justice shall inform the International Criminal Court accordingly.

C. Evolution of the Belgian Law on Universal Jurisdiction

[**Source:** Université Libre de Bruxelles, Centre de Droit International, Dossier d'Actualité sur la compétence universelle en droit belge, http://www.ulb.ac.be/droit/cdi, unofficial translation.]

Legislation

The Law on "universal jurisdiction", as it is called, was adopted on 16 June 1993 and addressed the repression of grave breaches of the Geneva Conventions of 12 August 1949 and the Additional Protocols I and II of 8 June 1977. Its scope of application was limited to war crimes, whether they are committed during an international or non-international conflict. To that extent, the Law broke new ground, in particular with regard to the international instruments that it set out to

implement. It will be recalled that the notion of war crimes was restricted in the Geneva Conventions and the Additional Protocols to international armed conflicts. On the basis of that Law, an investigation concerning Augusto Pinochet was initiated on 1 November 1998 [available in French on http://www.ulb.ac.be/droit/cdi/fichiers/OrdonnanceVdm.html].

The Law was submitted to an initial revision on 10 February 1999. That revision made two important amendments: on the one hand, the universal jurisdiction of Belgian judges was extended to the crime of genocide and to crimes against humanity and, on the other hand, the perpetrators of criminal breaches were to cease to be able to plead any kind of immunity.

There were few lawsuits based on that Law at first. The trial at the crown court in Brussels in April 2001 of four persons accused of having taken part in the Rwandan genocide and their conviction - which was until then the only application of universal jurisdiction under Belgium law - led to an increase in the number of lawsuits [details on this process available on http://www.trial-ch.org/trialwatch/home/en>]. These were aimed at, among others, Fidel Castro, Saddam Hussein, Laurent Gbagbo, Hisséne Habré and Ariel Sharon. The charges proffered against Arial Sharon on 1 and 18 June 2001 gave rise to strong criticism from the Israeli authorities.

The Law, as amended in 1999, was again amended four years later. On 14 February 2002 Belgium was ordered by the International Court of Justice to annul the international warrant for the arrest of Abdulaye Yerodia when he was the Minister for Foreign Affairs of the Democratic Republic of Congo on the grounds that the warrant for arrest took no account of the immunity granted to heads of State. [*See* **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium, p. 2257.] Following that ruling, a bill which took account of the adoption of the Statute of the International Criminal Court and which provided for bringing the Law into line with the existing rules of international law, was presented to the Senate on 18 July 2002. Moreover, following the two rulings by the Chamber of Indictment in Brussels which deemed the lawsuits against Abdulaye Yerodia and against Ariel Sharon and Amos Yaron to be inadmissible on the grounds that those persons were not present on Belgian territory, a bill interpreting the 1993 Law, according to which legal proceedings could be instituted regardless of the location of the accused, was also presented. That second bill was never adopted because the rulings were subsequently nullified by the Court of Cassation.

When the bill to amend the Law was being discussed in the Senate, John Ashcroft [the US Attorney General] informed the Prime Minister of his concern. However, the text was approved by the Senate on 30 January 2003 and forwarded to the Chamber on 5 February 2003. However, bringing charges against US political and military leaders, particularly after the intervention of the United States in Iraq, was to trigger increasingly harsh reactions by those leaders, which culminated in threats to move NATO headquarters and finally led to the 1993 Act being repealed. The first charge, relating to acts committed during the first Gulf War, was brought against George Bush Senior and former members of his team in March 2003. Colin Powell, who was targeted by that

charge, considered that the Belgian Act presented a "serious problem", particularly given the fact that NATO headquarters was in Brussels and issued a warning to Belgium.

Consequently, the bill was amended and stipulated that, in situations that are not linked to Belgium, the public prosecutor could refuse to instruct the examining magistrate in certain cases. Moreover, the bill also stipulated that the Justice Minister had the authority to issue a negative injunction, which in explicit terms meant the possibility of referring the charge back to the State on whose territory the breach was committed or of which the perpetrator is a national. The Law was passed on 23 April 2003.

It was not to prevent a charge being lodged against US General Franks on 14 May 2003. On 13 May 2003, at a press conference at NATO headquarters, General Richard Myers, who had been informed by a journalist that the charge was about to be lodged, said that he considered the situation "very serious" and that it could have a significant bearing on where NATO held its meetings.

At the meeting of NATO defence ministers one month later, and despite the lawsuit filed against General Franks having been referred back to the United States in accordance with the new procedure, Donald Rumsfeld, after having called the lawsuit "absurd" and refusing to recognize Belgium's authority to try American leaders, confronted it with its responsibilities as the country in which NATO has its headquarters and made the American contribution to the building of a new headquarters subject to assurance that Belgium would again be a "hospitable place for NATO to conduct its business", while at the same time acknowledging that Belgium's sovereignty had to be respected. [Speech available on http://www.nato.int/docu/speech/2003/s030612g.htm].

At the end of June 2003, the Belgium Minister for Foreign Affairs announced his intention to amend the Law again as soon as the new government had been formed. The Law of 16 June 1993 was repealed on 5 August 2003. The Criminal Code, the Act of 17 April 1878 containing the first part of the Code of Criminal Procedure and the Code of Criminal Procedure were thus amended to allow serious breaches of international humanitarian law to be prosecuted. However, in the absence of connections authorizing the Belgian courts to take cognizance of it, the charge is upheld only if a rule of international law, deriving from treaty or customary law which is binding on Belgium, requires it to prosecute perpetrators of the breaches specified therein. If universal jurisdiction really does subsist under Belgium law, its bearing is far more restricted (given that in the current state of international law, universal jurisdiction in absentia can no longer be exercised) and with an extensive system for filtering the charges (provided that the system set up at the time of the previous amendment of the law is upheld).

It remains to be seen how the criteria that the federal prosecutor must respect are upheld in practice: they refer to the concepts of impartiality and independence of another jurisdiction which may be competent and whose content is very vague.

DISCUSSION

1. Do the Criminal Code and the Code of Criminal Procedure fulfil Belgium's obligations to establish its (universal) jurisdiction over persons alleged to have committed grave breaches? Did the former 1993 law (modified in 1999) exceed conventional obligations? If so, was it a violation of international law? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions and Art. 85 of Protocol I.)

2. a. Are the definitions of genocide and crimes against humanity, taken from the 1948 Convention on genocide and from the Statute of the International Criminal Court, part of customary law? Could this national legislation create definitions other than those of the above-mentioned Conventions? More restrictive or broader definitions?

   b. Can genocide be committed in peacetime? What about a crime against humanity? Is armed conflict not a necessary condition for the commission of those crimes? How do you reconcile the definition of the crime against humanity, which has to be committed "as part of a widespread or systematic attack" with the fact that this crime can be committed in peacetime?

3. a. Does Art. 136 (c) of the Criminal Code cover all grave breaches foreseen by IHL? Does it permit punishment of violations of customary IHL? Does Belgium also establish its universal jurisdiction over violations of IHL not qualified as grave breaches? (*Cf.* Arts. 50/51/130/147, respectively, of the four Conventions and Arts. 11 and 85 of Protocol I.) Does that violate IHL or general international law as far as persons are concerned who were not otherwise under Belgian jurisdiction when they committed their crime?

   b. Is it appropriate for the Act to extend grave breaches to non-international conflicts? Is the prosecution of serious violations of IHL of non-international armed conflicts prescribed by IHL? Is it compatible with IHL?

4. When the Criminal Code treats international and non-international armed conflicts together, for which crimes listed does this present no difficulty from the point of view of substantive IHL? For which crimes are there only terminological problems? For which crimes are there substantive problems because the criminalized acts are not prohibited by IHL of non-international armed conflicts? Which crimes at least do not fall under a prohibition of Protocol II? Does the Belgian Law criminalize acts committed in a non-international armed conflict which are not prohibited by the applicable substantive IHL? May a State under IHL punish behaviour in armed conflict not prohibited by IHL? May universal jurisdiction be established for such crimes?

5. a. Can Art. 136 (f) be inferred from the pertinent provisions of the Conventions and Protocol I? Does it correspond to a rule of customary IHL? Could it conceivably be a rule introduced by this Act? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions and Arts. 85 (1) and 86 (2) of Protocol I.) What about Art. 136 (e)?

   b. Is the provision in Art. 136 (f) concerning failure to act different in substance from Art. 86 (2) of Protocol I?

6. a. When may a superior order provide a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation? Is Art. 136 (g) (2) consistent with IHL?

   b. Is there no possible defence for having committed any grave breach? For some breaches? Are the limitations to defences designated in Art. 136 (g) (1) prescribed by IHL?

7. Do you think that the provisions of the former 1993 law, which prescribe that immunity does not prevent the application of that law, combined with the interpretation of that law to the effect that the accused did not have to be present in Belgium, (which have been removed from the Belgian law) were excessive? Why? What do you think about the limitations included in the Code of Criminal Procedure? Do they annihilate the Belgian universal jurisdiction? Or do they adapt this universal jurisdiction to make it consistent with international law?

Case No. 53, Ivory Coast, National Interministerial Commission

THE CASE

[**Source:** *Journal Officiel de la République de Côte d'Ivoire*, November 14, 1996, p. 1042; original in French, unofficial translation; available on http://www.icrc.org/ihl-nat.]

DECREE No. 96-853 of 25 October 1996 setting up the National Interministerial Commission for the implementation of international humanitarian law.

THE PRESIDENT OF THE REPUBLIC,

[...]

DECREES:

Article 1: Establishment

A National Interministerial Commission responsible for the implementation of international humanitarian law is hereby established.

Article 2: Attributions

The Interministerial Commission shall:

- ensure respect for international humanitarian law and effective implementation thereof;
- study and prepare laws and implementation regulations in areas in which additions or amendments to national legislation may be required, and submit them to the Government;
- ensure the application of humanitarian law in Côte d'Ivoire;
- encourage the promotion, dissemination and teaching of this law.

Article 3: Organization

The Commission shall be presided over by the Minister of Justice and Public Freedoms. The Vice-Presidency shall be filled by the National Red Cross Society, and the secretariat by the Ministry of Foreign Affairs.

Article 4: Composition

The Commission shall comprise:

- two representatives of each of the following ministries: Foreign Affairs, Justice and Public Freedoms, Defence, Interior and National Integration, Public Health, Economy and Finance, and Higher Education;
- two representatives of the Bar;
- the regional representative of the International Committee of the Red Cross;
- the representative of the National Red Cross Society.

Article 5: Assistance

The assistance of the International Committee of the Red Cross (ICRC) may be sought to ensure the accomplishment of the tasks assigned to the Commission under the terms of Article 2 above.

Article 6: Operating procedures

A joint decree by the Ministry of Foreign Affairs and the Minister of Justice and Public Liberty shall set out the Commission's operating procedures and may set up subcommittees as necessary.

Article 7: Final provisions

The Ministers of Foreign Affairs, Justice and Public Liberty, Economy and Finance, Defence, Higher Education, Research and Technological Innovation, Interior and National Integration, and Public Health shall be responsible - in their respective areas of competence - for the execution of the present decree, which will be published in the Official Gazette of the Republic of Côte d'Ivoire.

Done in Abidjan, on October 25, 1996.

Henri Konan Bédié

DISCUSSION

1. Why is a National Interministerial Commission on the implementation of IHL necessary or useful? Is the establishment of such a commission prescribed by IHL?
2. Need States only concern themselves with IHL during times of armed conflict? If not, why? What measures concerning IHL are most effectively implemented in peacetime? (*Cf., e.g.*, Arts. 47-49/48-50/127-129/144-146, respectively, of the four Conventions.) Does this explain the variety of governmental ministers called upon, in Art. 7 above, to execute the decree of the Ivory Coast Republic?
3. If a State has agreed to be bound by a treaty, what need exists for national measures of implementation? Do the Conventions require national measures? Does the extent of obligations with regard to measures of implementation change if the State is also a party to one or both of the Protocols? (*Cf.* Art. 1 common to

the Conventions and Art. 1 (1) of Protocol I; *cf. also* Arts. 45 and 48 of Convention I, Arts. 46 and 49 of Convention II, Art. 128 of Convention III, Art. 145 of Convention IV and Art. 80 of Protocol I.)

4. Do the Conventions mandate fulfilment of all tasks listed in Art. 2 of the Ivory Coast Republic's National Interministerial Commission? Do the Conventions specify the manner in which these tasks are to be accomplished?

5. a. If national legislation is necessary, does this mean that no provisions of the Conventions are self-executing? What about the applicability of those provisions considered customary?

   b. What provisions in the Conventions specifically call upon States Parties to implement legislation? What particular legislation do the Conventions oblige a State Party to provide? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions; *cf. also* Art. 28 of the Hague Convention of 1954 [**Document No. 3**, Conventions on the Protection of Cultural Property, p. 525.]) How specific are Convention demands? On which points have States Parties large discretion? May a State Party enact legislation extending beyond what the Conventions mandate?

6. Will all national measures implemented to enforce the treaty be the same for every State Party? If not, why not?

7. Have most States Parties enacted national legislation or created national commissions like that of the Ivory Coast Republic? If many States Parties have not taken such action, what impact does this have on the practical application and effectiveness of IHL?

8. Is the role given to the ICRC in Art. 5 of the Ivory Coast Republic's decree and the participation of the National Red Cross Society in the Commission consistent with the Statutes and the fundamental principles of the Movement? What are the advantages and what are the disadvantages of such participation? (*Cf.* Art. 9 of Conventions I, II, and III, and Art. 10 of Convention IV as well as the Preamble and Arts. 3 and 5 of the Statutes of the International Red Cross and Red Crescent Movement, *see* **Document No. 20**. p. 648.)

Case No. 54, US, War Crimes Act

THE CASE

A. War Crimes Act of 1996

[**Source:** Title 18, Crimes and Criminal Procedure Part I, Crimes Chapter [116] 118, War Crimes, 18 USCS, §2401 (1996); available on http://uscode.house.gov.]

Sec. 2401. War crimes

"(a) OFFENSE: Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

"(b) CIRCUMSTANCES: The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the armed forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

"(c) DEFINITIONS: As used in this section, the term 'grave breach of the Geneva Conventions means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party."

[...]

B. 1997 Amendment to the War Crimes Act of 1996

[**Source:** This Amendment was contained in the Foreign Operations Appropriations Act approved by the Senate on November 9, 1997 and the House of Representatives on November 12, 1997; available on http://thomas.loc.gov/home/c105query.html.]

[N.B.: Section 2401 of the United States Code has since been re-numbered Section 2441.]

War Crimes Prosecution

SEC. 583. Section 2401 of title 18, United States Code (Public Law 104-192; The War Crimes Act of 1996) is amended as follows:

(1) in subsection (a), by striking "grave breach of the Geneva Conventions" and inserting "war crime";

(2) in subsection (b), by striking "breach" each place it appears and inserting "war crime";

and

(3) so that subsection (c) reads as follows:

"(c) Definition: As used in this section the term 'war crime' means any conduct:

"(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

"(2) prohibited by Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

"(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

"(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, wilfully kills or causes serious injury to civilians."

DISCUSSION

1. a. How has the 1997 amendment to the War Crimes Act of 1996 enlarged the range of offences covered? What further acts are now prohibited? (*Cf.* Arts. 23, 25, 27 and 29 of the Hague Regulations, Art. 3 common to the Conventions, and Amended Protocol II to the 1980 Conventional Weapons Convention. *See* **Document No. 1**, p. 517 and **Document No. 8**, p. 547.)

   b. Is the choice of the provisions of the Hague Regulations referred to in the Amendment appropriate? Would you have referred to additional provisions or excluded some of them? Does Art. 25 of the Hague Regulations provide an appropriate formulation on which attacks are prohibited in contemporary IHL? Can an undefended dwelling ever be a legitimate military objective? Under Art. 52 (2) of Protocol I? Under contemporary customary IHL?

   c. Are violations of Protocol II within the range of offences covered by the amended Act?

2. Does the War Crimes Act as amended fulfil the US obligation under IHL to enact the necessary legislation for providing "effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions.)

3. a. What is the jurisdictional scope of the War Crimes Act of 1996? Did the 1997 amendment alter this?

   b. Does the amended War Crimes Act provide for universal jurisdiction? Is the United States, as a State Party, not required to provide for universal jurisdiction under the Conventions? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions.)

   c. Why do you think that the proposed version of the amendment to the Act, which would have provided for universal jurisdiction did not prevail?

   d. Does the absence of universal jurisdiction in the US Act create a US "safe-haven" from prosecution for certain war criminals? Are extradition or deportation options available to the United States in such cases to respect their obligations under IHL? Are these always satisfactory options? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions.)

VII. National Statements

Case No. 55, Russian Federation, Succession to International Humanitarian Law Treaties

THE CASE

[**Source:** Note from the Permanent Mission of the Russian Federation in Geneva transmitted to the ICRC on January 15, 1992.]

Note of the Ministry for Foreign Affairs of the Russian Federation:

"... The Russian Federation continues to exercise the rights and carry out the obligations resulting from the international agreements signed by the Union of Soviet Socialist Republics.

Accordingly the Government of the Russian Federation will carry out, instead of the Government of the USSR, functions of depositary of the corresponding multilateral treaties.

In this connection the Ministry asks to consider the Russian Federation as the Party to all international agreements in force, instead of the USSR..."

DISCUSSION

1. Was this note necessary? Does it modify the legal situation of the Russian Federation towards IHL treaties? Would the Russian Federation have been a party to the IHL treaties without this note?
2. Are your answers to question 1 also valid for all other States of the former USSR? What would their legal situation if they had not made any declaration?

Case No. 56, USSR, Poland, Hungary, and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III

THE CASE

A. USSR

[**Source:** *Final Record of the Diplomatic Conference of Geneva of 1949*, vol.I, Federal Political Department, Berne, pp. 355-356. available on http://www.icrc.org/ihl.]

Reservations made upon signature and maintained upon ratification [12.12.1949;10.05.1954]:

General SLAVIN, Head of the Delegation of the Union of Soviet Socialist Republics: [...]

(3) On signing the Convention relative to the Treatment of Prisoners of War, the Government of the Union of Soviet Socialist Republics makes the following reservations: [...]

Article 85

"The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment." [...]

B. Poland

[**Source:** *Final Record of the Diplomatic Conference of Geneva of 1949*, vol.I, Federal Political Department, Berne, pp. 350-351; available on http://www.icrc.org/ihl.]

Reservations made upon signature and maintained upon ratification [08.12.1949; 26.11.1954]:

Mr PRZYBOS, Polish Minister in Switzerland, made the following reservations concerning the four Geneva Conventions: [...]

(3) "On signing the Geneva Convention relative to the Treatment of Prisoners of War, I declare that the Government of the Polish Republic adheres to the said Convention, with reservations in respect of Article [...] 85. [...]

"In regard to Article 85, the Government of the Polish Republic will not consider it legal for prisoners of war convicted of war crimes and crimes against humanity in accordance with the principles set forth at the time of the Nuremberg trials, to continue to enjoy protection under the present Convention, it being understood that prisoners of war convicted of such crimes must be subject to the regulations for the execution of punishments, in force in the State concerned." [...]

C. Hungary

[**Source:** *Final Record of the Diplomatic Conference of Geneva of 1949*, vol.I, Federal Political Department, Berne, pp. 346-347. available on http://www.icrc.org/ihl.]

Declarations and reservations made upon signature and maintained upon ratification [08.12.1949; 03.08.1954]: [...]

"The express reservations made by the Government of the Hungarian People's Republic on signing the Conventions, are as follows: [...]

(4) "The Delegation of the Hungarian People's Republic repeats the objection which it made, in the course of the meetings at which Article 85 of the Prisoners of War Convention was discussed, to the effect that prisoners of war convicted of war crimes and crimes against humanity in accordance with the principles of Nuremberg, must be subject to the same treatment as criminals convicted of other crimes. [...]

D. Democratic People's Republic of Korea

[**Source:** *UNTS*, vol. 276, 1957, pp. 263-264. available on http://www.icrc.org/ihl.]

Reservations made upon accession [27.08.1957]: [...]

On Article 85 [...] [of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949]:

"The Government of the Democratic People's Republic of Korea will not be bound by Article 85, in regard to the treatment of the prisoners of war convicted under the laws of the Detaining Power of prisoners of war for having committed war crimes or inhumane offences, based on the principles of Nuremberg and the Tokyo Far East International Military Tribunal." [...]

DISCUSSION

1. Why do you think so many States (in addition to those above: Albania, Belarus, Bulgaria, the Chinese People's Republic, Czechoslovakia, the German Democratic Republic, Hungary, Romania, the Ukraine, the People's Republic of Vietnam and Angola) made a similar reservation to Art. 85 of Convention III? (Note: Hungary, Belarus, Bulgaria and Romania have withdrawn their similar reservations.)

2. a. Should those prisoners of war, who violated the laws of war, still be permitted to claim that law's protection? Should the law of war be applicable to them at all? At least until *prima facie* evidence of guilt is established? Until a sentence has been pronounced against them? Yet, is not a prisoner of war extremely vulnerable in enemy hands and thus in greatest need of legal safeguards provided for him under international law? According to Art. 85 of Convention III until when are the benefits of the Convention applicable to prisoners of war who committed war crimes?

   b. With which safeguards does Convention III provide prisoners of war? Are such safeguards more or less extensive than most national legislation? Should an alleged war criminal be deprived of safeguards which national legislation routinely provides to even the worst criminals? Does Convention III raise any obstacle to the trial or sentencing of prisoners of war by the Detaining Power? Or to them serving a sentence like criminals convicted of other crimes? Which provisions of Convention III on the treatment of prisoners of war go beyond what International Human Rights Law guarantees to any convicted prisoners?

3. a. What is meant by the "principles of the Nüremberg trial," as stated in various ways by the reservations above? Is it a reference to those principles of international law recognized in the Charter of the Nüremberg Tribunal as formulated by the UN International Law Commission and through the judgement of the Tribunal? Are thus war crimes and crimes against humanity to be understood as the International Law Commission defined them?

   b. Why is it important that the reservations do not include crimes against peace? If such crimes were included what potential ramifications could that have for

prisoners of war? Under IHL, for which offences committed prior to capture may a prisoner of war be punished?

c. Is it clear in the reservation of the USSR when the benefits of the Convention would be withdrawn from prisoners of war? What recourse do States Parties have if a reservation leaves itself open to various interpretations? Are any and all reservations to a treaty permitted? If not, then which ones?

d. Do the three other reservations have the same effect as the reservation of the USSR?

Document No. 57, France, Accession to Protocol I

A. Statement at the Diplomatic Conference

[**Source:** *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, Vol. VII, Federal Political Department, Bern, 1978, pp. 192-194.]

3. Mr Paolini (France) made the following statement:

"[T]he French delegation wishes to note that Protocol I is not restricted to reaffirming and developing humanitarian law in armed conflicts; it also reaffirms and develops to a considerable extent the laws and customs of war established earlier in a number of international conventions adopted more than fifty years ago, particularly the Hague Convention No. IV of 18 October 1907 concerning the Laws and Customs of War on Land. Humanitarian law and the law of war are thus interlinked although hitherto these two fields of international law have remained separate. This is particularly clear in Part III, concerning the methods and means of warfare, and Part IV, concerning the general protection of the civilian population against effects of hostilities.

"This consolidation of humanitarian law and the law of war will no doubt enable humanitarian law to make progress in some cases. But it does have its dangers. Once an international instrument of humanitarian law also deals with the conduct of warfare, it is necessary to make sure that it maintains strict respect for the sovereignty of States and their inalienable right to provide for their peoples' self-defence against any aggression by foreign Powers.

"The French delegation therefore wishes to make it quite clear that its Government could not under any circumstances permit the provisions of Protocol I to jeopardize the 'inherent right of self-defence,' which France intends to exercise fully in accordance with Article 51 of the United Nations Charter, or to prohibit the use of any specific weapon which it considers necessary for its defence. [...]

"With regard to Protocol I itself, the French Government cannot accept that the provisions of paragraph 4 of Article 46 (Article 51 in the final numbering) and paragraph 2 of Article 50 (new Article 57), concerning indiscriminate attacks, could prohibit its own armed forces, in defending the national territory, from

carrying out military operations against enemy forces attacking or occupying certain areas or places.

"Nor can it accept that the provisions of Article 47 (new Article 52), concerning the general protection of civilian objects, or those of sub-paragraph (b) of Article 51 (new Article 58), recommending the Parties to avoid locating military objectives within or near densely populated areas, could prohibit or irrevocably prejudice the defence by its own armies of certain parts of the national territory or of towns or villages attacked by enemy forces. [...]

"The French delegation considers it regrettable that, because of their ambiguous nature, Articles 46 (new Article 51), 47 (new Article 52), 50 (new Article 57) and 51 (new Article 58) are of a nature to have serious implications for France's defence policy, and it therefore wishes to express the most categorical reservations with regard to them...".

B. Reservations and interpretative declarations concerning accession by France to Protocol I

[**Source:** "Accession by France to Protocol I of 8 June 1977," in *International Review of the Red Cross*, No. 842, June 2001, pp. 549-552, 2001, available on http://www.icrc.org/eng/review.]

Accession by France to Protocol I of 8 June 1977

France acceded on 11 April 2001 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted in Geneva on 8 June 1977. That accession was accompanied by various declarations and reservations (see below).

Protocol I came into force for France on 11 October 2001. France was the 158th State to become party to that Protocol.

It should be recalled that France acceded on 24 February 1984 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

Reservations and interpretive declarations concerning accession by France to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

1. The provisions of Protocol I of 1977 shall not prevent France from exercising its inherent right of self-defence, in accordance with Article 51 of the Charter of the United Nations.
2. With reference to the draft Protocol prepared by the International Committee of the Red Cross, which formed the basis for the work of the Diplomatic Conference of 1974-1977, the Government of the French Republic still considers that the provisions of the Protocol relate to conventional weapons only and that they do not regulate or prohibit recourse to nuclear weapons, nor can they undermine the other rules of international law applying to other weapons which France needs to exercise its inherent right of legitimate defence.

3. The Government of the French Republic considers that the expressions *possible* and *endeavour* to used in the Protocol mean what can be achieved or what is practicable, given the prevailing circumstances, including humanitarian and military considerations.
4. The Government of the French Republic considers that, of itself and in context, the expression "armed conflicts" employed in Article 1 (4) refers to a situation of a type that does not include committing ordinary crimes - including terrorist acts - irrespective of whether those crimes are collective or individual.
5. Given the practical need to use non-specific aircraft for the purpose of medical evacuation, the Government of the French Republic does not interpret Article 28 (2) as ruling out the presence on board of communication equipment and encoding material or the use of such equipment or material solely in order to facilitate navigation, identification or communication for the benefit of a medical transport mission, as defined in Article 8.
6. The Government of the French Republic considers, in relation to the provisions of Article 35 (2) and (3) and Article 55, that the risk of causing harm to the natural environment through the use of methods and means of warfare, must be analysed objectively on the basis of information available at the time of its assessment.
7. Taking account of the provisions of Article 43 (3) of the Protocol concerning armed law enforcement agencies, the Government of the French Republic informs the States party to the Protocol that its armed forces permanently include the gendarmerie nationale (national police force).
8. The Government of the French Republic considers that the situation referred to in the second sentence of Article 44 (3) can exist only if a territory is occupied or in the event of an armed conflict within the meaning of Article 1 (4). The term "deployment" used in paragraph 3 (b) of that same article means any movement towards a place from which an attack may be launched.
9. The Government of the French Republic considers that the rule stated in the second sentence of Article 50 (1) may not be interpreted as obliging commanding officers to take a decision which, depending on the circumstances and the information available to them, might be incompatible with their duty to ensure the safety of the troops under their responsibility or to maintain their military position, in accordance with the other provisions of the Protocol.
10. The Government of the French Republic considers that the expression "military advantage" used in Article 51 (5) (b), Article 52 (2) and Article 57 (2) (a) (iii) indicates the advantage expected to be gained from the attack as a whole and not from isolated or specific parts of the attack.
11. The Government of the French Republic declares that it will apply the provisions of Article 51 (8) to the extent that their interpretation does not impede the use, in accordance with international law, of the means that it

may deem indispensable to protect its civilian population against obvious and deliberate serious violations of the Geneva Conventions and the Protocol by the enemy.

12. The Government of the French Republic considers that a specific area may be considered a military objective if, owing to its location or any other criterion listed in Article 52, its total or partial destruction, its capture or neutralization, taking account of the circumstances prevailing at the time, presents a decisive military advantage. The Government of the French Republic also considers that the first sentence of Article 52 (2) does not tackle the issue of collateral damages resulting from attacks launched against military objectives.
13. The Government of the French Republic declares that if the objects protected under Article 53 are used for military purposes, they shall thereby lose the protection from which they might have benefited pursuant to the provisions of the Protocol.
14. The Government of the French Republic considers that Article 54 (2) does not prohibit attacks carried out with a specific goal, with the exception of those that aim to deprive the civilian population of objects indispensable to its survival and those that are directed against objects which, although they are used by the adverse party, do not serve to provide sustenance for its armed forces alone.
15. The Government of the French Republic cannot guarantee to provide absolute protection for works and installations containing dangerous forces, which may contribute to the war effort of the adverse party, or for the defenders of such installations but it will take every necessary precaution, pursuant to the provisions of Article 56, Article 57 (2) (a) (iii) and Article 85 (3) (c), to avoid severe collateral losses among the civilian populations, including in the event of any direct attacks.
16. The Government of the French Republic considers that the obligation to cancel or suspend an attack, pursuant to the provisions of Article 57 (2) (b), calls only for normal measures to be taken to cancel or suspend that attack, on the basis of information available to the party deciding to launch the attack.
17. The Government of the French Republic considers that Article 70 relating to relief actions is without implication for the existing rules applicable to war at sea with regard to maritime blockades, submarine warfare and mine warfare.
18. The Government of the French Republic does not deem itself bound by a declaration made in application of Article 96 (3) unless it has explicitly acknowledged that the declaration was made by an authoritative body that truly represents a people engaged in an armed conflict as defined in Article 1 (4).

Case No. 58, United Kingdom and Australia, Applicability of Protocol I

THE CASE

A. Declaration by the Delegation of the United Kingdom

[**Source:** *VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (CDDH) Geneva, 1974-1977, Federal Political Dept., Bern, 1978, p. 46.]

[...]

82. Mr. FREELAND *(United Kingdom)* [...]
83. His delegation has abstained in the vote on Article 1 as a whole and would have abstained on paragraph 4 if a separate vote had been taken on it. At the first session of the Conference the United Kingdom delegation had voted against the amendment to include the paragraph now appearing as paragraph 4, partly because it had seen legal difficulty in the language used, which seemed to be cast in political rather than legal terms. The main reason for its opposition, however, was that the paragraph introduced the regrettable innovation of making the motives behind a conflict a criterion for the application of humanitarian law.
84. His delegation had nevertheless fully understood the wish of those who in 1974 had sponsored the amendment now appearing as paragraph 4 to classify as international armed conflicts various conflicts which by traditional criteria would have been considered internal but in which the international community was taking a keen interest. Those conflicts had been mentioned during the debates in 1974. They were conflicts which had been of major concern to the United Nations, all of them outside Europe; some of them had fortunately come to an end since 1974.

[N.B.: The United Kingdom ratified Protocol I, with reservations, on 28 January 1998. *Cf.* http://www.icrc.org/ihl]

B. Australia's Explanation of Vote on Draft Protocol I

[**Source:** *VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (CDDH) Geneva, 1974-1977, Federal Political Dept., Bern, 1978, Annex, pp. 59-60.]

Article 1 of draft Protocol I

The Australian delegation voted in favour of Article 1 because it contains principles which are consistent with the purpose of this Protocol and because it extends international humanitarian law to armed conflicts which can no longer be considered as non-international in character. [...]

In applying Protocol I to armed conflicts involving national liberation movements, paragraph 4 is a significant development in international humanitarian law and one which my delegation supported at the first session of the Conference. This development of humanitarian law is the result of various resolutions of the United

Nations, particularly resolution 3103 (XXVIII), and echoes the deeply felt view of the international community that international law must take into account political realities which have developed since 1949. It is not the first time that the international community has decided to place in a special legal category matters which have a special significance.

In supporting paragraph 4, the Australian delegation should not be understood as expressing an opinion on the legitimacy of any particular national liberation movement.

In supporting Article 1 as a whole, Australia understands that Protocol I will apply in relation to armed conflicts which have a high level of intensity. Furthermore, Australia understands that the rights and obligations under the Protocol will apply equally to all parties to the armed conflict, impartially to all its victims.

DISCUSSION

1. Do you agree with the United Kingdom delegation that Art. 1 (4) of Protocol I uses political language rather than legal language? Does Art. 1 (4) of Protocol I make "motives behind a conflict a criterion for application"? Are the criteria for applying it objective or subjective?
2. a. To which conflicts is the United Kingdom delegation referring in *para. 84* above? Is Australia referring to the same "political realities"? Does Art. 1 (4) of Protocol I only apply to such conflicts? If only so intended, is it of the same significance today as in 1977?
   b. Is the list of conflicts in Art. 1 (4) of Protocol I exhaustive? Why were those conflicts listed? Does the choice of listing these conflicts not support the United Kingdom delegation's concerns about the use of political language and the use of motives behind a conflict as a criterion for application?
3. Why did the United Kingdom delegation stress that all conflicts which led to the introduction of Art. 1 (4) of Protocol I were situated outside Europe?
4. Why do you think that the United Kingdom and Australian delegation hold contrary positions concerning Art. 1 (4) of Protocol I?
5. Was the addition of Art. 1 (4) of Protocol I even necessary in order for the Conventions to apply to such conflicts? Could not Art. 2 common to the Conventions be read as applying to wars of national liberation? Does the term "Power" only refer to a State?

Case No. 59, Belgium and Brazil, Explanations of Vote on Protocol II

THE CASE

[**Source:** *VII Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH)*, Geneva, 1974-1977, Federal Political Dept., Bern, 1978, Annex, p.76.]

A. Belgium

Article 1 of draft Protocol II

This Article 1, concerning the field of application of Protocol II, gives a fairly specific description of a widely prevalent type of non-international armed conflict, without, however, covering all the forms which civil war may take. Indeed, the 1949 negotiators took care in laying down common Article 3 not to define its field of application.

Furthermore, while this Article 1, which develops and supplements common Article 3, does not cover all possible applications of Article 3, neither does it modify the conditions of application. These remain as they stand and are integrated into the Protocol, although the Conference seems to have decided not to try to reaffirm or to develop all the provisions of Article 3 in this instrument. In other words, the entire philosophy of the provisions of common Article 3, whether explicitly reaffirmed or not, is included in the Protocol.

It is implicit that the same applies to the basic sovereign principle that the obligations of the Protocol are equally binding on both Parties to the conflict, and particularly to the provision in Article 3 that an impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict.

The same is true of the obligation in both Parties to endeavour to bring into force, by means of special agreements, all or part of the other provisions of the four Conventions.

B. Brazil

Article 1 of draft Protocol II

When Article 1 was adopted by consensus in Committee I during the second session of the Conference, the Brazilian delegation stated that the conditions laid down in the article to define its material field of application could be recognized only by the Government of the State on whose territory the conflict was allegedly taking place. These were indeed distinctive factors the verification of which could not be a matter either for the dissident armed forces or for third States, in connection with which [...] Article 3 [...] point[s] out clearly the fundamental principle of non-intervention. These motives justified the Brazilian delegation's abstention when the article was voted upon in the plenary Conference.

DISCUSSION

1. a. In which situations does Art. 3 common to the Conventions apply? When does Protocol II become applicable? (*Cf.* Art. 1 of Protocol II.) Is its field of application the same as common Art. 3?
   b. Is Belgium's explanation on the field of application of common Art. 3 correct? If it was not explicitly reaffirmed, why is Belgium so sure?
   c. Which aspects of common Art. 3 were neither developed nor reaffirmed by Protocol II? Can you imagine why? Are those parts of common Art. 3 still valid? Or have they become obsolete?
   d. What does Belgium mean when it states that the right of the ICRC to offer its services is equally applicable to both sides of the non-international armed conflict? May the ICRC offer its services to only one side? May the ICRC deploy its activities on only one side if only that side accepts its services? Even if that side is the rebel side?
2. a. Who normally determines whether an international treaty is applicable to a State Party? A judge? The State Party concerned?
   b. Who determines the applicability of Protocol II? Do you agree with Brazil that only the government of the State on whose territory the conflict is allegedly taking place may recognize the applicability of Protocol II? Which concerns does such a manner of recognition raise? Does such a manner of recognition exist for the four Conventions or Protocol I? And more specifically for common Art. 3? Why would common Art. 3 and Protocol II be more problematic to States?
   c. If the government were again in the position to solely decide, would this not undermine much of the purpose of Art. 1 of Protocol II which is to define the elements of armed conflict such that authorities could no longer deny the existence of a conflict?
3. Is Protocol II based on the principle of equality of the parties to the conflict, thus, imposing the same duties and granting the same rights?
4. Does the applicability or the application of IHL of non-international armed conflicts have any effect on the legal status of the parties to the conflict? Has the application of either common Art. 3 or Protocol II been used for the purpose of claiming recognition?

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee

THE CASE

[**Source:** *Report of the Swedish International Humanitarian Law Comittee Stockholm*, 1984, Preliminary excerpt translation provided by the Swedish International Humanitarian Law Committee in 1986.]

INTERNATIONAL LAW IN ARMED CONFLICT

[...]

3.2 General international law

As already stated, the system of rules of international law contains two components: the international agreements, or treaties, and international customary law, or general international law. Rules of customary law exist not infrequently in codified form in treaties. Here, the rules are to be considered not only as *jus inter partes*, but also as binding *erga omnes* (upon all states). From time to time regional customary law may develop, although this has not happened in the case of the laws of war.

3.2.1. The practice of states as customary law

General international law (customary law) normally arises from the current practice of states, that is, some regular practice viewed by the states themselves as juridically binding assumes the status of general international law. But this process, normal in peacetime, scarcely gives a complete description of the origin of customary law relating to war. War is despite everything such an irregular and brief occurrence that states during the actual conflict can seldom develop rules of law through their concrete actions. Such rules are more easily established through peacetime practice, that is, by allowing "abstract" state acts such as diplomatic statements, undertakings and declarations to influence development. It is no accident that those parts of international law that relate to war have been established through diplomatic conferences, where attempts have been made to codify or extend what has been regarded as customary law.

At the maritime law conference in London in 1909 ten states sought to identify and codify legal rules for naval war. Even though the rules brought together in the so-called Declaration of London corresponded essentially with established practice and the rulings of national prize courts, it was impossible to reach an agreement that the states could ratify. The declaration contained certain sections on the taking of prizes which, chiefly from the British side, were considered controversial; yet many of the rules reflected current customary law and were recognised as such during the first World War. In the chapters of the London Declaration relating to blocade, contraband, convoys etc. there are probably several rules that states could recognise as binding customary law even today. Unfortunately, current law in this area still lacks codification, something which is essential in the case of the laws of war.

The situation is somewhat similar in the area of aerial warfare. The rules for protection of civil populations in an air war, adopted by a commission of jurists at the Hague in 1923, have never been ratified. In 1923 the time was not ripe for rules convering [sic] area bombing etc, but in 1977 it was possible to adopt a number of the items in these Hague Rules in a somewhat modified form within the framework of Additional Protocol I. Among these was in fact a rule on area bombing. In the opinion of several experts, this partially constituted a codification of general international law.

In summary it may be said that the part of customary law relating to war has not normally developed through repeated state acts (practice) in time of war but chiefly through the conclusion of agreements in peacetime, that is, through multilateral agreements which have gradually attracted more parties or won general recognition in other ways. These agreements, also a form of state practice, are treated below.

3.2.2. Customary law through international agreement

The fundamental declaration from St. Petersburg in 1868 stated that "the only legal aim states may adopt during war is impairment of the enemy's military strength" and that "for the achievement of this aim it suffices to place the greatest possible number of men *hors de combat*". The declaration was signed by seventeen states, representing the community of civilised states at that time.

There are few further parties to the declaration today, but its principles have won general recognition and are now considered an expression of general international law, binding upon all states.

The situation is comparable for the 1907 Hague Conventions. The IVth convention and its regulations for land warfare had their forerunners in the almost identical texts that were adopted by a limited number of states at the first Peace Conference at the Hague in 1899. When these rules on the prohibition of pillage, the taking of hostages, the poisoning of wells, poisoned weapons, arms and combat methods causing unnecessary suffering, and on the protection of enemies who had laid down their arms were confirmed at the second Peace Conference in 1907, they were probably already considered as binding under customary law. The thirteen conventions adopted in 1907, however, contained chiefly new rules, and the peace conference did not attempt to give these the status of general international law. On the contrary, as we have seen, the provisions were considered as a *jus inter partes* and each convention, moreover, provided that the provisions were applicable only "in the case where all the Belligerents are Parties to the Convention". This limiting clause meant that the Hague conventions were not formally applicable during the Second World War, since belligerent states such as Bulgaria, Greece, Italy and Jugoslavia had not acceded. This absurd situation was, however, largely imaginary since by the outbreak of war in 1939 the Hague conventions had won such general recognition that they were in all essential respects binding as general international law. Large parts were in fact respected during the war.

A general principle which since 1907 has been considered to contain features of customary law is the thesis of the so-called Martens Clause. This clause in the Preamble to the IVth Hague Convention on Land Warfare, is named after the

Russian professor of international law and conference delegate, Frederick de Martens. [...]

Even the 1949 Geneva conventions with over 150 accessories - *e.g.* practically the whole community of nations - consist predominantly of customary law. The first three of the 1949 conventions are based on earlier, less far-reaching conventions. The first Geneva convention relating to the wounded and the sick in land war came about on the initiative of Henry Dunant as early as 1864. Its successor of 1906 was replaced in 1929 by two new conventions, one on the wounded and the sick in land war and the other on prisoners of war. The IInd Geneva convention of 1949 concerning the protection of the wounded, the sick and those shipwrecked at sea is a replacement of the X Hague Convention of 1907. Since these so-called Geneva rules were all the time limited to the protection of persons not participating in combat (being thus clearly deliminated from the "combat law" of the Hague rules) a fixed core of humanitarian rules for protection as developed and acquired an increasingly solid status as international law. By the time the present Geneva conventions were adopted in 1949, the element of general international law was already appreciable.

3.2.3. Customary law in Additional Protocol I

When the 1949 Geneva conventions were to be supplemented with two Additional protocols, a diplomatic conference was convened. This was to meet in Geneva for four sessions during 1974-1977. Officially named "The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian law Applicable in Armed Conflict", it was intended both to *confirm* and to *further develop* current law. Initially there were many who believed that the starting point would be the Geneva Rules alone, but the result became a reaffirmation and a reinforcement of both the Hague and the Geneva rules.

The first additional protocol (relating to international conflicts), accordingly contains items of customary law taken over from the 1949 rules and those of 1907. It is safe to assume that all the rules then considered worthy of confirmation possess the character of customary law.

In what follows an attempt will be made to list the rules in the protocol that have the status of customary law. The list may be of practical significance in a situation in which Sweden (which has ratified Additional Protocol I) is involved in conflict with an adversary who has not ratified. According to the chief rule in Article 96 the protocol applies only among states that have ratified it or acceded to it. It may not, however, be concluded from this that Sweden, in the above situation, can disregard the protocol in its entirety. Rules constituting general international law must always be respected, just as an adversary must respect the same rules. If an adversary fails to do so, Sweden may - if this is considered possible and appropriate - resort to whatever reprisals are still consonant with international law [...].

The following rules in Additional Protocol I would in the opinion of the Swedish International Humanitarian Law Committee have the status of customary law, at the times however only in their main outlines.

- general protection for the wounded, the sick and the shipwrecked, Art. 10;

- general protection for persons deprived of their liberty, Art. 11:1-3;
- protection of medical units, Art. 12 and of medical personnel, Art 15;
- recognition of the role of aid organisations, Art. 17;
- identification of medical personnel and medical units, Art. 18:1-3;
- protection of medical vehicles, Art.. 21;
- general protection of medical aircraft, Art. 25-27;
- prohibition of methods or means of warfare which cause superfluous injury or unnecessary suffering, Art. 35:2;
- prohibition of perfidy, Art. 37;
- prohibition of improper use of recognised emblems and emblems of nationality, Art. 38-39;
- prohibition of orders of no quarter, Art. 40;
- safeguard of an enemy hors de combat, Art. 41;
- prisoner-of-war status for regular combatants, Art. 44:1;
- the principle of distinguishment, Art. 48;
- the principle of proportionality, Art. 51:5(b);
- prohibition of starvation of the civilian population if the intention is to kill and not primarily to force a capitulation: this prohibition is part of Art. 54;
- the chief rule relating to non-defended localities, Art. 59;
- protection of personnel in relief actions, Art. 71:2;
- fundamental guarantees for persons in the power of one party to the conflict, Art. 75, and
- general protection of women and children, Art. 76:1 and 77:1. [...]

There are however no guarantees that other states share this Committee's opinion on which rules have the status of customary law, any more than it can be guaranteed that these rules will be respected by an adversary.

Apart from the articles listed above, Sweden has also reason to follow, in all circumstances, other articles in Additional Protocol I that are important in a humanitarian perspective, even where these have little or no connection with customary law. These articles concern protection of the sick, the wounded, medical transports, civil defence (Art. 61-67), basic needs in occupied territories (Art. 69), protection of refugees and stateless persons (Art. 73), reunion of families (Art. 74) and protection of journalists (Art. 79).

3.3 The situation where an adversary has not ratified Additional Protocol I

What is the scope of the rules of humanitarian law when a lack of agreement exists between the explicit undertaking of the parties? Sweden ratified Additional Protocol I (and II) on 31 August 1979. What applies in a conflict to which Sweden is a party and where the adversary has not ratified the protocol? This question has been touched upon in another connection: an opinion is here given in summary.

According to general international law and Article 96 of Additional Protocol I, the principle of reciprocity applies. Sweden shall not be required to abide by more comprehensive obligations than those applying to our adversary. From the point of view of humanitarian law that the Humanitarian Law Committee was instructed to

consider, it is natural to imagine that Sweden in such as situation would do all in her power to ensure that Additional Protocol I were applied by all the parties to a conflict in which we were involved. This might take the form of an official declaration, addressed to the non-ratifying parties, stating that Sweden for its part would apply Additional Protocol I in its entirety as long as the adversary did not, through lack of respect for the rules of the protocol, make this impossible. Thereby, the presumption that Additional Protocol I is capable of application could be maintained, which is important not least because of the example it would set.

If however the adversary failed in his respect for the protocol, Sweden would in turn have to reserve the possibility of waiving full application of the protocol rules. The adversary should be made aware that Sweden in such a case was not considering herself able to follow the protocol's rules of warfare, i.e. the main parts of Articles 51-58. [...]

If during the conflict an adversary announced officially his intention of applying the rules of the Protocol and did so in practice, Sweden would be bound by the Protocol in the normal way (AP I, Art. 96:2). Since the condition is that the adversary really abides by the rules of the Protocol, Sweden would in this case have the right to reserve full application during a "trial period". The customary law parts of the Protocol must however, as already shown, be respected even in the case outlined. If the adversary were to commit only small infringements of the rules, Sweden could hardly motivate non-application: such would conflict with the spirit of the protocol. Above all, a state that has ratified the protocol should not too readily and categorically choose a line of non-application in relation to an adversary that has not ratified. The principle of reciprocity is intended to give reasonable protection against obvious military disadvantages (a "safety net"), not to be an unconditional mechanism for setting aside the provisions of the protocol.

DISCUSSION

1. a. What kind of rules of customary IHL could be derived from the actual practice of belligerents? May one thus limit those contributing to the formation of customary law to belligerents? How can one establish such practice? Are reports of humanitarian organizations on "violations" useful? Does every act of a combatant constitute State Practice? Is it at least State Practice when the combatant is not punished?

   b. Can customary IHL be derived only from "abstract State acts such as diplomatic statements undertakings and declarations"? Acts by belligerents? Acts by nonbelligerents? Acts by both? What if the actual behavior of the belligerents is incompatible with their statements?

   c. Do statements made at diplomatic conferences for the development and the reaffirmation of IHL count as State Practice for the development of customary IHL? Which such statements have a greater weight than others?

   d. Does widespread State participation in an IHL treaty make its rules customary? Does such participation count as State Practice?

2. How can a rule of the Conventions which was not yet customary in 1949 later become customary? Does the practice of more than 190 States Parties also count as practice forming customary IHL or only that of the 3 States not party?

3. Does the list of the customary rules of Protocol I given in 1984 (section 3.2.3) constitute State Practice contributing to make those rules customary? Is the list still valid in 2005? How can a rule since then have become customary? Does the practice of the some 160 States Parties also count as practice forming customary IHL or only that of the some States not party?

4. a. What consequences could the perspective that Sweden might be involved in an armed conflict with a State not party to Protocol I have for the peacetime training of Swedish troops?

   b. Does the idea that Sweden would not respect non-customary parts of Arts. 51-58 of Protocol I against an adversary not bound to Protocol I and not respecting it violate the obligation laid down in Art. 1 of Protocol to respect it "in all circumstances"? The prohibition of reciprocity in the application of humanitarian treaties foreseen in Art. 60 (5) of the Vienna Convention on the Law of Treaties? The prohibition of reprisals laid down in Art. 51 (6) of Protocol I?

Case No. 61, US, President Rejects Protocol I

THE CASE

[**Source:** *Message from the President of the United States*, US Government Printing Office, 100th Congress, 1st Session, Treaty doc. 100-2, Washington, 1987.]

A Message from the President of the United States regarding Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-international Armed Conflicts

[...]

LETTER OF SUBMITTAL [p. IX]

DEPARTMENT OF STATE,
Washington, December 13, 1986

THE PRESIDENT,
The White House.

THE PRESIDENT:

I have the honor to submit to you, with a view to transmission to the Senate for its advice and consent to ratification, Protocol II Additional to the Geneva Conventions of August 12, 1949, concluded at Geneva on June 10, 1977.

PROTOCOL I

The Departments of State, Defense, and Justice have also conducted a thorough review of a second law of war agreement negotiated during the same period - Protocol I Additional to the Geneva Conventions of August 12, 1949. This Protocol was the main object of the work of the 1973-77 Geneva diplomatic conference, and represented an attempt to revise and update in a comprehensive manner the 1949 Geneva Conventions on the protection of war victims the 1907 Hague Conventions on means and methods of warfare, and customary international law on the same subjects.

Our extensive interagency review of the Protocol has, however, led us to conclude that Protocol I suffers from fundamental short-comings that cannot be remedied through reservations or understandings. We therefore must recommend that Protocol I not be forwarded to the Senate. The following is a brief summary of the reasons for our conclusion.

In key respects Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions such as Article 1(4), which gives special status to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination", would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law. Protocol I also elevates the international legal status of self-described "national liberation" groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions, and the resources to fulfill their obligations.

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to "national liberation" movements in general, but in particular to the inhumane tactics of many of them. Article 44 (3), in a single subordinate clause, sweeps away years of law by "recognizing" that an armed irregular, "cannot" always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States announced policy of combatting terrorism.

The Joint Chiefs of Staff have conducted a detailed review of the Protocol, and have concluded that it is militarily unacceptable for many reasons. Among these are that the Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces. It also unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions. Weighing all aspects of the Protocol, the Joint Chiefs of Staff found it to be too ambiguous and complicated to use as a practical guide for military operations, and recommended against ratification by the United States.

We recognize that certain provisions of Protocol I reflect customary international law, and other appear to be positive new developments. We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions into rules that govern our military operations, with the intention that they shall in time win recognition as customary international law separate from their presence in Protocol I. This measure would constitute an appropriate remedy for attempts by nations to impose unacceptable conditions on the acceptance of improvements in international humanitarian law. I will report the results of this effort to you as soon as possible, so that the Senate may be advised of our progress in this respect.

CONCLUSION

I believe that U.S. ratification of the agreement which I am submitting to you for transmission to the Senate, Protocol II to the 1949 Geneva Conventions, will advance the development of reasonable standards of international humanitarian law that are consistent with essential military requirements. The same is not true with respect to Protocol I to the 1949 Geneva Conventions, and this agreement should not be transmitted to the Senate for advice and consent to ratification. We will attempt in our consultations with allies and through other means, however, to press forward with the improvement of the rules of international humanitarian law in international armed conflict, without accepting as the price for such improvements a debasement of our values and of humanitarian law itself.

The effort to politicize humanitarian law in support of terrorist organizations have [sic] been a sorry develo[p]ment. Our action in rejecting Protocol I should be recognized as a reaffirmation of individual rights in international law and a repudiation of the collectivist apology for attacks on non-combatants.

Taken as a whole, these actions will demonstrate that the United States strongly supports humanitarian principles, is eager to improve on existing international law consistent with those principles, and will reject revisions of international law that undermine those principles. The Departments of State and Justice support these recommendations.

Respectfully submitted.

George P. Shultz

DISCUSSION

1. a. Do you agree with the criticism that Art. 1 (4) of Protocol I introduced political objectives into humanitarian law? Are the determinations necessary for application of Art. 1 (4) really subjective? (*See* **Case No. 140**, South Africa, S. v. Petane. p. 1511.)

   b. Is Art. 1 (4) a recognition of terrorists? Are those fighting national liberation wars necessarily committing more terrorist acts than their opponents? Than those fighting in classical wars? Even if Protocol I "elevate[d] their international legal status", is that equivalent to legitimizing any and all conduct during hostilities? If Protocol I applies to them, are they not also

bound by the provisions of the Protocol, *e.g.,* recognizing the protected status of civilians? Would they not also be accountable for their actions? Does Protocol I prohibit terrorist acts? (*Cf.* Preamble para. 5 and Arts. 1 (4), 51 (2) and 85 (3) of Protocol I.)

c. If Protocol I had not "elevated" national liberation wars to international armed conflicts, how would such conflicts have been qualified? Would the applicable IHL then set stronger or weaker requirements as far as the prohibition of terrorists acts and the obligation of combatants to distinguish themselves from the civilian population are concerned? (*Cf.* Protocol II.)

d. Are "guerrillas" or "terrorists" truly granted a legal status often superior to that accorded to regular forces? Does Article 1 (4), in particular, lead to a situation where both sides of an armed conflict are not equal before IHL? Which protections does IHL grant guerrillas? regular forces? Which obligations are imposed on each?

2. Which provisions in Protocol I reflect customary international law and which are new developments? Is, *e.g.,* Art. 1 (4) of Protocol I an innovative development in the law of war, or is it merely a reflection of existing international law? (*See* **Case No. 140**, South Africa, S. v. Petane. p. 1511.)

3. a. Does Protocol I (Art. 44 (3)) really "sweep away years of law"? Does Art. 44 (3) grant combatant status to those who do not distinguish themselves? Does this Article not specifically stipulate how they must distinguish themselves? Why do you think that the exception in the second sentence of Art. 44 (3) was included in the Protocol? What kind of hostilities did the drafters of the Protocol have in mind? Would the respect of IHL have improved in guerilla wars if Art. 44 (3) had not been included in Protocol I?

b. Why is the principle of distinction so important? Who does it protect? Does the exception in Article 44 (3) diminish this protection? (*See* **Case No. 98**, Malaysia, Osman v. Prosecutor. p. 1112.)

c. Which consequences do combatants that fail to distinguish themselves face under IHL? How does the exception in Art. 44 (3) alter these consequences for those, *e.g.,* guerrilla fighters, who fail to comply with the obligation to distinguish themselves from the civilian population? When do guerrilla fighters lose combatant or prisoner-of-war status? Whether they retain or lose prisoner-of-war status, are they punishable for violations of the laws of war? What are the legal consequences if, in the exceptional situation referred to in Art. 44 (3), combatants fail to carry their arms openly or if the combatants abusively assume the existence of an exceptional situation?

4. How does Protocol I further define legitimate objects of attack? And means and methods of warfare? Are these unreasonable restrictions? Is Protocol I really too ambiguous and simultaneously too complicated for practical military use, as the US letter of submittal claims?

5. Does Protocol I really not improve the compliance and verification mechanisms of Conventions? If so, is this alone a sufficient reason to reject it? Does Protocol I in fact protect victims of conflicts more, *e.g.,* by expanding the acts regarded as

grave breaches? Does Protocol I eliminate an important sanction against violations of the Conventions? To which important sanction is the US Department of State referring?

Case No. 62, Iran, Renouncing Use of the Red Lion and Sun Emblem

THE CASE

[**Source:** Schindler, D. & Toman, J. (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Dordrecht, Geneva, Nijhoff Publishers, Henry-Dunant Institute, 4th ed., 2004, p. 663.]

The Geneva Conventions of August 12, 1949

Iran (Islamic Rep. of)

[...]

Declaration of September 4, 1980:

By a memorandum dated September 4, 1980, the Legal Department of the Ministry of Foreign Affairs of the Islamic Republic of Iran informed the Swiss Embassy in Tehran of the following:

"In order to avoid the proliferation of international emblems denoting charitable and assistance activities and to favour the unification of these emblems, the Government of the Islamic Republic of Iran deems it appropriate to renounce its right to use the "Red Lion and Sun" as an official emblem of the International Association [sic] of the Red Cross and will therefore use the "Red Crescent" accepted by all Islamic countries. This step is being taken in order that all countries be required to accept one of the two emblems, i.e. either the "Red Cross" or the "Red Crescent". However, should any flagrant violations of this international rule be noted, the Government of the Islamic Republic of Iran reserves the right to resume the use of its emblem on both national and international levels." [...]

DISCUSSION

1. Why does Iran make such a declaration? Is it only to avoid the proliferation of protective emblems which motivates Iran to renounce its use of the "Red Lion and Sun"?
2. Why has the International Red Cross and Red Crescent Movement encountered problems arising from a plurality of protective emblems? Is it related to an interpretation of the red cross emblem as a Christian symbol? Is the non-religious connotation of the red cross emblem harder to claim since acceptance of the second emblem, the red crescent? How does this affect the principle of universality? (*See* **Case No. 31**, ICRC, The Question of the Emblem. p. 761.)

3. Which emblems does IHL protect? Who may use these emblems? In which circumstances and under what conditions? (*Cf.* Art. 23 (f) of the Hague Regulations, Arts. 38-44 and 53 of Convention I, Arts. 41-43 of Convention II, Arts. 8 (l) and 18 of Protocol I, Arts. 4-5 of Annex I of Protocol I and Art. 12 of Protocol II.)

4. a. What does Iran mean by "flagrant violations": the non-respect of personnel and units marked with the emblem? The frequent abuse of the emblem by those who are not entitled to use it? The use, by Israel, of an emblem other than the red cross and the red crescent to mark medical personnel and units?

   b. Are States under an obligation to use the red cross or the red crescent emblems? If a State does not use one of the protective emblems, what are the ramifications? Are there disadvantages? Are their medical personnel and units less protected: in law? in fact?

Document No. 63, Switzerland, Prohibition of the Use of Chemical Weapons

[**Source:** "Le droit de la guerre" in *Annuaire Suisse de Droit International,* 1989, pp. 244-247; original in French, unofficial translation.]

10.1 Is the prohibition on the use of chemical weapons a principle of customary law? Treaty and custom. Reservations in international treaties. Reprisals: conditions governing the conduct thereof.

In the note which is reproduced in part below the Directorate for Public International Law [of the Swiss Federal Department for Foreign Affairs] considers whether the prohibition on the use of chemical methods of warfare stipulated in the Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare [...] has acquired the force of custom.

[Opinion of the Directorate for Public International Law:]

1. The 1925 Protocol prohibits the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices. In other words, it bans the use of chemical weapons. The Protocol also extends that prohibition to the use of bacteriological and biological weapons.
   Under the Protocol, the States Parties shall, in so far as they are not already party to treaties which prohibit the use of such weapons, accept that prohibition. That particular wording suggests that the 1925 Protocol confirms rather than stipulates the rule prohibiting the use of chemical weapons. Therefore, certain writers have described that instrument as declamatory.

   The 1919 Treaty of Versailles, which appears indirectly to establish the existence of an international custom which prohibits gases in that it states at the beginning of Article 171 that "The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices [shall be] prohibited," is among the treaties to which the 1925 Protocol implicitly refers.

Under Article 23(a) of the Regulations annexed to the 1899/1907 Convention Respecting the Laws and Customs of War, it is also prohibited to employ poison or poisoned weapons. Moreover, subparagraph (e) of that provision reiterates the general prohibition contained in the 1868 Declaration of St Petersburg and the 1880 Oxford Manual. Article 5 of the Treaty relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington in 1922, also reiterates that the use of chemical weapons is condemned by the general opinion of the civilized world. Thus, it is possible to state, as do the learned writers, that the 1925 Protocol declares a custom.

2. Many States have issued reservations when ratifying the Protocol. Those States essentially fall into one of two categories. First, there are those States making reservations which wished to make clear that they had an obligation solely towards the States Parties to the Protocol. Such reservations would appear to be superfluous since the Protocol contains a restriction to that effect. [...]. Under the reservations of a second type, various States have declared that they would not deem themselves bound by the Protocol with respect to a State if that State or its allies failed to comply with the prohibitions contained therein. In other words, the States making the reservations rely on their right to carry out reprisals in the event that one of the States Parties to the Protocol or one of their allies uses chemical weapons first. Incidentally, those reservations constitute a certain degree of progress in comparison with the *si omnes* clause contained in Article 2 of the abovementioned 1899/1907 Hague Convention which releases the State Parties from any obligation towards another State Party on the sole pretext that that State has an ally which is not party to the Convention.

   To be lawful reprisals must be of the same kind. Thus, a State against which chemical herbicide methods of warfare are used is not theoretically justified in responding by using anti-personnel agents, whether they be irritant, asphyxiating or lethal. Therefore, reprisals must be in kind to use the English terminology.

3. What are the effects of the reservations to the 1925 Protocol - those of the second type - which the vast majority of learned writers regard as an expression of customary law? Sandoz regards them as irrelevant. [However, it is possible to lean towards] a less black and white view where a reservation, which consists in declaring that the Protocol will cease to be applicable with respect to a hostile State whose armed forces or allies fail to comply with the prohibitions contained therein, goes further than the right of reprisal which itself enables the fundamental prohibition on the use of chemical weapons to be preserved.

   In that context several situations may be envisaged. When all the belligerent States are party to the Protocol no chemical or bacteriological weapons may be lawfully used other than in the event of reprisals in kind. The same applies where States which are not party thereto take part in the conflict. However, in that case it is in accordance with custom that the States Parties are under an obligation with regard to them. Moreover, if any hostile State, whether or not party to the Protocol, uses prohibited methods of warfare, a State making a reservation will continue to be bound by the rule of custom only with regard

to that and any other belligerent State. On the other hand, a State Party which has issued no reservation will only be able to exercise its right of reprisal with regard to a State Party which has infringed one of the rules of the Protocol. However, in practice the distinction is a fragile one. Whether or not party to the Protocol and, as far as the former are concerned, whether or not they have deposited a reservation, States are justified in using toxic agents only within the well defined framework of reprisals. Customary law and treaty law impose the same conditions on the conduct of reprisals, i.e. subsidiarity, proportionality and indeed humanity.

4. To sum up, the 1925 Protocol and custom prohibit the first use of chemical weapons and accept the lawfulness of second use only in the case of reprisals in kind.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs dated 15 December 1988.

Unpublished document.

Case No. 64, US, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons

THE CASE

[**Source:** Doswald-Beck, L. (ed.), *Blinding Weapons: Reports of the meetings of experts convened by the International Committee of the Red Cross on Battlefield Laser Weapons 1989-1991*, Geneva, International Committee of the Red Cross, Annex C, 1993, pp. 367-371.]

[...]

September 29, 1988

MEMORANDUM OF LAW

Subject: use of lasers as antipersonnel weapons

1. *Summary.* This memorandum considers the legality of the use of a laser as an antipersonnel weapon. It concludes that such use would not cause unnecessary suffering when compared to other wounding mechanisms to which a soldier might be exposed on the modern battlefield, and hence would not violate any international law obligation of the United States. Accordingly, the use of antipersonnel laser weapons is lawful.

2. *Background.* Department of Defense Instruction 5500.15 requires that a weapon or munition undergo a legal review during its development and prior to acquisition to ensure that the weapon or munition in question complies with the international law obligations of the United States. This review is to be conducted by the Judge Advocate General of the Service sponsoring the weapon/munition. This memorandum does not constitute a review of a particular weapon, but addresses a basic question regarding the legality of the use of lasers for antipersonnel purposes. This memorandum has been coordinated with the International Law Divisions of the Offices of the Judge

Advocates General of the Navy and Air Force, each of which concurs in its contents and conclusion.

3. *Previous Opinions.* Each of the Judge Advocates General has proffered opinions relating to the legality of lasers. Navy [...] opinions concluded that injury to combatants secondary or ancillary to the use of a laser for rangefinding, target acquisition, or other antimateriel purposes is lawful, and that blindness *per se* could not be a basis for concluding that a laser violates the law of war prohibition against weapons that may cause unnecessary suffering. Opinions by the Air Force [...] concluded that the use of lasers to produce flash effects (the temporary induction of a visual impairment) to combatants would not violate the law of war obligations of the United States. While they did not have a direct impact on the contents or conclusions of this memorandum, related legal opinions prepared by a close ally of the United States and another agency of the United States were considered, as were threat briefings regarding the actions, programs, and possible intent of potential opponents of the United States.

4. *Law of War.* No specific rule prohibits laser weapons. In fact, antipersonnel weapons are designed specifically to kill or disable enemy combatants and are not unlawful because they cause death, disability, pain or suffering. This principle is tempered by the law of war obligations of the United States relating to the legality of weapons or munitions, contained in the Annex to Hague Convention IV Respecting the Laws and Customs of War on Land of October 18, 1907 [...]. In particular, article 23(e) prohibits the employment of arms, projectiles, or material calculated to cause unnecessary suffering. There is no internationally accepted definition of unnecessary suffering. In fact, an anomaly exists in that while it is legally permissible to kill an enemy soldier, in theory any wounding should not be calculated or intended to cause unnecessary suffering. In endeavouring to reconcile the two, in considering the customary practice of nations during this century, and in acknowledging the lethality of the battlefield for more than a century, certain factors emerge that are germane to this opinion:
   a) No legal obligation exists or can exist to limit wounding mechanisms in a way that permits lawful killing while requiring that wounds merely temporarily disable, that is, that the effects of wounds do not extend beyond the period of hostilities, and
   b) In considering whether a weapon may cause unnecessary suffering, it must be viewed in light of comparable wounding mechanisms extant on the modern battlefield rather than viewing the weapon in isolation.
   c) The term unnecessary suffering implies that there is such a thing as necessary suffering, i.e., that ordinary use of any militarily effective weapon will result in suffering on the part of those against whom it is employed.
   d) The rule does prohibit deliberate design or alteration of a weapon solely for the purpose of increasing the suffering of those against whom it is used, including acts what will make their wounds more difficult to treat. This is the basis for rules against poisoned weapons and certain small calibre hollow point ammunition.

5. *Recent negotiations.* Law of war provisions to regulate or prohibit laser weapons have been considered over the past fifteen years; none have been accepted by the community of nations. Separate weapons discussions were held in conjunction with the 1974-1977 Diplomatic Conference on Humanitarian Law. Although the issue of laser weapons was raised by a small number of nations, all weapons questions were deferred save and except incorporation of article 23(e) of the Annex to Hague IV of 1907 into article 35 (2) of the 1977 Protocol I additional to the 1949 Geneva Conventions for the Protection of War Victims. At the subsequent United Nations Conference on Certain Conventional Weapons, held in Geneva from 1978 to 1980, the subject of regulation of laser weapons was again raised by a very small minority of nations but, owing to lack of support, was not actively pursued. In the course of the XXV International Conference of the Red Cross (Geneva, October 1986), Sweden and Switzerland offered a resolution condemning the blinding effect of laser weapons; that resolution enjoyed little support, was strongly resisted by some nations, and was not adopted by the conference. In April 1988 Sweden again endeavoured to raise the issue, though in substantially modified form. It acknowledged the legality of the use of lasers to produce flash effects to combatants; accepted the lawfulness of the use of lasers for rangefinding, target acquisition, and similar military purpose; and also accepted the legality of blinding of enemy combatants incidental to the use of a laser for the above-cited purposes. Sweden's most recent effort proposed to prohibit use of lasers as antipersonnel weapons *per se.* This proposal, offered first on an informal basis to delegates to the United Nations Committee on Disarmament in Geneva on 18 April 1988, and subsequently to the United Nations Special Session on Disarmament III in New York in June, 1988, met with no success in either instance. This history not only indicates a lack of international support for any prohibition or regulation on the use of lasers as antipersonnel weapons, but simultaneously serves as an acknowledgement of the legality of such use under the current law of war ; were such use illegal *per se*, no further regulation would be necessary. That said, however, it is beneficial to consider laser weapons and their effects in the context of the current law of war to understand the basis for their legality.

6. *Lasers.* Lasers operate in a wide variety of wavelengths and exposure durations. The susceptibility of the human eye and skin is dependent on a number of physical and operational factors, including the output characteristics of the laser source and the conditions of the atmosphere between the laser and the target (rain, sleet, snow, fog, dust) [...] which can cause considerable attenuation or reduction of the light intensity at the target. If the target is the human eye or skin surface, the laser may produce minimal effect at low levels, from veiling glare or dazzle to the eye or the bare perception of warmth on the skin, to the most severe effects of severe eye and skin burns. At high levels of laser irradiation the damage mechanism which predominates is a thermal phenomenon, [...]. The human eye is particularly susceptible to laser light in the visible and near infrared portions of the electromagnetic spectrum [...]. Laser light incident on the cornea in

this wavelength region (commonly referred to as in-band to the eye) is focused to a very small retinal spot increasing the energy per unit area on the retina by a factor of 100,000 times. At these levels the high concentration of light is sufficient to produce irreversible damage [...]. At these high levels of laser irradiation the effects on the human eye may be the appearance of a large retinal burn with accompanying haemorrhage into the portion of the eye behind the lens. As the incident laser energy is reduced, the haemorrhage is no longer a factor and the size of the retinal burn diminishes. As the laser exposure level falls below the threshold for retinal burn, the effect is one of bright light exposure producing a dazzle or glare phenomenon. In general the factors of importance in laser-induced trauma of the eye follow those of exposure to any intense light source, including the sun. [...] Lasers can produce corneal burns, retinal burns and flash effects. The degree of injury is related to the operation characteristics of the laser source and the condition of the atmosphere which determines the amount of energy reaching the eye and the eye itself. Eye factors may include the direction of the eye with reference to the laser, the age of the individual, and the degree of pupillary dilatation or light collection and adaptation level (for lasers operating in the visible or near infrared). Not all individuals exposed to incident laser irradiation will be permanently blinded. Those lasers which produce wavelengths in the ultraviolet and the infrared are known as out-of-band and produce mainly surface effects to the eye (cornea and lens) and skin. These effects may vary from large corneal burns to deep, full thickness skin burns.

7. *Issue.* This memorandum is not concerned with skin burns. Incendiary weapons have been in use by most nations throughout the history of war. Attempts at prohibiting or regulating their use against enemy combatants were specifically rejected by national delegations attending the 1978-1980 United Nations Conference on Certain Conventional Weapons. Neither is it concerned with eye injury not of a permanent nature, as it would be compatible to and generally less damaging than other conventional wounding mechanisms. The fundamental issue with which this review is concerned is whether the use of a laser for the purpose of blinding an enemy soldier would constitute unnecessary suffering. The conclusion is that it would not.

8. *Rationale.* Blinding is no stranger to the battlefield. Records on eye injury to U.S. military personnel in World War I and II, Korea, and the Vietnam War reveal that permanently disabling eye wounds have resulted from bomb, shell, and hand grenade fragments, bullets, landmines, other mechanisms, poisonous gas, and battlefield debris such as dirt, rocks, and glass. Like lasers, eye injury caused by the these mechanisms does not necessarily result in death or permanent blindness. Unlike lasers, however, injury from each of these mechanisms frequently results in death; therefore anti-personnel laser injury is more humane than injury caused by comparable weapons. While some laser injury can lead to permanent blindness, the extent of injury is subject to the myriad of factors previously listed. As with defense against chemical agents or conventional munitions, potential laser

injuries can be minimized with the utilization of appropriate protective equipment and defensive actions. The weapons under consideration have not been designed with the sole purpose of producing permanent injury to combatants. As with other weapons, even were a laser developed that would, in most cases, cause a permanently disabling wound, it is lawful because its increased power has militarily useful effects, such as increased range against other sensors.

Some laser injury may lead to permanent blindness. The issues are whether the intentional use of a laser for the purpose of blinding necessarily should be considered as causing unnecessary suffering in that its effect, if permanent, outlasts the duration of the hostilities, and whether permanent blindness can or should be regarded as more sever than other forms of permanent disability. The following addresses these matters.

Permanent blinding, again, is not unique to lasers, nor is a permanently disabling wound a remote occurrence in modern war. Many wounds lead to permanently disabling effects. Modern weapons are not designed to temporarily incapacitate. Wounds that last beyond the duration of hostilities are commonplace, and there exists no law of war obligation to design weapons along lines to the contrary. The prohibition contained in article 23(e) of the Annex to Hague IV limiting the employment of arms, projectiles, or material calculated to cause unnecessary suffering must be balanced against the necessity for destructive power adequate to meet a variety of threats at a variety of ranges and in a variety of circumstances, such as combatants in bunkered positions or armoured vehicles, or at extended range. The lawful attack of enemy combatants inevitably will cause - and has caused - vast numbers of permanently disabling wounds, including blindness. U.S. Government disability tables regard permanent blindness as equal to but not greater than other forms of permanent disability.

Proposals to conclude that the use of a laser to intentionally blind would result in unnecessary suffering would lead to a contradiction in the law in that a soldier legally could be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers against materiel [sic] targets, but could not be attacked individually. Thus enemy soldiers riding on the outside of a tank lawfully could be blinded as the tank is lased incidental to its attack by antitank munitions; yet it would be regarded as illegal to utilize a laser against an individual soldier walking ten meters away from the tank. No case exists in the law of war whereby a weapon lawfully may injure or kill a combatant, yet be unlawful when used in closely related circumstances involving other combatants.

9. *Conclusion.* For the foregoing reasons, it is concluded that the use of lasers as antipersonnel weapons would not cause unnecessary suffering nor otherwise constitute a violation of the international legal obligations of the United States. Accordingly, the use of a laser as an antipersonnel weapon is lawful.

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DISCUSSION

1. a. Does IHL require the US to initiate a legal review of a weapon during its development to ensure that it complies with IHL? even though the US is not a party to Protocol I? (*Cf.* Art. 23 (e) of the Hague Regulations and Arts. 35 (2) and 36 of Protocol I. *See also* **Document No. 34**, ICRC, New Weapons, p. 783.)

   b. Which responsibilities do States Parties hold regarding the study and development of new weapons? Which assessments must States Parties make? Which criteria are they to use in making these assessments? (*Cf.* Art. 36 of Protocol I.)

2. a. Is the use of lasers as anti-personnel weapons consistent with IHL for States not party to Protocol IV to the 1980 UN Weapons Convention? Which standard is to be applied for this determination? (*Cf.* Art. 23 (e) of the Hague Regulations and Art. 35 (2) of Protocol I. *See also* **Document No. 7**, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), October 13, 1995, p. 546.) Does the use of lasers to blind enemy soldiers constitute "superfluous injury or unnecessary suffering" thus making their use prohibited by IHL? What qualifies as "superfluous injury"? As "unnecessary suffering"? Do these terms cover merely physical suffering? Or also moral suffering? Are these objective terms? Are objective criteria agreed upon by States Parties and utilized by them for the determination of what constitutes "superfluous injury and unnecessary suffering"?

   b. Is the most appropriate method for determining "unnecessary suffering" to make a comparison with other wounding mechanisms to which a soldier might be exposed on the modern battlefield rather than assessing the weapon and/or its use in isolation? Should a weapon's objective effect on the

victim, *e.g.*, severity of the injury or intensity of suffering, be balanced against its relation to military necessity? Is the determination actually a balance of the harm caused versus the ability to meet threats? Are these precise concepts on which to base a judgement?

c. If more concrete criteria should be adopted for determining what constitutes "superfluous injury and unnecessary suffering," which criteria would you propose? What do you think of the criteria proposed by the ICRC's SIrUS Project?

[ICRC, The SIrUS Project: Towards a determination of which weapons cause "superfluous injury or unnecessary suffering" (Robin M. Coupland, ed., 1997), p. 23:

"[W]hat constitutes "superfluous injury and unnecessary suffering" be determined by design-dependent, foreseeable effects of weapons when they are used against human beings and cause: specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement (*Criterion 1*); or field mortality of more than 25% or hospital mortality of more than 5% (*Criterion 2*); or Grade 3 wounds as measured by the Red Cross wound classification (*Criterion 3*); or effects for which there is no well-recognized and proven treatment (*Criterion 4*)."]

3. Is it irreconcilable that weapons may cause death but can not be calculated or intended to cause "superfluous injury or unnecessary suffering"? According to IHL what is the purpose of weapons in conflict? To kill? To render an adversary *hors de combat*? Are these not different objectives? If so, does the argument that use of a laser, even one causing blindness, is more humane than killing the soldier not miss the objective of IHL? Does such an argument fail to take into account that conventional weapons are not always lethal? That there also exists a psychological impact of sudden blindness? That the injury is guaranteed to last beyond the duration of hostilities? That soldiers returning blind impacts the whole society?

[*Cf.* Preamble of the Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles. Saint Petersburg, 29 November/11 December 1868:

[". . .]

Considering:

[. . .]

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity; . . . . "]

4. Would it be lawful for a soldier to be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers against material targets? Should it be? Would it be legally inconsistent if the soldier then could not be attacked individually? Does it make a difference whether the deliberate objective is to

blind the soldier? (*Cf.* Art. 3 of Protocol on Blinding Weapons (Protocol IV), **Document No. 7**, p. 546.)

5. a. Do you agree with the US Judge Advocate General that the use of a laser as an anti-personnel weapon is lawful? Because a laser's ability to cause blindness remains subject to a myriad of factors and, thus, blindness does not always occur? Because these factors can be protected against? Because its military useful effects outweigh the harm caused?

   b. Yet, must not the use of lasers be deemed illegal, as they are an indiscriminate means of warfare? What if civilians were in the area where a laser was used? Can a laser distinguish between combatants, *hors de combats*, and civilians? (*Cf.* Art. 51 (4) of Protocol I.)

6. a. Does the existence of the Protocol on Blinding Laser Weapons (Protocol IV) not further substantiate the US claim that IHL alone does not proscribe the use of lasers as anti-personnel weapons? Or does it solidify the international community agreement that such use of laser weapons is contrary "to the laws of humanity, and the dictates of public conscience"? (*Cf.* the Martens clause: Paras. 8-9 of Hague Convention IV, Arts. 63 (4)/62 (4)/142 (4)/158 (4), respectively, of the four Conventions, Art. 1 (2) of Protocol I and Para. 4 of the Preamble to Protocol II.)

   b. Would not IHL be better served if agreements such as Protocol IV proscribed the effect on human beings, here intentional blinding, and not merely a weapon's technology? Nevertheless, is Protocol IV not at least unique in that it applies to a weapon before that weapon's effects have been observed on the battlefield?

Case No. 65, UK, Reservations to Additional Protocol I

THE CASE

[**Source:** Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Reservation letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom.]

"(...) I also have the honour to lodge with the Government of the Swiss Federation, as the depository of Additional Protocol I the following statements in respect of the ratification by the United Kingdom of that Protocol: [...]

"(d) Re: ARTICLE 1, paragraph 4 and ARTICLE 96, paragraph 3

It is the understanding of the United Kingdom that the term "armed conflict" of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. (...)"

(m) Reservation: Article 51-55

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result". [...]

DISCUSSION

1. Does reservation (d) mean that the UK considers that the fight against terrorism never constitutes an armed conflict? That the UK could not detain terrorists as "enemy combatants", as the US does (*See* **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base, p. 2309.)?

2. Is reservation (m) really a reservation or does it simply interpret the obligations under Arts. 51 and 55? Which specific provision is not accepted by the UK?

3. Is reservation (m) directed against the prohibition of reprisals? Or does the UK reserve the right to suspend (contrary to Art. 60 (5) of the Vienna Convention on the Law of Treaties (*Cf.* **Quotation**, Part I, Chapter 13. IX. 2. c) dd) p. 301.)) the applicability of Arts. 51 and 55 in case of a substantive breach by the enemy?

4. Does the reservation correctly restate the limitations put forward by customary international law on reprisals? Or is it more restrictive than customary law? Which elements go beyond customary law?

5. a. Is reservation (m) not largely without practical consequences as it contains an engagement not to violate the Conventions? And do the Conventions not prohibit reprisals against protected persons?

   b. What do the Conventions state in relation to reprisals? (*Cf.* Arts. 46/47/13 (3)/ 33 (3), respectively, of the four Conventions.) Do the Conventions protect in a sufficient manner the civilian population against reprisals? Does the prohibition contained in Article 33 (3) of Convention IV prohibit reprisals against the civilian population in the conduct of hostilities?

c. What does Art. 51 of Protocol I add to the Conventions in relation to reprisals against the civilian population? Was the clarification given in Art. 51 (6) of Protocol I necessary?

6. Does Art. 51 (6) reduce the scope for reprisals? What kind of reprisals are still lawful under Protocol I?

7. Does reservation (m) to Arts. 51 and 55 undermine Protocol I in its entirety, in particular its provisions on the protection of the civilian population?

8. Does reservation (m) reflect a pragmatic compromise between the concept of military necessity and the protection of the civilian population? Does it not actually protect the civilian population by dissuading an enemy from violating Protocol I?

VIII. National Decisions

Case No. 66, UK, Interpreting the Act of Implementation

THE CASE

[**Source:** 1 All ER (1968), pp. 779-783.]

CHENEY v. CONN (Inspector of Taxes).

SAME v. INLAND REVENUE COMMISSIONERS

[CHANCERY DIVISION (Ungoed-Thomas, J), July 3, 1967.]

UNGOED-THOMAS, J: This is an appeal against an assessment [...] and also an assessment to surtax. Both these cases raise the same point. The submission is that the assessments are invalid because it is to be taken that what is collected will be, in part, applied in expenditure on the armed forces and devoted to the construction of nuclear weapons with the intention of using those weapons if certain circumstances should arise. It is conceded for the purposes of this case that a substantial part of the taxes for the years that I have mentioned was allocated to the construction of nuclear weapons. The issue therefore becomes whether the use of income tax and surtax for the construction of nuclear weapons, with the intention of using them should certain circumstances arise, invalidates the assessments.

The assessments were made under statute and the relevant statute is the Finance Act 1964. [...] The provision is, first, of force statutorily; secondly, unambiguous; and, thirdly, limited to the raising of taxation and not to the purposes for which that taxation has to be applied or any such policy matters at all.

The ground on which it was argued that the use of this money for the construction of nuclear weapons is illegal is that such use conflicts primarily with Conventions incorporated in an Act of Parliament - and, so it was suggested, impliedly ratified by them - and also ratified by the Crown in the usual way; and also because, according to the Case Stated, it was contrary to international law. But the case as presented before me was rested primarily, at any rate, on a conflict between two statutes - namely, the statute which refers to the Geneva Conventions (viz., the Geneva Conventions Act, 1957) and the Finance Act 1964. Before coming to the Act of 1957 I shall deal first with the relationship of statute law to international law and international conventions.

First, international law is part of the law of the land, but it yields to statute. [...] It is therefore very understandable why the taxpayer in the case relies primarily, at any rate, not on a conflict between international law in general and the statute, but on the conflict between the Act of 1957, and its reference to ratification, and another statute, the Finance Act 1964. Secondly, conventions which are ratified

by an Act of Parliament are part of the law of the land; and, thirdly, conventions which are ratified, but not by an Act of Parliament, which would thereby give them statutory force, cannot prevail against a statute in unambiguous terms. The law is thus stated in OPPENHEIM'S INTERNATIONAL LAW (8th ed.) at p. 924:

> "The binding force of a treaty concerns in principle the contracting States only, and not their subjects. As international law is primarily a law between States only and exclusively, treaties can normally have effect upon States only: This rule can, as has been pointed out by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise, if treaties contain provisions with regard to rights and duties of the subjects of the contracting States, their courts, officials, and the like, these States must take such steps as are necessary, according to their Municipal Law, to make them provisions binding upon their subjects, courts, officials and the like."

At p. 40 the law is stated thus:

> "Such treaties as affect the private rights and, generally, as require for their enforcement by English courts a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament. To that extent binding treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislature. That departure from the traditional common law rule is largely due to the fact that, according to British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown, which would otherwise be in a position to legislate for the subject without obtaining parliamentary assent"

IN WADE AND PHILLIPS' CONSTITUTIONAL LAW (7th ed.) [...] [I]t is pointed out on p. 275 that: "treaties which, for their execution and application in the United Kingdom, require some addition to, or alteration of the existing law "are treaties which involve legislation."

Here the legislation so relied on is, as I have indicated, the Genveva Conventions Act, of 1957. The title and preamble of the Act of 1957 are as follows:

> "An Act to enable effect to be given to certain international conventions done at Geneva on Aug. 12, 1949, and for purposes connected therewith. Whereas, with a view to the ratification by Her Majesty of the conventions set out in the schedules to this Act, it is expedient to make certain amendments in the law."

What the Act of 1957 then does is to make certain specific amendments in the law by reference to particular provisions in the Geneva Conventions. There is no conflict whatsoever between the particular provisions included in those specific amendments and to the Finance Act. 1964; nor have any of those specific amendments been relied on for that purpose.

What has been relied on has been the combination of the title and the preamble, which I have read. It is said that the whole object of the Act of 1957 was, first, with a view to ratification by the Crown; and secondly, with a view to giving effect to the Geneva Conventions. The ratification by the Crown might or might not have been made. If the ratification were made (as in fact, subsequently, it was made in this case), then, of course, the ratification would take effect, not by reason of this Act of Parliament at all, but by reason of ratification by the executive. It would

then have the consequences in law which ratification by the executive has, as contrasted with the effect it would have in law if it were ratified by law, embodied in statute and made by Parliament part of the law of this land. The title and the preamble relied on do not make the Geneva Conventions statute; and therefore, except to the extent of the specifical amendments to the law made by the Act of 1957 itself, which I have mentioned and which have not been relied on for the purposes of this case - and which, indeed, appear hardly applicable to it at all - the Act of 1957 does not provide material which can be relied on as being in conflict with the Finance Act 1964 at all. Is conceded by the Crown for purposes of this case, though not otherwise, that the ratification in fact took place; but it is clear that in so far as the ratification has taken place by executive action and not by parliamentary action, it yields to statute. So even if there were a conflict between what is contained in the conventions ratified and the Finance Act 1964, the Finance Act 1964, unambiguous as it is, would prevail. Therefore, on this ground, apart from any other, the taxpayer's case, in my judgement, fails.

DISCUSSION

1. a. Why did the Act of 1957 fail to make the Conventions part of British statutory law? What limitations did the preamble place on the Act? Why is it important that the Conventions become part of statutory law?

   b. By the decision of this Court, are we to presume that none of the provisions of the Conventions relevant to this situation are self-executing? Does it matter in English law whether a provision of an international treaty is self-executing?

2. Do the Conventions prohibit the construction of nuclear weapons? Their use? If any, which provisions of IHL prohibit the use of nuclear weapons? Are those rules self-executing? (*Cf.* Art. 23 (e) of the Hague Regulations and Arts. 35 (2)-(3), 36 and 51 of Protocol I.)

3. Would statutory law still take precedence if customary law prohibited the use and/or construction of nuclear weapons? (*See* **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. p. 896.)

4. What obligation does the UK have regarding implementation of the Conventions? Does the Act of 1957 fulfil this obligation? As interpreted in this Case? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions.)

Case No. 67, UK, Labour Party Campaign - Misuse of the Emblem

THE CASE

A. Labour Attacked over 'Misuse' of Red Cross Symbol

[**Source:** Reynolds, N., *The Daily Telegraph,* February 19, 1988.]

THE LABOUR party has been accused of hijacking the red cross emblem, used by medical and relief workers around the world, for its campaign to persuade the Government to make more money available for the Health Service in the Budget.

Two days ago Labour started to distribute one million pamphlets and lapel stickers bearing a red cross superimposed on a pound sign.

The move has angered the British Red Cross Society, the Ministry of Defence, and a Tory MP.

The Red Cross Society has demanded that the campaign be halted immediately for fear of tarnishing the cross's "traditional symbol of neutrality".

The Defence Ministry, the legal protector of the symbol in this country under powers given by the Geneva Conventions Act 1957, last night wrote to Labour, claiming it had broken the law by using a protected emblem without permission.

But the party is unimpressed and has accused the Red Cross Society of "quibbling".

After taking legal advice [...] Labour said last night that it would continue with its campaign.

[...]

His deputy, Mr Roy Hattersley, said yesterday: "We have had a legal opinion which is utterly conclusive. There's been no breach of the law".

A Labour spokesman said that the official red cross was against a white background and had arms of equal length, whereas Labour's cross had unequal arms.

The pamphlet had a buff background and the stickers were yellow.

A spokeswoman for the Red Cross Society said yesterday: "It's awful sad that it's being used for a political party."

If used "for all sorts of things then its basic role as a humanitarian symbol gets diluted and people become very confused", she said.

She believed Labour had used the symbol unwittingly. "We're awfully sorry about this, but they are breaking the law". [...]

A Labour spokesman said of the Red Cross objection: "We are surprised that an organisation that shares our concern for the well-being and effectiveness of the Health Service, would quibble about the use of this symbol.

B. Labour Official Falls Foul of Red Cross

[**Source:** Rose, D., *The Guardian,* November 11, 1988.]

Mr Larry Whitty, Labour's general secretary, was yesterday convicted of breaching the Geneva Convention for using the Red Cross emblem on party leaflets without permission.

Sir Bryan Robertson granted Mr Whitty a 12-month conditional discharge plus 200 prosecution costs, at Horseferry Road magistrate's court, London.

Mr Philip Kelly, the editor of Tribune, was also given a conditional discharge for 12 months for using the symbol on his front page.

After the hearing, Mr Whitty said the case, brought by the Department of Trade and Industry, was politically motivated. The complaint against Tribune was made by Mr Gerald Hartup, campaigns director of the Freedom Association, the right-wing pressure group.

The court heard that the British Red Cross director, Mr John Burke-Gaffney, asked Mr Whitty last February to withdraw the leaflets, which campaigned against health cuts.

He said it appeared to breach section six of the 1957 Geneva Convention Act, which prohibits the use of the symbol without authority from the Department of Trade and Industry.

Mr Whitty wrote back saying the Labour red cross was not the same as the International Red Cross and so distribution of the leaflets could go ahead.

Outside the court, Mr Whitty accused the Government of bringing a "squalid" prosecution for political reasons.

"This was not a case brought by the Red Cross. It was instigated by government departments.

[...]

A DTI spokeswoman denied this, saying there had been no political direction and Mr Whitty had been treated in the same way as anyone who broke the Geneva Convention.

Mr Kelly accused the Red Cross of being in league with the Government. He said the case should cause people to think about its charitable status.

Mr Burke-Gaffney said after the hearing: "I am sad about the whole thing but I'm glad the court has felt that the emblem should be protected.

"I hope people realise that it is important and needs supporting."

DISCUSSION

1. Who may use the red cross emblem in peacetime? In which circumstances and under what conditions? (*Cf.* Art. 23 (f) of the Hague Regulations, Arts. 38, 44 and 53 of Convention I, Arts. 41-43 of Convention II, Arts. 8 (l) and 18 of Protocol I, Arts. 4-5 of Annex I of Protocol I and Art. 12 of Protocol II.)

2. a. Did the Labour party properly use the emblem? Did it even utilize the emblem? Was not the image on their pamphlet a cross with arms of unequal length and the background buff or yellow in contrast to the protected emblem which is a red cross with arms of equal length on a white background? Is this nevertheless misuse of the emblem? Although it is drawing the attention of public opinion on problems of the health service which may use the emblem (rather than, *e.g.*, a campaign of pharmaceutical producers who may not use the emblem)? (*Cf.* Art. 53 of Convention I, Art. 38 of Protocol I and Art. 12 of Protocol II.)

   b. Is such misuse of the emblem a war crime? Would any misuse of the emblem constitute a war crime? If so, when? Even in peacetime? (*Cf.* Art. 34 of the Hague Regulations, Art. 53 of Convention I and Arts. 37 (1) (d), 38 and 85 (3) (f) of Protocol I.)

3. a. Would the criminal convictions still have occurred if the Labour party had received prior authorization to use the emblem? Should such use ever be authorized? Would authorization for such use be consistent with the Conventions and Protocols?

   b. Who authorizes use of the emblem? International Red Cross and Red Crescent organizations? The National Societies? The States Parties? Who has the responsibility to punish misuse and abuse of the emblem? (*Cf.* Art. 54 of Convention I, Art. 45 of Convention II and Art. 18 of Protocol I.) Is it not then logical that governmental departments, not the Red Cross, brought the case?

   c. Which obligations have States Party to the Conventions and Protocols regarding the emblem? Must each State Party adopt implementing legislation, such as the United Kingdom's Geneva Conventions Act of 1957? Which issues should this legislation encompass? (*Cf.* Art. 54 of Convention I, Art. 45 of Convention II and Art. 18 of Protocol I.)

4. a. Is not, as the Labour spokesman said, the British Red Cross merely quibbling? What concerns the Red Cross about the Labour party's use of the emblem? Is the Red Cross only concerned because the Labour party did not receive prior authorization? What dangers to the emblem's authority arise with such misuse of the emblem? How does this impact the emblem's essential neutrality? Its impartiality? Does such use undermine the protection it provides?

   b. Is the political neutrality of the British Red Cross more undermined by the use of the emblem by the Labour party or by a controversy between the Red Cross and the Labour party which ends up in the criminal conviction of a Labour leader?

   c. May or must a National Red Cross Society strive against abuses of the emblem? Because it is a violation of IHL or because the same emblem is also used by the National Society? May or must a National Red Cross Society more generally strive against specific violations of IHL? Including seeing to it that violators are brought to court?

IX. PRIVATE RESTATEMENTS

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea

[**Source:** *San Remo Manual on International Law Applicable to Armed Conflicts at Sea adopted in June 1994*, prepared by lawyers and naval experts convened by the International Institute of Humanitarian Law of San Remo, Geneva, ICRC, November 1995, 43 pp. available on http://www.icrc.org/ihl.]

PART I: GENERAL PROVISIONS

[...]

SECTION IV: AREAS OF NAVAL WARFARE

10. Subject to other applicable rules of the law of armed conflict at sea contained in this document or elsewhere, hostile actions by naval forces may be conducted in, on or over:
    (a) the territorial sea and internal waters, the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States;
    (b) the high seas; and
    (c) subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States.
11. The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:
    (a) rare or fragile ecosystems; or
    (b) the habitat of depleted, threatened or endangered species or other forms of marine life.
12. In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States. [...]

PART II: REGIONS OF OPERATIONS

SECTION I: INTERNAL WATERS, TERRITORIAL SEA AND ACHIPELAGIC WATERS

14. Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States. Neutral airspace consists of the airspace over neutral waters and the land territory of neutral States.
15. Within and over neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised, hostile actions by belligerent forces are

forbidden. A neutral State must take such measures as are consistent with Section II of this Part, including the exercise of surveillance, as the means at its disposal allow, to prevent the violation of its neutrality by belligerent forces.

16. Hostile actions within the meaning of paragraph 15 include, inter alia:
    (a) attack on or capture of persons or objects located in, on or over neutral waters or territory;
    (b) use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;
    (c) laying of mines; or
    (d) visit, search, diversion or capture.
17. Belligerent forces may not use neutral waters as a sanctuary.
18. Belligerent military and auxiliary aircraft may not enter neutral airspace. Should they do so, the neutral State shall use the means at its disposal to require the aircraft to land within its territory and shall intern the aircraft and its crew for the duration of the armed conflict. Should the aircraft fail to follow the instructions to land, it may be attacked, subject to the special rules relating to medical aircraft as specified in paragraphs 181-183.
19. Subject to paragraphs 29 and 33, a neutral State may, on a non-discriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warships and auxiliary vessels.
20. Subject to the duty of impartiality, and to paragraphs 21 and 23-33, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:
    (a) passage through its territorial sea, and where applicable its archipelagic waters, by warships, auxiliary vessels and prizes of belligerent States; warships, auxiliary vessels and prizes may employ pilots of the neutral State during passage;
    (b) replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and
    (c) repairs of belligerent warships or auxiliary vessels found necessary by the neutral State to make them seaworthy; such repairs may not restore or increase their fighting strength.
21. A belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters, or its presence in those waters for replenishment or repair, for longer than 24 hours unless unavoidable on account of damage or the stress of weather. The foregoing rule does not apply in international straits and waters in which the right of archipelagic sea lanes passage is exercised.
22. Should a belligerent State be in violation of the regime of neutral waters, as set out in this document, the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of

the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

SECTION II: INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA LANES

General rules

23. Belligerent warships and auxiliary vessels and military and auxiliary aircraft may exercise the rights of passage through, under or over neutral international straits and of archipelagic sea lanes passage provided by general international law.
24. The neutrality of a State bordering an international strait is not jeopardized by the transit passage of belligerent warships, auxiliary vessels, or military or auxiliary aircraft, nor by the innocent passage of belligerent warships or auxiliary vessels through that strait.
25. The neutrality of an archipelagic State is not jeopardized by the exercise of archipelagic sea lanes passage by belligerent warships, auxiliary vessels, or military or auxiliary aircraft.
26. Neutral warships, auxiliary vessels, and military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters. The neutral State should, as a precautionary measure, give timely notice of its exercise of the rights of passage to the belligerent State.

Transit passage and archipelagic sea lanes passage

27. The rights of transit passage and archipelagic sea lanes passage applicable to international straits and archipelagic waters in peacetime continue to apply in times of armed conflict. The laws and regulations of States bordering straits and archipelagic States relating to transit passage and archipelagic sea lanes passage adopted in accordance with general international law remain applicable.
28. Belligerent and neutral surface ships, submarines and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under, and over all straits and archipelagic waters to which these rights generally apply.
29. Neutral States may not suspend, hamper, or otherwise impede the right of transit passage nor the right of archipelagic sea lanes passage.
30. A belligerent in transit passage through, under and over a neutral international strait, or in archipelagic sea lanes passage through, under and over neutral archipelagic waters, is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral or archipelagic State, or in any other manner inconsistent with the purposes of the Charter of the United Nations, and otherwise to refrain from any hostile actions or other activities not incident to their transit. Belligerents passing through, under and over neutral straits or waters in which the right of archipelagic sea lanes passage

applies are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents in transit or archipelagic sea lanes passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary nor as a base of operations.

Innocent passage

31. In addition to the exercise of the rights of transit and archipelagic sea lanes passage, belligerent warships and auxiliary vessels may, subject to paragraphs 19 and 21, exercise the right of innocent passage through neutral international straits and archipelagic waters in accordance with general international law.
32. Neutral vessels may likewise exercise the right of innocent passage through belligerent international straits and archipelagic waters.
33. The right of non-suspendable innocent passage ascribed to certain international straits by international law may not be suspended in time of armed conflict.

SECTION III: EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF

34. If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, inter alia, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.
35. If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, inter alia, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.

SECTION IV: HIGH SEAS AND SEA-BED BEYOND NATIONAL JURISDICTION

36. Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploitation of the natural resources of the sea-bed, and ocean floor, and the subsoil thereof, beyond national jurisdiction.
37. Belligerents shall take care to avoid damage to cables and pipelines laid on the sea-bed which do not exclusively serve the belligerents.

PART III: BASIC RULES AND TARGET DISCRIMINATION

SECTION I: BASIC RULES

38. In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
39. Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.
40. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
41. Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.
42. In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:
    (a) are of a nature to cause superfluous injury or unnecessary suffering; or
    (b) are indiscriminate, in that:
        (i) they are not, or cannot be, directed against a specific military objective; or
        (ii) their effects cannot be limited as required by international law as reflected in this document.
43. It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.
44. Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.
45. Surface ships, submarines and aircraft are bound by the same principles and rules.

SECTION II: PRECAUTIONS IN ATTACK

46. With respect to attacks, the following precautions shall be taken:
    (a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
    (b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
    (c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage; and

(d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which world be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

Section VI of this Part provides additional precautions regarding civil aircraft.

SECTION III: ENEMY VESSELS AND AIRCRAFT EXEMPT FROM ATTACK

Classes of vessels exempt from attack

47. The following classes of enemy vessels are exempt from attack:

(a) hospital ships;
(b) small craft used for coastal rescue operations and other medical transports;
(c) vessels granted safe conduct by agreement between the belligerent parties including:
  (i) cartel vessels, *e.g.*, vessels designated for and engaged in the transport of prisoners of war;
  (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
(d) vessels engaged in transporting cultural property under special protection;
(e) passenger vessels when engaged only in carrying civilian passengers;
(f) vessels charged with religious, non-military scientific or philanthropic missions, vessels collecting scientific data of likely military applications are not protected;
(g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;
(h) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;
(i) vessels which have surrendered;
(j) life rafts and life boats.

Conditions of exemption

48. Vessels listed in paragraph 47 are exempt from attack only if they:

(a) are innocently employed in their normal role;
(b) submit to identification and inspection when required; and
(c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

Loss of exemption

Hospital ships

49. The exemption from attack of a hospital ship may cease only by reason of a breach of a condition of exemption in paragraph 48 and, in such a case, only after due warning has been given naming in all appropriate cases a reasonable time limit to discharge itself of the cause endangering its exemption, and after such warning has remained unheeded.

50. If after due warning a hospital ship persists in breaking a condition of its exemption, it renders itself liable to capture or other necessary measures to enforce compliance.

51. A hospital ship may only be attacked as a last resort if:

(a) diversion or capture is not feasible;
(b) no other method is available for exercising military control;
(c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective; and
(d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

All other categories of vessels exempt from attack

52. If any other class of vessel exempt from attack breaches any of the conditions of its exemption in paragraph 48, it may be attacked only if:

(a) diversion or capture is not feasible;
(b) no other method is available for exercising military control;
(c) the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; and
(d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

Classes of aircraft exempt from attack

53. The following classes of enemy aircraft are exempt from attack:

(a) medical aircraft;
(b) aircraft granted safe conduct by agreement between the parties to the conflicts; and
(c) civil airliners.

Conditions of exemption for medical aircraft

54. Medical aircraft are exempt from attack only if they:

(a) have been recognized as such;
(b) are acting in compliance with an agreement as specified in paragraph 177;
(c) fly in areas under the control of own or friendly forces; or
(d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

Conditions of exemption for aircraft granted safe conduct

55. Aircraft granted safe conduct are exempt from attack only if they:
    (a) are innocently employed in their agreed role;
    (b) do not intentionally hamper the movements of combatants; and
    (c) comply with the details of the agreement, including availability for inspection.

Conditions of exemption for civil airliners

56. Civil airliners are exempt from attack only if they:
    (a) are innocently employed in their normal role; and
    (b) do not intentionally hamper the movements of combatants.

Loss of exemption

57. If aircraft exempt from attack breach any of the applicable conditions of their exemption as set forth in paragraphs 54-56, they may be attacked only if:
    (a) diversion for landing, visit and search, and possible capture, is not feasible;
    (b) no other method is available for exercising military control;
    (c) the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and
    (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.
58. In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used.

SECTION IV: OTHER ENEMY VESSELS AND AIRCRAFT

Enemy merchant vessels

59. Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.
60. The following activities may render enemy merchant vessels military objectives:
    (a) engaging in belligerent acts on behalf of the enemy, *e.g.*, laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
    (b) acting as an auxiliary to an enemy s armed forces, *e.g.*, carrying troops or replenishing warships;
    (c) being incorporated into or assisting the enemy s intelligence gathering system, *e.g.*, engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
    (d) sailing under convoy of enemy warships or military aircraft;
    (e) refusing an order to stop or actively resisting visit, search or capture;

(f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, *e.g.*, against pirates, and purely deflective systems such as chaff ; or

(g) otherwise making an effective contribution to military action, *e.g.*, carrying military materials.

61. Any attacks on these vessels is subject to the basic rules set out in paragraphs 38-46.

Enemy civil aircraft

62. Enemy civil aircraft may only be attacked if they meet the definition of a military objective in paragraph 40.

63. The following activities may render enemy civil aircraft military objectives:

(a) engaging in acts of war on behalf of the enemy, *e.g.*, laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;

(b) acting as an auxiliary aircraft to an enemy's armed forces, *e.g.*, transporting troops or military cargo, or refuelling military aircraft;

(c) being incorporated into or assisting the enemy's intelligence-gathering system, *e.g.*, engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;

(d) flying under the protection of accompanying enemy warships or military aircraft;

(e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;

(f) being armed with air-to-air or air-to-surface weapons; or

(g) otherwise making an effective contribution to military action.

64. Any attack on these aircraft is subject to the basic rules set out in paragraphs 38-46.

Enemy warships and military aircraft

65. Unless they are exempt from attack under paragraphs 47 or 53, enemy warships and military aircraft and enemy auxiliary vessels and aircraft are military objectives within the meaning of paragraph 40.

66. They may be attacked, subject to the basic rules in paragraphs 38-46.

SECTION V: NEUTRAL MERCHANT VESSELS AND CIVIL AIRCRAFT

Neutral merchant vessels

67. Merchant vessels flying the flag of neutral States may not be attacked unless they:

(a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
(b) engage in belligerent acts on behalf of the enemy;
(c) act as auxiliaries to the enemy s armed forces;
(d) are incorporated into or assist the enemy s intelligence system;
(e) sail under convoy of enemy warships or military aircraft; or
(f) otherwise make an effective contribution to the enemy s military action, *e.g.*, by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

68. Any attack on these vessels is subject to the basic rules in paragraphs 38-46.

69. The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

Neutral civil aircraft

70. Civil aircraft bearing the marks of neutral States may not be attacked unless they:
    (a) are believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
    (b) engage in belligerent acts on behalf of the enemy;
    (c) act as auxiliaries to the enemy's armed forces;
    (d) are incorporated into or assist the enemy's intelligence system; or
    (e) otherwise make an effective contribution to the enemy's military action, *e.g.*, by carrying military materials, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

71. Any attack on these aircraft is subject to the basic rules in paragraphs 38-46.

SECTION VI: PRECAUTIONS REGARDING CIVIL AIRCRAFT

72. Civil aircraft should avoid areas of potentially hazardous military activity.

73. In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the belligerents regarding their heading and altitude.

74. Belligerent and neutral States concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are aware on a continuous basis of designated routes

assigned to or flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.

75. Belligerent and neutral States should ensure that a Notice to Airmen (NOTAM) is issued providing information on military activities in areas potentially hazardous to civil aircraft, including activation of danger areas or temporary airspace restrictions. This NOTAM should include information on:
    (a) frequencies upon which the aircraft should maintain a continuous listening watch;
    (b) continuous operation of civil weather-avoidance radar and identification modes and codes;
    (c) altitude, course and speed restrictions;
    (d) procedures to respond to radio contact by the military forces and to establish two-way communications; and
    (e) possible action by the military forces if the NOTAM is not complied with and the civil aircraft is perceived by those military forces to be a threat.
76. Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, *e.g.*, safety or distress, in which case appropriate notification should be made immediately.
77. If a civil aircraft enters an area of potentially hazardous military activity, it should comply with relevant NOTAMs. Military forces should use all available means to identify and warn the civil aircraft, by using, inter alia, secondary surveillance radar modes and codes, communications, correlation with flight plan information, interception by military aircraft, and, when possible, contacting the appropriate Air Traffic Control facility. [...]

PART IV: METHODS AND MEANS OF WARFARE AT SEA

SECTION I: MEANS OF WARFARE

[...]

Mines

80. Mines may only be used for legitimate military purposes including the denial of sea areas to the enemy.
81. Without prejudice to the rules set out in paragraph 82, the parties to the conflict shall not lay mines unless effective neutralization occurs when they have become detached or control over them is otherwise lost.
82. It is forbidden to use free-floating mines unless:
    (a) they are directed against a military objective; and
    (b) they become harmless within an hour after loss of control over them.

83. The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives.
84. Belligerents shall record the locations where they have laid mines.
85. Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.
86. Mining of neutral waters by a belligerent is prohibited.
87. Mining shall not have the practical effect of preventing passage between neutral waters and international waters.
88. The minelaying States shall pay due regard to the legitimate uses of the high seas by, inter alia, providing safe alternative routes for shipping of neutral States.
89. Transit passage through international straits and passage through waters subject to the right of archipelagic sea lanes passage shall not be impeded unless safe and convenient alternative routes are provided.
90. After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines. With regard to mines laid in the territorial seas of the enemy, each party shall notify their position and shall proceed with the least possible delay to remove the mines in its territorial sea or otherwise render the territorial sea safe for navigation.
91. In addition to their obligations under paragraph 90, parties to the conflict shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance, including in appropriate circumstances joint operations, necessary to remove minefields or otherwise render them harmless.
92. Neutral States do not commit an act inconsistent with the laws of neutrality by clearing mines laid in violation of international law.

SECTION II: METHODS OF WARFARE

Blockade

93. A blockade shall be declared and notified to all belligerents and neutral States.
94. The declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.
95. A blockade must be effective. The question whether a blockade is effective is a question of fact.
96. The force maintaining the blockade may be stationed at a distance determined by military requirements.

97. A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.
98. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.
99. A blockade must not bar access to the ports and coasts of neutral States.
100. A blockade must be applied impartially to the vessels of all States.
101. The cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified as in paragraphs 93 and 94.
102. The declaration or establishment of a blockade is prohibited if:
    (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
    (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.
103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:
    (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
    (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.
104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

Zones

105. A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.
106. Should a belligerent, as an exceptional measure, establish such a zone:
    (a) the same body of law applies both inside and outside the zone;
    (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
    (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
    (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:

(i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
(ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and

(e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.

107. Compliance with the measures taken by one belligerent in the zone shall not be construed as an act harmful to the opposing belligerent.

108. Nothing in this Section should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.

SECTION III: DECEPTION, RUSES OF WAR AND PERFIDY

109. Military and auxiliary aircraft are prohibited at all times from feigning exempt, civilian or neutral status.

110. Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:

(a) hospital ships, small coastal rescue craft or medical transports;
(b) vessels on humanitarian missions;
(c) passenger vessels carrying civilian passengers;
(d) vessels protected by the United Nations flag;
(e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
(f) vessels entitled to be identified by the emblem of the red cross or red crescent; or
(g) vessels engaged in transporting cultural property under special protection.

111. Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:

(a) exempt, civilian, neutral or protected United Nations status;
(b) surrender or distress by, *e.g.*, sending a distress signal or by the crew taking to life rafts. [...]

PART VI: PROTECTED PERSONS, MEDICAL TRANSPORTS AND MEDICAL AIRCRAFT

GENERAL RULES

159. Except as provided for in paragraph 171, the provisions of this Part are not to be construed as in any way departing from the provisions of the

Second Geneva Convention of 1949 and Additional Protocol I of 1977 which contain detailed rules for the treatment of the wounded, sick and shipwrecked and for medical transports.

160. The parties to the conflict may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.

SECTION I: PROTECTED PERSONS

161. Persons on board vessels and aircraft having fallen into the power of a belligerent or neutral shall be respected and protected. While at sea and thereafter until determination of their status, they shall be subject to the jurisdiction of the State exercising power over them.

162. Members of the crews of hospital ships may not be captured during the time they are in the service of these vessels. Members of the crews of rescue craft may not be captured while engaging in rescue operations.

163. Persons on board other vessels or aircraft exempt from capture listed in paragraphs 136 and 142 may not be captured.

164. Religious and medical personnel assigned to the spiritual and medical care of the wounded, sick and shipwrecked shall not be considered prisoners of war. They may, however, be retained as long as their services for the medical or spiritual needs of prisoners of war are needed.

165. Nationals of an enemy State, other than those specified in paragraphs 162-164, are entitled to prisoner-of-war status and may be made prisoners of war if they are:

(a) members of the enemy's armed forces;
(b) persons accompanying the enemy's armed forces;
(c) crew members of auxiliary vessels or auxiliary aircraft;
(d) crew members of enemy merchant vessels or civil aircraft not exempt from capture, unless they benefit from more favourable treatment under other provisions of international law; or
(e) crew members of neutral merchant vessels or civil aircraft that have taken a direct part in the hostilities on the side of the enemy, or served as an auxiliary for the enemy.

166. Nationals of a neutral State:

(a) who are passengers on board enemy or neutral vessels or aircraft are to be released and may not be made prisoners of war unless they are members of the enemy's armed forces or have personally committed acts of hostility against the captor;
(b) who are members of the crew of enemy warships or auxiliary vessels or military aircraft or auxiliary aircraft are entitled to prisoner-of-war status and may be made prisoners of war;
(c) who are members of the crew of enemy or neutral merchant vessels or civil aircraft are to be released and may not be made prisoners of war unless the vessel or aircraft has committed an act covered by

paragraphs 60, 63, 67 or 70, or the member of the crew has personally committed an act of hostility against the captor.

167. Civilian persons other than those specified in paragraphs 162-166 are to be treated in accordance with the Fourth Geneva Convention of 1949.

168. Persons having fallen into the power of a neutral State are to be treated in accordance with Hague Conventions V and XIII of 1907 and the Second Geneva Convention of 1949. [...]

Chapter 2

CASES AND DOCUMENTS RELATING TO PAST AND CONTEMPORARY CONFLICTS

I. AMERICAN CIVIL WAR

Case No. 69, US, The Prize Cases

THE CASE

[**Source:** Supreme Court of the United States, 67 US 635 (1862) available on http://laws.findlaw.com/us/67/635.html.]

THE BRIG AMY WARWICK; THE SCHOONER CRENSHAW; THE BARQUE HIAWATHA; THE SCHOONER BRILLIANTE

[The Prize Cases]

December 1862

PRIOR HISTORY:

[...]

The whole matter comes, then, to a few propositions. To justify this condemnation, there must have been war at the time of this so-called capture; not war as the old essayists describe it, beginning with the war between Cain and Abel; not a fight between two, or between thousands; not a conflict carried on with these or those weapons, or by these or those numbers of men; but war as known to international law - war carrying with in the mutual recognition of the opponents as belligerents; giving rise to the right of blockade of the enemy's ports, and affecting all other nations with the character of neutrals, until they shall have mixed themselves in the contest. War, in this, the only sense important to this question, is matter of law, and not merely matter of fact. [...]

It is worthy of remark that the sovereign can exercise these belligerent powers at first, if ever. The lapse of time gives him no new rights of war. The recognition of the rebel state as belligerent by foreign powers, confers no right on the sovereign. It only recognizes an existing right. The recognition of rebel States as sovereign by foreign powers, confers on the sovereign no new war power. The moment he ceases to claim jurisdiction over the rebel territory, the war ceases to be a civil war, and becomes an international war. [...]

According to this theory, if the civil war is one in which each party claims to be the state, neither can exercise belligerent powers. If neither makes that claim, both may exercise them. If one claims to be the state, and the other does not, (as in this case,) the latter only can exercise them. [...]

OPINION BY: GRIER

[...]

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents - the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war - those maxims of humanity, moderation, and honor - ought to be observed by both

parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land." [...]

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. [...]

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. [...]

DISCUSSION

1. Is the definition of war used by the Court ("That state in which a nation prosecutes its right by force.") not a very Clausewitzian approach? Is such utilization of war permitted today? (*Cf.* Art. 2 (4) of the UN Charter.) Does this explain why the UN International Law Commission (ILC) chose not to delve into issues concerning *ius in bello*? Was this an appropriate decision by the ILC?

2. Are non-international armed conflicts treated the same as international armed conflicts under IHL? Does the Court suggest that they should be?

3. a. Must war be declared for application of IHL? (*Cf.* Art. 2 common to the Conventions, Art. 1 (3) of Protocol I and Art. 1 of Protocol II.) If not, only in cases of internal rebellion? Or also in conflicts between States?

b. Today, for IHL to apply, does armed conflict really require mutual recognition of opponents as belligerents? Also in non-international armed conflict? (*Cf.* Art. 3 (4) common to the Conventions.)

4. a. Under international law today, what factors turn an internal conflict, such as a civil war, into an international conflict? (*See, e.g.,* **Case No. 180**, ICTY, The Prosecutor v. Tadic (particularly A., Jurisdiction, *paras. 72-73*). p. 1804 and **Case No. 182**, ICTY, The Prosecutor v. Rajic, Rule 61 Decision (particularly *paras. 13-31*). p. 1888)?

b. Does recognition by another State of, *e.g.,* insurgents automatically make a conflict international?

c. When do internal tensions or disturbances reach the level of conflict such that Art. 3 common and/or Protocol II apply? Is the test mentioned in the writing of the sages of the common law cited by the Court really the true test?

d. Is the existence of an armed conflict in contemporary IHL a matter of fact or a matter of law?

II. World War II

Document No. 70, Switzerland Acting as Protecting Power in World War II

[**Source:** Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 82-83.]

DIPLOMATIC PROTECTION

[...]

The Third Reich and the Anglo-Americans

One of the tasks of a Protecting Power is to communicate one governments accusation of anothers violation of international law. The German Foreign Office, for instance, would send a note to the German Embassy in Bern, Switzerland; the embassy would transmit that note to the Swiss Foreign Office (called the Federal Political Department), which would telegraph the note to the Swiss Embassy in London or Washington, which would bring it to the attention of the British or American government. After due investigation an official answer would be drafted by the British Foreign Office or the U.S. Department of State and telegraphed to its embassy in Bern for delivery to the Swiss Federal Political Department, which would complete the circle by informing the German Foreign Office through the Swiss Embassy in Berlin. [...]

The German Foreign Office obtained its information about violations of the laws of war from many sources first of all through the War Crimes Bureau but also through its own liaison officers at the High Command of the Army, Navy and Air Force, in the Wehrmacht propaganda department, and with the armies in the field. The Bureau however, besides making its documents available to the Foreign Office, often itself recommended lodging a protest with the Protecting Power and sometimes prepared the draft of the note.

Perhaps the most frequent cause of protest was the treatment of German prisoners of war, one of the most celebrated cases being the shackling of German soldiers taken prisoner by British commandos at Dieppe in August 1942. Another case involved the misuse of German POWS on dangerous assignments close to the front line. On 20 December 1944 the Bureau sent to the Wehrmacht operations staff a copy of the sworn deposition of Private Hans Greiss, who alleged that he and other German POWS had been forced to dig trenches at the American battle front close to Kirchberg, Jülich, in November 1944. Greiss stated that he and his comrades had been compelled to work under German artillery fire and that the resulting casualties included two dead and twenty wounded. Goldsche recommended lodging a diplomatic protest against the British and American governments, "since this case entails a very serious violation of the Convention on the Treatment of Prisoners of War (Articles 7 and 9)". (1929 Geneva Convention relative to POWS). The operations staff passed the recommendation to the German Foreign Office, which agreed and transmitted an official protest on January 26, 1945. [...]

1. War Events

Document No. 71, German Invasion of Crete

[**Source:** Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 156, 157.]

[...]

Judge Rüdel, in charge of investigating allegations about crimes committed against parachutists, first questioned numerous wounded soldiers who had been flown to hospitals in Athens. Their testimony convinced the chief of staff of the 11th Air Corps, Major General Alfred Schlemm, that a special commission under intelligence officer Major Johannes Bock should be sent forthwith to Crete to continue on-site investigations. Rüdel, as a member of the commission, flew to Crete on May 28, 1941. On 14 July he submitted a long report more favorable to the British military than to the Cretan civilian population. He summed up:

On the basis of sworn testimony of German soldiers who participated in the fighting on Crete, [plus] interrogation of Greek and British soldiers, and aided by photographic evidence, we could establish the following:

1. Participation of civilians and policemen in open battle on all battlefields, especially in the western parts of the island; in some areas civilians offered organized resistance according to military principles. The civilian population, including youngsters about ten years old, fired with all sorts of weapons, also with dumdum and hunting ammunition. Bush and tree snipers were repeatedly observed... .
2. Dead and Wounded soldiers were robbed and deprived of parts of their clothing, primarily by the civilian population.
3. On corpses of German soldiers countless mutilations have been established; some had their genitals amputated, eyes put out, ears and noses cut off; others had knife wounds in the face, stomach, and back; throats were slit, and hands chopped off. The majority of these mutilations were probably defilement of the dead bodies; only in a few cases does the evidence indicate that the victim was maltreated and tortured to death. A number of corpses were found with hands, arms, or legs tied up; in one case the corpse had a cord around his neck... .
4. On the enemy side the use of German uniforms, especially parachutist combinations and steel helmets, was observed. Similarly, in order to deceive the other side, they signaled with swastika flags.
5. Shipwrecked soldiers of the light squadron "West"... which had been attacked and partly destroyed by British warships in the night of the 21-22 May, were shot at by the British. Soldiers swimming in the water with life vests or paddling their lifeboats were fired upon and many killed or wounded... .

From these investigations it appears that the mutilation of corpses and the maltreatment of soldiers were committed almost exclusively by Cretan civilians. In some cases survivors observed that civilians fell upon dead soldiers, robbed them, and cut them with knives. In only one case were enemy soldiers involved in such acts; on the contrary, the British attached great importance to the proper treatment of prisoners of war, prevented abuses by Greek soldiers and civilians, and did all was necessary in the medical field. On the other hand, the shooting of shipwrecked was carried out exclusively by British warships. It is difficult to determine how it was that the civilian population of Crete participated in the fighting and committed atrocities; the statements made by the Cretans and by the British prisoners must be taken *cum grano salis*, because they each tend to put the blame on the other.

Document No. 72, Germany/UK, Shackling of Prisoners of War

[**Source:** Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, p.108.]

The Shackling of Prisoners

Perhaps the most notorious example of an official German reprisal concerned the shackling of prisoners of war following the British commando landing in Dieppe, France, in August 1942. As witness depositions show, numerous Germans who had been surprised by the British and who could not be immediately treated as prisoners of war were tied up for the duration of the commando action. In retaliation, Hitler ordered that all British prisoners of war in Germany should be similarly tied up. As counter reprisal the British government ordered German prisoners of war to be shackled. Only through the constant efforts of the International Committee of the Red Cross was this vicious circle of reprisals and counter reprisals broken.

Document No. 73, British Policy Towards German Shipwrecked

[**Source:** Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 258-259.]

There is no doubt that official British policy was in keeping with the laws of war. But this did not preclude discussion of the limits of the laws of war in the British ministries - particularly, discussion of the possible military advantages of a harsher policy toward shipwrecked enemy crews.

Early in 1943 the German submarine commander Hans Diedrich von Tiesenhausen, who had been rescued by a British destroyer after his

submarine was sunk, submitted a protest to the British government and asked that it be forwarded to the Protecting Power. He alleged that after his submarine had shown the white flag, British planes continued the attack and machine-gunned the shipwrecked crew. Von Tiesenhausen's report was considered at a British Foreign Office meeting on 3 June 1943. Legal advisor Patrick Dean, who chaired the meeting, advised against forwarding the report to the Protecting Power. He had already argued at the Air Ministry on 14 May 1943 that an airplane cannot capture a submarine it can only sink it. "The surrender of such vessels should not be accepted unless Allied surface craft in the immediate vicinity are in a position to ensure their capture. In all other circumstances the attack should be pressed home in spite of the flying of a white flag. It has been agreed that for operational reasons this policy should as far as possible be concealed from the German government... if it became known to them, they might institute reprisals against captured British seamen." Yet Dean did not succeed in having his point of view adopted; instead, the Air Ministry drafted very clear instructions for fighter pilots: "In no circumstances is the crew of a U-boat in the water to be subjected to any form of attack". On 28 May 1943, Dean objected that "circumstances can be imagined (e.g. when a U-Boat crew are swimming from their sunk or damaged U-boat to an enemy war vessel) where one would have thought that attack upon them from the air was justifiable."

Dean's point of view parallels the German hypothesis with respect to Narvik, that the crews of British destroyers considered it justifiable to shoot at the German shipwrecked because any German sailors who reached land would be incorporated into the German forces there. And it may be that the British destroyers in Narvik acted according to this unwritten policy - but other attacks on shipwrecked survivors were less easily rationalized. A case in point was the machine-gunning of the shipwrecked crew of the U-852 by four British fighter planes on 3 May 1944 near Bender-Beila, Somaliland, which was in British hands so that there was no danger whatsoever that the German crew would join other German forces on land. In fact, the survivors were all taken prisoner shortly after the landing.

This incident is not devoid of historical irony: it was this very U-boat that two months earlier, on 13 March 1944, had sunk the steamer *Peleus* in the Atlantic and machine gunned a number of Greek survivors. After the war, in criminal proceedings before a British military court in Hamburg, the commander of the U-852, Heinz Eck, defended his actions on grounds of operational necessity, arguing that Allied air surveillance was very intensive in the Atlantic and that late in 1943 four German U-boats had been discovered in the same area and sunk by fighter planes. He contended that he had never ordered the killing of survivors; rather, he gave an order to destroy all floating wreckage to prevent Allied planes from using it to find and destroy his ship - even though he knew that a number of shipwrecked would be hit by the shelling and that those not hit would have a much smaller chance of surviving without the larger floating objects to cling to.

[*See* **Case No. 75**, British Military Court at Hamburg, The Peleus Trial, p. 1022.]

Document No. 74, UK/Germany, Sinking of the Tübingen in the Adriatic

[**Source:** Zayas, A., *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 261-266.]

HOSPITAL SHIPS

[...]

As the bombardment of hospital ships continued, the Bureau compiled a second list of twenty-four cases covering the period from May 1943 to December 1944, including thoroughly documented attacks on the Erlangen on June 13 and 15, 1944 and on the *Freiburg* on August 14,1944. On the basis of these records the German government submitted protest notes to the British government: for instance, a note of November 1,1944 described attacks on the *Hüxter, Innsbruck, Erlangen, Bonn,* and *Saturnus* as well as upon hospital trains bearing the red cross.

The most significant case on the Bureau's list was the sinking of the *Tübingen* (3,509 tons) on 18 November 1944 at 0745 hours GMT (Central European Time) near Pola, south of Cape Promontore in the Adriatic. The case was all the more remarkable considering that Great Britain had recognized the *Tübingen* as a hospital ship and the British Mediterranean Command knew its exact course. Yet two British Beaufighter planes attacked and sank it.

Apparently, the sinking came as a surprise to the British Foreign Office; in the afternoon of the same day it communicated the news to the Swiss government as Protecting Power. The Swiss telephoned the German delegation in Bern, which in turn cabled the German Foreign Office in Berlin: "Hospital ship *Tübingen* pursuant to assurances given sailed on 17 November... from Bari to Triest. British authorities have been informed that the hospital ship was attacked in the early hours of today by a British plane and severely damaged. The British have ordered an immediate investigation."

The British government sent a second, more extensive note to the Protecting Power on November 19,1944. The Official German protest followed on 24 November:

On 18 November 1944 at 0745 hours near Pola the German hospital ship *Tübingen* was attacked by two double-engine British bombers with machine guns and bombs so that it sank, although the course of the hospital ship had been communicated to the British government well in advance of its voyage to Saloniki and back for the purpose of transporting wounded German soldiers. Numerous members of the crew were thereby killed and wounded. The German government emphatically protests the serious violations of international law committed by the sinking of the hospital ship *Tübingen.*

The German government demands that the British government take all necessary measures to prevent the recurrence of such - undoubtedly deliberate - violations of international law. It further reserves the right to draw the appropriate consequences of this and many other violations of international law especially such as were communicated to the Swiss delegation in Berlin by verbal note of November 1,1944.

This note was forwarded to London by the Swiss on 27 November 1949:

The British Air Ministry had already ordered an inquiry on 18 November 1944, and on 29 November the British Foreign Office informed its delegation in Bern that an investigation of the case was in progress. On 19 November the Royal Air Force headquarters in the Mediterranean had telegraphed the Air Ministry: "The report is too long and intricate to lend itself to summarizing in a signal, but the incident was the result of a curious mixture of bad luck and stupidity." It appears that though a chain of errors on the part of the British pilots and a misunderstanding in the wireless transmission, the order was in fact given to attack the ship. The official British answer, submitted to Germany on 4 December 1944, explained that four aircraft circled the ship, but as the leader was still unable to identify her he decided to signal sighting details to base and to request instructions. For technical reasons he was unable to transmit the signal himself and he therefore instructed the second aircraft in his section to do so.

The captain of the second aircraft [...]. had identified the ship as a hospital ship and incorrectly assumed that his leader had done so too. He supposed, however, that there must be some special circumstances justifying and exception from standing orders prohibiting attacks on hospital ships and transmitted a message to the following effect: "I H.S. 350" (one hospital ship - course 350 degrees) and giving her position. Owing to atmospheric conditions, this message was received by base incorrectly and read to the following effect: "I H.S.L. 350" (one high-speed launch - course 350 degrees) with a position in the middle of the Gulf of Venice. A second version of this message showing the position of the ship as overland in the Istrian Peninsula and requesting instructions was later retransmitted by another station, but it again incorrectly referred to a high-speed launch.

These messages were then brought to the notice of the controlling officer, who ascertained that no Allied high-speed launch was in the position indicated in the first version of the message, which was in any case many miles from the *Tübingen's* position, and gave orders to attack. On receipt of these orders the leader, who was still unaware that the ship was a hospital ship, instructed his section to attack. It was not until he passed over the ship after completing his attack that he distinguished the name *Tübingen* on her side and realized her identity.

His Majesty's Government have given instructions that the circumstances attending this attack shall be fully investigated at a court of enquiry with a view to preventing any similar incident, and that if the facts disclosed justify such a course, appropriate disciplinary action shall be taken [...].

Although as stated above, his Majesty's Government regret the sinking of the ship in the circumstances described, they cannot refrain from remarking that had the Tübingen been properly illuminated at the time of sighting in accordance with international practice, the leader of the section would have had no difficulty in identifying her as a hospital ship and the incident would thus have been avoided. They trust that care will be taken to ensure that in the future, all German hospital ships are illuminated in poor visibility in such a way as to leave no doubt as to their identity.

As was to be expected, the German authorities too devoted considerable time to investigating the circumstances of the sinking. On 23 December 1944, ship's captain Wolfgang Diettrich Hermichen, first officer Günter Quidde, and the third officer Heinrich Bruns made sworn statements before German Navy Judge Franz Nadenau; on 29 December they were followed by chief engineer Ernst Frenz, second officer Martin Messeck, and third engineer August Glander. The statement of Captain Hermichen casts doubt on part of the British version:

Both British planes flew 60 to 70 meters right over our ship. With the unaided eye I saw the British colors on the fuselage. Even if the planes had not recognized us before as a hospital ship - something which is, I think, out of the question because of the extraordinarily good visibility - at the very latest, at this moment they must have realized that we were a hospital ship. After both planes had flown over the ship they turned around and flew one by one over the ship, one plane from starboard and the other from port, and attacked us again. The bombardment was repeated about six times from starboard and about three times from port.

Obviously, a key question is whether the ship was immediately identifiable (as the German claimed) or whether the visibility was impaired (as the British contended). Second officer Martin Messeck, who was responsible for illumination, explained: "shortly after 7:00 A.M. I ordered our electrician Kessenich to turn off the night illumination. The sun had risen already about 6:30 A.M... during my watch the weather did not change. After sunrise we had perfectly calm weather..." Shortly after 7 A.M., after the night illumination had been turned off, four fighter bombers circled over us. Yet they turned around and flew southward. They were clearly British planes. I saw their colors." According to the Germans the ship was attacked between 7:45 and 8:05 A.M. and sank at 8:20 A.M. There was enough time to put down lifeboats, and two members of the crew, sailors Töllner and Heuer, were able to take pictures of the sinking ship. The photographs, which survived the war, show good visibility and calm seas.

On the basis of these depositions the High Command of the German Navy submitted a preliminary report to the German Foreign Office, rejecting the British allegations: "The note's contention that the incident would have been avoided if the *Tübingen* had been illuminated can only be termed an inadequate excuse, considering that a German court has now taken statements from the captain of the *Tübingen* as well as the first and third officers, according to whom a mistake about the identity of the ship as a hospital ship was completely out of the question because of the clear weather.

2. Decisions of Allied Military Tribunals in Germany

Case No. 75, British Military Court at Hamburg, The Peleus Trial

THE CASE

[**Source:** *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, vol. I, 1947, pp. 1-21.]

THE *PELEUS* TRIAL

TRIAL OF KAPITÄNLEUTNANT HEINZ ECK AND FOUR OTHERS FOR THE KILLING OF MEMBERS OF THE CREW OF THE GREEK STEAMSHIP *PELEUS*, SUNK ON THE HIGH SEAS

BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS
HELD AT THE WAR CRIMES COURT, HAMBURG,
17TH-20TH, OCTOBER 1945

[...]

2. THE CHARGE

The prisoners were:

Kapitänleutnant Heinz Eck,

Leutnant zur See August Hoffmann,

Marine Stabsarzt Walter Weisspfennig,

Kapitänleutnant (Ing) Hans Richard Lenz,

Gefreiter Schwender.

They were charged jointly with:

"Committing a war crime in that you in the Atlantic Ocean on the night of 13/14th March, 1944, when Captain and members of the crew of Unterseeboat 852 which had sunk the steamship "Peleus" in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them." [...]

3. THE OPENING OF THE CASE BY THE PROSECUTOR

The "Peleus" was a Greek ship chartered by the British Ministry of War Transport. The crew consisted of a variety of nationalities; on board there were 18 Greeks, 8 British seamen, one seaman from Aden, two Egyptians, three Chinese, a Russian, a Chilean and a Pole. On the 13th March, 1944, the ship was sunk in the middle of the Atlantic Ocean by the German submarine No. 852, commanded by the first accused, Heinz Eck. Apparently the majority of the members of the crew of the "Peleus" got into the water and reached two rafts and wreckage that was floating about. The submarine surfaced, and called over one of the members of

the crew who was interrogated as to the name of the ship, where she was bound and other information.

The submarine then proceeded to open fire with a machine-gun or machine-guns on the survivors in the water and on the rafts, and also threw hand grenades on the survivors, with the result that all of the crew in the water were killed or died of their wounds, except for three, namely the Greek first officer, a Greek seaman and a British seaman. These men remained in the water for over 25 days, and were then picked up by a Portuguese steamship and taken into port. [...]

4. EVIDENCE FOR THE PROSECUTION

[...]

The fifth accused, Kapitän-Leutnant Engineer Lenz, appears to have behaved in the following way: (a) When he heard that the captain had decided to eliminate all traces of the sinking, he approached the captain and informed him that he was not in agreement with this order. Eck replied that he was nevertheless determined to eliminate all traces of the sinking. Lenz then went below to note the survivors' statements in writing and did not take part in the shooting and throwing of grenades. (b) Later on, Lenz went on the bridge and noticed the accused Schwender with a machine gun in his hand. He saw that Schwender was about to fire his machine gun at the target and thereupon he, Lenz, took the machine gun from Schwender's hand and fired it himself in the general direction of the target indicated. He did this because he considered that Schwender, long known to him as one of the most unsatisfactory ratings in the boat, was unworthy to be entrusted with the execution of such an order.

5. OUTLINE OF THE DEFENCE

[...] The Defence claimed that the elimination of the traces of the "Peleus" was operationally necessary in order to save the U-boat.

The other accused relied mainly on the pleas of superior orders. [...]

With regard to the plea of superior orders, Professor Wegner said that he stuck "to the good old English principles" laid down by the "Caroline case", according to which, he submitted, it was a well-established rule of International Law that the individual forming part of a public force and acting under authority of his own Government is not to be held answerable as a private trespasser or malefactor, that what such an individual does is a public act, performed by such a person in His Majesty's service acting in obedience to superior orders, and that the responsibility, if any, rests with His Majesty's Government. [...].

6. EVIDENCE BY THE ACCUSED HEINZ ECK, COMMANDER OF THE SUBMARINE

The accused, Heinz Eck, [...] thought that the rafts were a danger to him, first because they would show aeroplanes the exact spot of the sinking, and secondly because rafts at that time of the war, as was well-known, could be provided with modern signalling communication. When he opened fire there

were no human beings to be seen on the rafts. He also ordered the throwing of hand grenades after he had realised that mere machine gun fire would not sink the rafts. He thought that the survivors had jumped out of the rafts. [...]

It was clear to him, he went on, that all possibility of saving the survivors' lives had gone. He could not take the survivors on board the U-boat because it was against his orders. He was under the impression that the mood on board was rather depressed. He himself was in the same mood; consequently he said to the crew that with a heavy heart he had finally made the decision to destroy the remainder of the sunken ship.

Eck referred to an alleged incident involving the German ship "Hartenstein" of which he had been told by two officers. After this boat had saved the lives of many survivors, it was located by an aeroplane. The boat showed the Red Cross sign and one of the survivors, a flying officer, had, with a signal lamp, given some signals to the aeroplane not to attack the boat because of the survivors being on board, including women. The plane left, and after a time it returned and attacked the boat, which was forced to unload the survivors again, in order to dive, and it survived only after sustaining some damage. This case, about which he had been told before the beginning of his voyage, showed him that on the enemy side military reasons came before human reasons, that is to say before the saving of the lives of survivors. For that reason, he thought his measures justified. [...]

Eck's description of the "Hartenstein" incident was, in the main, confirmed by an English witness, a solicitor serving as a temporary civil servant at the Admiralty. He confirmed that, as a result of the incident, the German U-boat Command issued instructions as follows:

"No attempt of any kind should be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews. Orders for bringing Captains and Chief Engineers still apply. Rescue the shipwrecked only if their statements will be of importance for your boat. Be harsh, having in mind that the enemy takes no regard of women and children in his bombing attacks of German cities." [...]

8. EXAMINATION OF THE FOUR OTHER ACCUSED

[...]

The accused Weisspfennig also referred to the order but admitted that in the German navy there were regulations about the conduct of medical officers which forbade them to use weapons for offensive purposes. Weisspfennig disregarded this regulation because he had received an order from the Commandant. He did not know whether his regulations provided that he could refuse to obey an order which was against the Geneva Convention. He knew what the Geneva Convention was and realised that one of the reasons why he was given protection as a doctor was because he was a non-combatant. He realised that there were survivors. He did not regard the use of the machine gun in his particular case as an offensive action. [...]

12. SUMMING UP BY THE JUDGE ADVOCATE

The Judge Advocate stated at the very outset that the court should be in no way embarrassed by the alleged complications of International Law which, it had been suggested, surrounded such a case as this. It was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilised nations through many centuries. To fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. The right to punish persons who broke such rules of war had clearly been recognised for many years. [...]

Regarding the defence of operational necessity, the Judge Advocate stated: "The question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life has been the subject of much discussion. It may be that circumstances can arise-it is not necessary to imagine them-in which such a killing might be justified. But the court had to consider this case on the facts which had emerged from the evidence of Eck. He cruised about the site of this sinking for five hours, he refrained from using his speed to get away as quickly as he could, he preferred to go round shooting, as he says, at wreckage by means of machine guns." The Judge Advocate asked the court whether it thought or did not think that the shooting of a machine gun on substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. He asked whether it was not clearly obvious that in any event, a patch of oil would have been left which would have been an indication to any aircraft that a ship had recently been sunk. He went on to say: "Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Captain Schnee, who was called for the defence, said he would have done, namely have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance?"

Eck did not reply on the defence of superior orders. He stood before the court taking upon himself the sole responsibility of the command which he issued.

With regard to the defence of superior orders, the Judge Advocate said: "The duty to obey is limited to the observance of orders which are lawful. There can be no duty to obey that which is not a lawful order. The fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime, neither does it confer upon the perpetrator immunity from punishment by the injured belligerent."

The Judge Advocate added: "It is quite obvious that no sailor and no soldier can carry with him a library on international law or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done; but is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it

was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?"

[...]

13. THE VERDICT

The five accused were found guilty of the charge.

14. THE SENTENCE

After Counsel for the Defence had pleaded in mitigation on behalf of the accused and some of them had also called witnesses, the following findings and sentences of the court were pronounced on 20th October, 1945, subject to confirmation:

Eck, Hoffmann, Weisspfennig were sentenced to suffer death by shooting. Lenz was sentenced to imprisonment for life, Schwender was sentenced to suffer imprisonment for 15 years.

The sentences were confirmed by the Commander-in-Chief, British Army of the Rhine, on 12th November, 1945, and the sentences of death imposed on Kapitänleutnant Heinz Eck, Marine Oberstabsarzt Walter Weisspfennig, and Leutnant zur See August Hoffmann, were put into execution at Hamburg on 30th November, 1945.

DISCUSSION

Please consider the 1949 Geneva Conventions and the 1977 Additional Protocols applicable for the following discussion.

1. Did Eck violate IHL by not collecting the shipwrecked into his submarine? By destroying their rafts and wreckage? By giving orders to fire upon them? (*Cf.* Arts. 12 (2), 18 and 51 of Convention II.)
2. Does the Judge Advocate exclude the possibility that firing on shipwrecked could be justified by military necessity? Could under the 1949 Geneva Conventions the firing on shipwrecked be justified if it were the only means to ensure that a submarine remains undetected? to save the life of the person firing?
3. Which duties of medical personnel did Weisspfennig violate? Is the prohibition to use weapons for offensive purposes in force for medical officers in the German Navy necessary under today's IHL? (*Cf.* Art. 35 of Convention II, Arts. 13 and 16 (2) of Protocol I.)
4. Was the conduct of Lenz appropriate? What should he have done not to violate IHL? Not participate in the execution of the order? Hinder any of his subordinates from executing the order? Hinder any member of the crew from executing the order? Arrest Eck? (*Cf.* Arts. 86-87 of Protocol I.)
5. When may a superior order prevent punishment for a violation of IHL?

6. Was the British attack on the "Hartenstein" lawful under present IHL? Was it lawful for the crew of the "Hartenstein" to show the red cross emblem when the ship was attacked? (*Cf.* Arts. 41 and 43 of Convention II; *see also* The San Remo Manual on International Law Applicable to Armed Conflicts at Sea, **Document No. 68**. p. 994.)

Case No. 76, US Military Court in Germany, Trial of Skorzeny and Others

THE CASE

[**Source:** *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, vol. IX , 1949, pp. 90-93.]

TRIAL OF OTTO SKORZENY AND OTHERS

General Military Government Court of the U.S. Zone of Germany
18th August to 9th September, 1947

A. OUTLINE OF THE PROCEEDINGS

The ten accused involved in this trial were all officers in the 150th Panzer Brigade commanded by the accused Skorzeny. They were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States. They were also charged with participation in wrongfully obtaining from a prisoner-of-war camp United States uniforms and Red Cross parcels consigned to American prisoners of war.

In October, 1944, the accused Colonel Otto Skorzeny had an interview with Hitler. Hitler knew Skorzeny personally from his successful exploit in liberating Mussolini and commissioned him to organise a special task force for the special Ardennes offensive. This special force was to infiltrate through the American lines in American uniform and to capture specified objectives in the rear of the enemy. [...] [The] special task force called the 150th Brigade was formed. [...] They received training in English, American mannerisms, driving of American vehicles, and the use of American weapons. The Chief-of-Staff of the German Prisoner-of-War Bureau was approached by Skorzeny to furnish the Brigade with American uniforms. These uniforms were mainly obtained from booty dumps and warehouses, but some were obtained from prisoner-of-war camps where they were taken from the prisoners on orders from two of the accused. [...]

The piercing of the enemy lines by the S.S. Armoured Division was not successful, and on 18th December Skorzeny decided to abandon the plan of taking the three Maas bridges [the Ardennes offensive] and put his brigade at the disposal of the commander of the S.S. corps [...], to be used as infantry. He was given an infantry mission to attack towards Malmedy. During this attack

several witnesses saw members of Skorzeny's brigade, including two of the accused, wearing American uniforms and a German parachute combination in operational areas, but the evidence included only two cases of fighting in American uniform.

In the first case, Lieutenant O'Neil testified that in fighting in which he was engaged about 20th December his opponents wore American uniforms with German parachute overalls, some of them who were captured by him said "that they belonged to the 'First', or the 'Adolf Hitler', or the 'Panzer' Division". The second case was contained in an affidavit of the accused Koscherscheid, who [...] said in his affidavit that during the attack on Malmedy he and some of his men were engaged in a reconnaissance mission in American uniform [...].

All accused were acquitted of all charges. [...]

DISCUSSION

1. a. Is it ever permissible to wear the uniforms of the enemy? Is it always permissible under IHL or only sometimes? When? Is it permitted to wear enemy uniforms during attack? If not, why not? Is it permissible to wear enemy uniforms prior to attack, such as here in the Ardennes offensive where they wanted to enter enemy territory? As long as their own uniforms are worn once actual fighting starts? Could Skorzeny have been acquitted if Protocol I was applicable? (*Cf.* Art. 23 (b) and (f) of the Hague Regulations and Arts. 37 and 39 (2) of Protocol I.)

   b. Is the wearing of enemy uniforms an act of perfidy? What is the difference between perfidy and ruses of war? Are not the latter permitted? Yet, are ruses of war not also attempts to mislead the enemy? Did Skorzeny mislead the enemy as to whether he was protected by IHL? (*Cf.* Arts. 23 (f) and 24 of the Hague Regulations and Arts. 37 and 44 (3) of Protocol I.)

2. Would not the use of the parcels labeled with a red cross to disguise an offensive at least be considered perfidy? Does one who carries a red cross parcel make the enemy believe that he is protected by IHL? (*Cf.* Arts. 37 (1) (d), 38 and 39 of Protocol I.) Is such use of the emblem of the red cross or red crescent a grave breach? (*Cf.* Art. 85 (3) (f) of Protocol I.) Is the application of the red cross on such parcels an indicative or a protective use of the emblem? Is it lawful? (*Cf.* Arts. 38-44 of Convention I.)

Case No. 77, US Military Tribunal at Nuremberg, The Justice Trial

THE CASE

[**Source:** *War Crimes Reports*, vol. 6, 1948, p. 1. Cited in Lauterpacht, H. (ed.), *Annual Digest and Reports of Public International Law Cases: Year 1947*, London, Butterworth & Co. Ltd., 1951, pp. 278, 288-289; footnotes omitted.]

_In re_ Altstötter and Others (The Justice Trial), Nuremberg, Germany, United States Military Tribunal, December 4, 1947

THE FACTS. The fourteen accused were judges, public prosecutors or high officials in the Reich Ministry of Justice. They were charged before a United States Military Tribunal with enacting and enforcing statutes, decrees and orders of an essentially criminal nature and with working with German Security Police organizations for essentially criminal purposes, in the course of which, by distortion and denial of judicial process, they committed crimes against civilian inhabitants of occupied territories, prisoners of war and German nationals. [...]

Held: that Altstötter and nine other accused were guilty of various charges. The four other accused were acquitted. [...]

(10) *Effect of Aggressive War on the Right of the Aggressors to Rely on Rules of Warfare.* "It is persuasively urged that the fact that Germany was waging a criminal war of aggression colours all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the Charter, this argument is conclusive ; but these defendants are not charged with crimes against the peace, nor has it been proven here that they knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was *per se* a violation of international law. The lying propaganda of Hitler and Göbbels concealed even from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. [...]

DISCUSSION

1. How does *ius in bello* contrast with *ius ad bellum*? Is *ius in bello* merely an extension of *ius ad bellum*? Why did the UN International Law Commission decide not to concentrate on the codification of *ius in bello*? (*See* **Quotation**, Chapter 2. II. 2. The inevitable tension between the prohibition of the use of force and International Humanitarian Law. p. 105.) What is *ius contra bellum*?

2. a. Is the Court correct in this case that the argument presented improperly mixes *ius ad bellum* and *ius in bello*? That violations of *ius ad bellum* do not automatically imply violations of *ius in bello*? If the Court had agreed with the argument presented that a violation of *ius ad bellum* conclusively establishes guilt for these charges, is the contrary true that the other party to the conflict is incapable of committing violations because its war is "just" and therefore may use all means to secure its rights? What impact would a proven violation of *ius ad bellum* have upon a charge for the crime against peace?

   b. What are the dangers of mixing *ius ad bellum* and *ius in bello*? Would it not make respect for IHL impossible to obtain? Practically, how is one to prove and then establish which party to the conflict is resorting to force in conformity with *ius ad bellum* and which violates the *ius contra bellum?* Do not victims on both sides of the conflict need the same protection? Are the victims all responsible for the violation of *ius ad bellum* committed by their party?

3. If *ius ad bellum* is completely separate from *ius in bello*, which limitations are placed upon *ius ad bellum* in relation to IHL and vice versa? (*Cf.* Preamble of Protocol I.)

Case No. 78, US Military Tribunal at Nuremberg, US v. Alfried Krupp *et al.*

THE CASE

[**Source:** *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals,* vol. X, 1949, pp. 130-159; footnotes omitted.]

THE KRUPP TRIAL
TRIAL OF ALFRIED FELIX ALWYN KRUPP VON BOHLEN UND HALBACH AND ELEVEN OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG, 17th NOVEMBER, 1947 - 30th JUNE 1948

[...]

4. The judgment of the tribunal on counts II and III [...]

(ii) *The Law relating to Plunder and Spoliation* [...]

"[...] The Articles of the Hague Regulations, quoted above [Arts. 45-52 and 56], are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority - permissions which all refer to the army of occupation. [...]

"Spoliation of private property, then, is forbidden under two aspects; firstly, the individual private owner of property must not be deprived of it; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort - always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation insofar as such needs do not exceed the economic strength of the occupied territory.

"Article 43 of the Hague Regulations is as follows:

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

This Article permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety. However, the Article places limitations upon the activities of the occupant. This restriction is found in the clause which requires the occupant to respect, unless absolutely prevented, the laws in force in the occupied country. This provision reflects one of the basic standards of the Hague Regulations, that the personal and private rights of persons in the occupied territory shall not be interfered with except as justified by emergency conditions. The occupying power is forbidden from imposing any new concept of law upon the occupied territory unless such provision is justified by the requirements of public order and safety. [...]

"'[...] Art. 46 [...] requires belligerent to respect enemy private property and which forbids confiscation, and [...] Art. 47 [...] prohibits pillage.'

[...]

"The general rule contained in Article 46 is further developed in Articles 52 and 53. Article 52 speaks on the 'requisitions in kind and services' which may be demanded from municipalities or inhabitants, and it provides that such requisitions and services 'shall not be demanded except for the needs of the *Army of Occupation.*' As all authorities are agreed, the requisitions and services which are here contemplated and which alone are permissible, must refer to the needs of the Army of Occupation. It has never been contended that the Krupp firm belonged to the Army of Occupation. For this reason alone, the 'requisitions in kind' by or on behalf of the Krupp firm were illegal. [...]

"The situation which Article 52 has in mind is clearly described by the second paragraph of Article 52:

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

"The concept relied upon by the defendants - namely: that an aggressor may first overrun enemy territory, and then afterwards industrial firms from within the aggressor's country may swoop over the occupied territory and utilise property there - is utterly alien to the laws and customs of warfare as laid down in the Hague Regulations, and is clearly declared illegal by them because the Hague Regulations repeatedly and unequivocally point out that requisitions may be made only for the needs of, and on the authority of, the Army of Occupation. [...]

"The defendants cannot as a legal proposition successfully contend that, since the acts of spoliation of which they are charged were authorised and actively supported by certain German governmental and military agencies or persons, they escape liability for such acts. It is a general principle of criminal law that encouragement and support received from other wrong-doers is not excusable. It is still necessary to stress this point as it is essential to point out that acts forbidden by the laws and customs of warfare cannot become permissible through the use of complicated legal constructions. The defendants are charged with plunder on a large scale. Many of the acts of plunder were committed in a most manifest and direct way, namely, through physical removal of machines and materials. Other acts were committed through changes of corporate property, contractual transfer of property rights, and the like. It is the results that count, and though the results in the latter case were achieved through 'contracts' imposed upon others, the illegal results, namely, the deprivation of property, was achieved just as though materials had been physically removed and shipped to Germany".

(iii) *The Plea of National Emergency*

The Judgment continued:

"Finally, the Defence has argued that the acts complained of were justified by the great emergency in which the German War Economy found itself. [...]

"[...][T]he contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected on other grounds. War is by definition a risky and hazardous business. That is one of the reasons that the outcome of a war, once started, is unforeseeable and that, therefore, war is a basically - unrational means of "settling" conflicts - why right-thinking people all over the world repudiate and abhor aggressive war. It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly - and at the sole discretion of any one belligerent - disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."

(iv) *The Tribunal's Application of these Rules to the facts of the Case: Findings on Count II*

In the following paragraphs the Tribunal is seen to have made specific application, to certain of the facts of the case, of the rules elaborated above:

"We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its subsequent detention by the *Krupp firm* constitute a violation of Article 43 of the Hague Regulations which requires that the laws in force in an occupied country be respected: that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected: that the Krupp firm, through defendants Krupp, Loeser, Houdremont, Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations by

purchasing and removing the machinery and leasing the property of the Austin plan and in leasing the Paris property: and that there was no justification for such action, either in the interest of public order and safety or the needs of the army of occupation.

"From a careful study of the credible evidence we conclude there was no justification under the Hague Regulations for the seizure of the Elmag property and the removal of the machinery to Germany. This confiscation was based on the assumption of the incorporation of Alsace into the Reich and that property in Alsace owned by Frenchmen living outside of Alsace could be treated in such a manner as to totally disregard the obligations owned by a belligerent occupant. This attempted incorporation of Alsace into the German Reich was a nullity under international law and consequently this interference with the rights of private property was a violation of Article 46 of the Hague Regulations."

Of the taking of machines from the Als-Thom Factory, the Tribunal also ruled: "We conclude from the credible evidence that the removal and detention of these machines was a clear violation of Article 46 of the Hague Regulations."

Again, the Tribunal decided that: "We conclude that it has been clearly established by credible evidence that from 1942 onwards illegal acts of spoliation and plunder were committed by, and in behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly between about September, 1944, and the spring of 1945, certain industries of the Netherlands were exploited and plundered for the German war effort, 'in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.'" [...]

(vii) *The Plea of Superior Orders or Necessity*

After dealing with the law and evidence regarding the employment of civilians, the Tribunal turned its attention next to a plea put forward by the Defence:

"The real defence in this case, particularly as to Count III, is that known as necessity. It is contended that this arose primarily from the fact that production quotas were fixed by the Speer Ministry; that it was obligatory to meet the quotas and that in order to do so it was necessary to employ prisoners of war, forced labour and concentration camp inmates made available by government agencies because no other labour was available in sufficient quantities and, that had the defendants refused to do so, they would have suffered dire consequences at the hands of the government authorities who exercised rigid supervision over their activities in every respect. [...]

"The defence of necessity in municipal law is variously termed as 'necessity', 'compulsion', 'force and compulsion', and 'coercion and compulsory duress'. Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.

"The rule finds recognition in the systems of various nations. The German criminal code, Section 52, states it to be as follows:

'A crime has not been committed if the defendant was coerced to do the act by irresistible force or by a threat which is connected with a present danger for life

and limb of the defendant or his relatives, which danger could not be otherwise eliminated'.

"The Anglo-American rule as deduced from modern authorities has been stated in this manner:

'Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil. Homicide through necessity - i.e., when the life of one person can be saved only by the sacrifice of another - will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.'

"As the Prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an over-loaded lifeboat; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nurenberg Trials of industrialists is novel. [...]

"The defence of necessity is not identical with that of self-defence. The principal distinction lies in the legal principle involved. Self-defence excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right. [...]

"Here we are not dealing with necessity brought about by circumstances independent of human agencies or by circumstances due to accident or misadventure. Upon the contrary, the alleged compulsion relied upon is said to have been exclusively due to the certainty of loss or injury at the hands of an individual or individuals if their orders were not obeyed. In such cases if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct. That is this case. [...]

The Tribunal dealt with another aspect of the plea of necessity as follows:

"It will be observed that it is essential that the 'act charged was done to avoid an evil both serious and irreparable,' and 'that the remedy was not disproportioned to the evil'. What was the evil which confronted the defendants and what was the remedy that they adopted to avoid it? The evidence leave no doubt on either score." In the opinion of the Tribunal, in all likelihood the worst fate which would have followed a disobedience of orders to use slave labour would have been, for Krupp, the loss of his plant, and for the other accused the loss of their posts.

(viii) *The Individual Responsibility of the Accused*

When dealing with the law protecting prisoners of war, the Tribunal interjected the following remark: "The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt." [...]

[T]he Tribunal emphasised that guilt must be personal. It continued: "The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient. The rule which we adopt and apply is stated in an authoritative American text as follows:

'Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. [...] He is liable where his [...] authority is established, or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.' [*Corpus Juris Secundum,* Vol. 19, pp. 363, American Law Book Co. (1940), Brooklyn, N.Y.]

"Under the circumstances as to the set up of the Krupp enterprise after it became a private firm in December, 1942, the same principles apply. [...]

DISCUSSION

1. According to IHL, what constitutes looting? Under what circumstances may property from occupied territory be used? Any type of property? Who may use such property? (*Cf.* Arts. 23 (g), 46 (2), 47, 52, 53 and 55 of the Hague Regulations.) Do the previously noted IHL provisions prohibit the use of property by private individuals? Even if those private individuals are empowered by the occupying power? May an occupying power delegate certain of its prerogatives under IHL to private enterprises?

2. a. To whom apply the rules of IHL? Only to States? Only to combatants? Only to agents of the State? To private individuals? If applicable to private individuals, does IHL prohibit only actions committed by individuals against the State? Or also actions against another individual? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions, Arts. 85 and 86 of Protocol I.)

   b. Was it proper for the Court to find private individuals guilty of violations of IHL? Particularly if the State not only authorized but actively encouraged such actions? Could the Court have so held if those individuals had not acted in conformity with the policy and ideology of the Nazi regime, but instead under an "occupying power" following a "Manchester liberal approach" of not interfering with private enterprise? Are looting and slave labor imaginable under pure market conditions, without any interference by the occupying power?

3. Did the Court correctly determine that the accused could not invoke the defense of national emergency? Is it correct to state that under no circumstances may a

State or an individual derogate from the rules of IHL in case of national emergency? Is the pertinent passage in this decision compatible with the theory of the ICJ in **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. p. 896, where the ICJ leaves the question open whether "in an extreme circumstance of self-defense, in which the very survival of a State is at stake", rules of IHL might be violated?

4. a. Is the defense of necessity or duress available for an individual accused of grave breaches of IHL? If so, when?
   b. Are the defenses of national emergency and of necessity be treated in the same way as far as breaches of IHL are concerned?

Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case

THE CASE

[**Source:** Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War,* Naval War College, R.I., Naval War College Press, vol. 60, Document No. 104, 1979, pp. 481-496.]

U.S. v. ERNST von WEIZSAECKER *ET AL.*
(THE MINISTRIES CASE)

(U.S. Military Tribunal, Nuremberg, April 11-13, 1949)

SOURCE
14 TWC 308

[...]

COUNT THREE - WAR CRIMES, MURDER, AND ILL-TREATMENT OF BELLIGERENTS AND PRISONERS OF WAR

[...]

STEENGRACHT VON MOYLAND

* * * * *

Sagan murders. - The International Military Tribunal found:

"In March 1944 fifty officers of the British Royal Air Force who escaped from the camp at Sagan where they were confined as prisonars [sic], were shot on recapture on direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It is not contended by the defendants that this was other than plain murder, in complete violation of international law."

Switzerland, the Protective [*sic*] Power, on 26 May 1944, made inquiry of the German Foreign Office in regard to the escape of these British officers from Stalag Luft III. On 6 June the defendant Steengracht von Moyland, for the Foreign Office, answered that a preliminary note was submitted to the Swiss Legation on 17 April concerning the escape which took place on 25 March, stating that

according to the investigation nineteen of the eighty prisoners of war who had escaped were taken back to the camp; that the hunt still continued and investigations had not been concluded; that there were preliminary reports that thirty-seven British prisoners of war were shot down when they were brought to bay by the pursuing detachment and when they offered resistance or attempted escape anew after recapture; and thirteen other prisoners of war of non-British nationality were shot after having escaped from the same camp; that the Foreign Office reserved the right to make a definite statement after the conclusion of the investigation, and as soon as details were known, but that the following could be said: that mass escapes of prisoners of war occurred in March, amounting to several thousands; that they in part were systematically prepared by the general staffs in conjunction with agents abroad and pursued political and military aims; were an attack on the public security of Germany; were intended to paralyze its administration, and in order to nip in the bud such ventures, especially severe orders were issued to the pursuit detachments not only for recapture but also for protection of the detachments themselves; and accordingly, pursuit detachments launched a relentless pursuit of escaped prisoners of war who disregarded a challenge while in flight or offered resistance, or attempted to re-escape after having been captured, and made use of their arms until the fugitives were deprived of the possibility of resistance or further flight; that arms had to be used against some prisoners of war, including the fifty prisoners of war from Stalag Luft III; that the ashes of twenty-nine British prisoners of war have been brought to camp so far.

Apparently on 23 June the British Foreign Secretary made a declaration with respect to these murders. On 26 June the Swiss again made inquiry of the Foreign Office and received a reply dated 21 July that Germany emphatically rejected the British Foreign Secretary's declaration; that because of alleged bombings of civilian population and other alleged acts, Great Britain must be denied the moral right to take a stand in the matter of the escapees or to raise complaints against others, and the German Government declined to make further communications in the matter.

On 25 May Vogel on instructions from Ritter informed Legation Councillor Sethe that the Foreign Office had not yet received a copy of the communication of the OKW dated 29 April. On 4 June, Ritter informed the Foreign Office that the day before Keitel had agreed to the draft of the note to the Swiss Legation regarding British prisoners of war, and inquired why the Foreign Office wanted to inform the Protective [*sic*] Power of the funeral beforehand, as this information had not been requested. [...]

On 22 June von Thadden submitted a memorandum to the chief of Inland II that Anthony Eden had made a statement in the House of Commons that a decision would be made with respect to the shooting of British prisoners who escaped from prison camps, and that Albrecht, chief of the Foreign Office legal division, had advised him that the British had been informed via Switzerland that it had been found necessary to shoot several British and other officers in the course of such activities because of refusal to submit to orders when captured; that nineteen other officers who did not offer resistance were taken back to the camp,

and that further details of the fifty cases of prisoners being shot would be submitted to the British.

On 17 July Brenner of the Foreign Office informed Ritter that Hitler agreed to the note to the Swiss delegation regarding the escapes from Stalag Luft III, and approved the drafting of a warning against attempts to escape and the publication of Germany's note to the Swiss Legation, and that this warning should be made public; that von Ribbentrop had ordered Ritter to transmit Germany's second reply to the Swiss envoy, and directed Ritter to cooperate with the OKW in composing the warning which was to be posted in the prisoner-of-war camps and to submit the same to von Ribbentrop for approval; that the warning could perhaps state that there were certain death zones where very special weapons were tested, and any person found in one of these zones would be shot on sight, and, as there are numerous such zones in Germany, escaping prisoners would expose themselves not only to the danger of being mistaken for spies, but of unwittingly entering one of the zones and being shot. [...]

[T]wo officials of the criminal police appeared and submitted photostatic copies of teletype messages and reports from various police offices throughout Germany reporting that individuals or groups of prisoners of war from the Sagan camp had been shot while resisting recapture, or in renewed attempts to escape.

It was apparent to both Ritter and Albrecht that these teletype reports were fictitious - a fact which the police officials did not seriously dispute. Thereupon [sic], according to Albrecht, after conference with Ritter he drafted a reply on the basis of this fictitious and false information, and Ritter submitted it to von Ribbentrop with the urgent advice, in which Albrecht concurred, that it be not sent. [...]

While it may be true that at an early stage Keitel had given orders not to inform the Foreign Office of the Sagan murders, and that the OKW's "provisional communication" of April 29, 1944 was not contemporaneously delivered to the Foreign Office, the fact remains that by May 25, 1944 Legation Councillor Sethe had examined and made a copy of it in the office of the High Command, so that when the note was drafted Ritter had full knowledge of the fact that escaped prisoners of war had been deliberately murdered by officers of the German Reich, in clear violation of international law and of the Geneva Convention. [...]

Brenner's memorandum of 17 July relates to the second note and the warning, and states that Ritter had been directed by von Ribbentrop to cooperate with the OKW in composing the warning, and to submit it to the Foreign Minister for approval, and had made suggestions with respect to the wording of the "death zone" clause. It bears the notation, "Submitted, Ambassador Ritter,"

On August 5, 1944 Ritter wrote to Albrecht that the "enclosed version of a warning has now been approved by the Reich Minister for Foreign Affairs and the OKW;" that the OKW was then engaged in translating it, and when completed it would be given to the prisoner-of-war sections of the OKW for distribution to the camps; that "the Foreign Office has not yet communicated the warning to the Swiss Government, which must coincide with the time of the posting of the warning in the camps; the draft of the note to the Swiss was to be submitted to

Ribbentrop for approval in advance, so that it could be dispatched as soon as possible after the warning has been posted."

On July 21, 1944 the Foreign Office delivered to the Swiss Government a second note stating that the Foreign Office refused to further communicate about the matter on the pretense of Eden's speech of 23 June in the House of Commons. This was an infantile proceeding which, of course, deceived no one.

It does not appear, however, that the proposed note mentioned in Ritter's memo to Albrecht of 5 August was ever sent, and there is no evidence that the warnings were ever posted. It is a fair inference that the German Government concluded that its ostrich-like note of 21 July had enabled it to withdraw with what it hoped to be some shreds of dignity, from an unspeakable situation which it could not maintain, and which it could not afford to have bared to the civilized world; and therefore, the proposed note was not sent, the warnings remained unposted, and a veil was dropped over the whole matter.

While Steengracht von Moyland was not as close to the situation as Ritter, nevertheless it was he who, as the responsible leading official of the Foreign Office, second only to von Ribbentrop, delivered at least the first note to the Swiss delegation.

It is altogether likely that he delivered the second message, inasmuch as that was one of his admitted official functions. He testified he had had no "clear recollection" of the Foreign Office directors' meeting of June 22, 1944 at which was discussed both Eden's speech and Albrecht's statement that the British had been informed, through Switzerland, that several British and other fliers had been shot, and that further details respecting the fifty cases of shooting would be submitted to the British. [...]

In discussing Reinhardt's statement that "such occurrences as in camp Sagan in which fifty officers were shot after having made an attempt to escape are extremely regrettable," Steengracht von Moyland said: "We all regretted this extremely, and it was a terrible crime."

In a matter as important as this, involving the inevitable repercussions in neutral as well as enemy nations, it is unbelievable that a state secretary would deliver a note so patently lame without making some inquiry about the matter, and it is extremely unlikely that Albrecht or Ritter would not have informed him not only that the justifications for the shootings were fictitious, but their misgivings about the terms of the note as well.

A man of ordinary intelligence would recognize that this was an attempt to cover up an incident which could not bear the light of day. We are convinced that Steengracht von Moyland delivered the note of June 6, 1944 to the Swiss Government, and that he was informed of the actual facts.

The murder of these unfortunate escapees [...] was a crime of insensate horror and brutality [...], and that it violated every principle of the Geneva Convention, is unquestioned. No defendant does other than condemn it, and each disclaims any guilty connection with it.

Steengracht von Moyland had no part in either the issuance of the order or its execution. The murders were long-accomplished facts before he knew of them.

However, under the Geneva Convention and Hague Regulation (Art. 77, Geneva Convention [Prisoners of War], 1929, and Art. 14, Hague Regulation [Annex to Convention No. IV, Laws and Customs of War on Land], 1907), Germany was under the duty of truthfully reporting to the Protecting Power, the facts surrounding the treatment of prisoners of war, and of the circumstances relating to the deaths of such prisoners. To make a false report was a breach of its international agreement, and a breach of international law. The detaining powers' duty to report the facts was intended to prevent the very kind of savagery upon helpless prisoners which took place in the Sagan incident.

If a belligerent can starve, mistreat, or murder its prisoners of war in secret, or if it can, with impunity, give false information to the Protecting Power, the restraining influence which Protecting Powers can exercise in the interests of helpless unfortunates would be wholly eliminated. Thus, the duty to give honest and truthful reports in answer to inquiries such as were addressed by the Swiss Government is implicit.

The false reports which Ritter helped draft and which Steengracht von Moyland transmitted, stupid and inept as they were, were intended and calculated to deceive both the Protecting Power and Great Britain, and at least give a color of legality to what was beyond the pale of international law.

The inquiries from the Protecting Power regarding the treatment of and fate of prisoners of war, addressed to the German Government both by necessity and by diplomatic usage, were addressed to the Foreign Office. The reply of the German Government to the Protecting Power of necessity and by diplomatic usage came from the Foreign Office.

Steengracht von Moyland and Ritter must each be held guilty of the crime set forth in paragraph 28c of count three of the indictment.

* * * * *

von Weizsaecker and Woermann

* * * * *

Depriving French prisoners of war of a protecting power. - On November 1, 1940, Ritter transmitted to the Foreign Office a memorandum stating that he had informed General Jodl of Hitler's determination to have the United States removed as the Protecting Power for French prisoners of war. This was initiated by von Weizsaecker.

On 2 November, Albrecht, Chief of the Foreign Office Legal Department, wired the German embassy at Paris that the Fuehrer had issued instructions that in the future the French were themselves to act as the Protecting Power for French prisoners of war, and directed Abetz to take up discussions with Laval with the following objectives:

(1) That the French take over protection of their own prisoners of war, and

(2) That it explicitly state to the United States that its activities as a Protecting Power were finished, and, finally,

(3) That Laval be informed that Scapini would suit Germany as Plenipotentiary for prisoners-of-war matters, and that he be directed to visit Berlin for discussion of details.

This teletype was initiated by Ritter, von Weizsaecker, and Woermann.

On 3 November, Abetz wired the Foreign Office that Laval had been so informed and that the Vichy government was immediately informing the United States that it was no longer recognized as a Protecting Power for French prisoners of war, and further that Scapini had been requested to see Marshal Petain on Tuesday to be officially informed of his intended duties and to prepare for the journey to Berlin. This reply was received by von Weizsaecker.

Woermann asserts that "after direct relations have been taken up between Germany and France, a Protecting Power is no longer needed," and that these matters could be regulated between them and Scapini. He asserts that Scapini's appointment instead of leading to a deterioration of the conditions of the French prisoners of war, improved it. We greatly doubt that the Franch [sic] action was voluntary. Hitler had decided what they should do. The Foreign Office told Abetz to see that the French complied, and within 24 hours the matter was consummated.

Matters of such importance are not consummated with that degree of speed between foreign powers who are each free to act and consider. However, the prosecution has offered no evidence that by reason of the change the conditions and treatment of the French prisoners of war deteriorated, and in the absence of such proof, this incident cannot form the basis of a finding of guilt.

Murder of captured British soldiers. - On 14 February 1941 the United States as Protecting Power made inquiries as to the circumstances under which six British soldiers were captured and then shot in the forest of Dieppe.

A memo from the office of von Ribbentrop, initiated by von Weizsaecker, directs Legation Councillor Albrecht to ascertain the facts, stating that he was of the opinion that the note should be "rejected in the sharpest terms."

Albrecht made written inquiry of the Wehrmacht prisoner-of-war department. Here the record ends. Whether the Wehrmacht replied, and what response the Foreign Office made to the United States Government, whether the Foreign Office ever even acted on the facts, or rejected the note, are all wholly unknown.

Conviction cannot be based on such a record.

DISCUSSION

Please apply in the following discussion International Humanitarian Law as it stands today.

1. What is a Protecting Power? (*Cf.* Art. 2 (c) of Protocol I.) What role does it play? (*Cf.* Arts. 8/8/8/9 respectively of the four Conventions.) Are the tasks of the Protecting Power limited to those defined in the various articles of the Conventions? Which tasks does the Protecting Power perform, *e.g.*, with respect to prisoners of war? (*Cf.* Arts. 13-108 and 126 of Convention III.)

2. a. What are the procedures for appointing a Protecting Power? Who may be a Protecting Power? Who appoints the Protecting Power? Must the enemy Power automatically accept the Protecting Power? Could it refuse all neutral Powers appointed? (*Cf.* Arts. 10/10/10/11 respectively of the four Conventions and Art. 5 of Protocol I.)

   b. May a State dismiss a Protecting Power after it concluded an armistice with the Detaining Power? Even though the prisoners of war remain detained, do they still benefit from the services of a Protecting Power? Even despite the fact that the Power of origin was occupied by the Detaining Power? May a Power of origin be the Protecting Power of its own prisoners of war? Could a Detaining Power agree with a Power of origin to waive the protection foreseen by Convention III? (*Cf.* Arts. 5, 6 and 8 of Convention III and Art. 5 of Protocol I.)

3. When do the duties of a Protecting Power end? When occupation extends to the whole territory of the Power of Origin? When a cease-fire is concluded? When there are no more protected persons within the meaning of the Convention? (*Cf.* Arts. 5 and 8 of Convention III and Art. 5 of Protocol I.)

4. a. Which obligations has the Detaining Power to the Protecting Power? Has the Detaining Power an obligation to inform the Protecting Power of all violations of IHL committed against prisoners of war? Of any death of prisoners of war? Of the results of an inquiry on a death of a prisoner of war? Of the reasons for any death of prisoners of war? (*Cf.* Arts. 121, 122 and 126 of Convention III.) What are the consequences for willfully disregarding these obligations? Does such disregard constitute a grave breach of the Conventions? A war crime? (*Cf.* Art. 14 of the Hague Regulations, Arts. 50/51/130/147 respectively of the four Conventions and Arts. 11 (4) and 85 of Protocol I.)

   b. Are the individuals found guilty of disregarding the obligation to properly inform the Protecting Power? Or for the specific act which they concealed, in this case, murdering prisoners of war? Or both? If for the specific act they concealed, why? Does concealing the crime after the fact constitute a participation in that act? Should it be the case? (*Cf.* Arts. 50/51/130/147 respectively of the four Conventions and Arts. 11 (4) and 85 of Protocol I.)

5. According to IHL today, if the United Kingdom were bombing Germany's civilian population, would the United Kingdom lose the right to ensure that Germany apply the Conventions with respect to British prisoners of war? Would Germany no longer remain bound to respect the Conventions with respect to the United Kingdom? (*Cf.* Arts. 1 and 2 (3) common to the Conventions, Art. 13 (3) of Convention II, Arts. 51 (6) and 96 (2) of Protocol I and Art. 60 of the Vienna Convention on the Law of Treaties, *see* Quotation, Chapter 13. IX. 2. c) dd) Applicability of the general rules on State responsibility. But no reciprocity p. 301.)

6. a. May a Detaining Power shoot at prisoners of war to hinder their escape? At prisoners of war who escaped in order to recapture them? Only as an extreme measure? Only when they are armed? Would the German behavior

have been compatible with IHL if the facts were as described in the answer of the German Foreign Office of 6 June 1944? (*Cf.* Art. 42 of Convention III.)

b. May a Detaining Power punish prisoners of war for an attempted escape? For a successful escape if they are recaptured before reaching their lines? May the punishment even be the death penalty? May those who escaped be punished for common-law crimes committed for the sole purpose of escaping (stealing money, shooting at a guard etc.)? (*Cf.* Arts. 89, 91-93 and 100 of Convention III.)

7. Does this case show that IHL had any importance for Hitler and his officials?

Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List

[**Source:** *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, vol. VIII, 1949, pp. 34-76.]

THE HOSTAGES TRIAL
TRIAL OF WILHELM LIST AND OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG
8TH JULY, 1947, TO 19TH FEBRUARY, 1948

The accused were all former high ranking German army officers and they were charged with responsibility for offences committed by troops under their command during the occupation of Greece, Yugoslavia, Albania and Norway, these offences being mainly so-called reprisal killings, purportedly taken in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity. The accused were charged with having thus committed war crimes and crimes against humanity.

In its judgment the Tribunal dealt with a number of legal issues, including [...] the extent of responsibility of commanders for offences committed by their troops and the degree of effectiveness of the plea of superior orders. [...]

3. JUDGMENT OF THE TRIBUNAL

[...]

(ii) *The Plea of Superior Orders*

[...]

"The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. [...]

"It cannot be questioned that acts done in time of war under the military authority of an enemy, cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war.

Implicit obedience to orders of superior officers is almost indispensable to every military system. But it implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates International Law and outrages fundamental concepts of justice. In the German War Trials (1921), the German Supreme Court of Leipzig in *The Llandovery Castle* case said: 'Patzigs order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law."

"It is true that the foregoing rule compels a commander to make a choice between possible punishment by his lawless government for the disobedience of the illegal order of his superior officer, or that of lawful punishment for the crime under the law of nations. To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defence.

> "We concede the serious consequences of the choice especially by an officer in the army of a dictator. But the rule becomes one of necessity, for otherwise the opposing army would in many cases have no protection at all against criminal excesses ordered by superiors.

"The defence relies heavily upon the writings of Professor L. Oppenheim to sustain their position. It is true that he advocated this principle throughout his writings. As a co-author of the British *Manual of Military Law,* he incorporated the principle there. It seems also to have found its way into the United States *Rules of Land Warfare* (1940). We think Professor Oppenheim espoused a decidedly minority view. It is based upon the following rationale: The law cannot require an individual to be punished for an act which he was compelled by law to commit. The statement completely overlooks the fact that an illegal order is in no sense of the word a valid law which one is obliged to obey. The fact that the British and American armies may have adopted it for the regulations of its own armies as a matter of policy, does not have the effect of enthroning it as a rule of International Law. We point out that army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilised nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact.

Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but, in the latter, they do not constitute an authoritative precedent.

"Those who hold to the view that superior order is a complete defence to an International Law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of International Law, where a fundamental rule of justice is concerned, we submit that the conflict in any event does not sustain the position claimed for it. If, for example, one be charged with an act recognised as criminal under applicable principles of International Law and pleads superior order as a defence thereto, the duty devolves upon the Court to examine the sources of International Law to determine the merits of such a plea. If the Courts finds that the army regulations of some members of the family of nations provide that superior order is a complete defence and that the army regulations of other nations express a contrary view, the court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of International Law, that general acceptation or consent was lacking among the family of nations. Inasmuch as a substantial conflict exists among the nations whether superior order is a defence to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defence to an International Law crime. But, as we have already stated, army regulations are not a competent source of International Law when a fundamental rule of justice is concerned. This leaves the way clear for the court to affirmatively declare that superior order is not a defence to an International Law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance.

"International Law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10." [...]

(v) *The irrelevance to the Present Discussion of the Illegality of Agressive War*

[...]

"For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defense. The prosecution attempts to simplify the issue by posing it in the following words:

> 'The sole issue here is whether German forces can with impunity violate international law by initiating and waging wars of aggression and at the

same time demand meticulous observance by the victims of these crimes of duties and obligations owed only to a lawful occupant.'

"At the outset, we desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

"It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject: "whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of international law, as when a belligerent declares war upon a neutral state for refusing passage to its troop, or when a state goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a violation of neutrality and international law, it is "inoperative in law and without any judicial significance" is erroneous. The rules of international law apply to war *from whatever cause it originates*." [...]

(x) *The extent of Responsibility of the Commanding General of Occupied Territory*

"We have herein before pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence. The fact is that the reports of subordinate units almost without exception advised these defendants of the policy of terrorism and intimidation being carried out by units in the field." [...]

"The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordinations are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them".

Elsewhere the Judgment laid down that a commanding general "is charged with notice of occurrences taking place within the territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

"Want of knowledge of the contents of reports made to him is not a defence. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

"The reports made to the defendant List as Wehrmacht Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence, constitutes a serious breach of duty and imposes criminal responsibility." [...]

4. THE FINDINGS OF THE TRIBUNAL

[...]

Of Foertsch, the Tribunal concluded that the nature of the position of the defendant Foertsch as Chief of Staff, his entire want of command authority in the field, his attempts to procure the rescission of certain lawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the Prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.

"That he had knowledge of the doing of acts which we have herein held to be unlawful under International Law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible

act that he was. Many of these acts were committed by organisations over which the Wehrmacht, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged."

Document No. 81, US Military Tribunal at Nuremberg, US v. Wilhelm von Leeb *et al.*

[**Source:** *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, vol. XII, 1949, pp. 86-89.]

The following analysis is based upon the judgment of US v. Wilhelm von Leeb, et al. (The High Command Case, US Military Tribunal, Nuremberg, October 27-28, 1948) Source 11 TWC 462.

[...]

(xii) *The Interpretation and Applicability of the Hague and Geneva Conventions*

The Tribunal pointed out that: "Another question of general interest in this case concerns the applicability of the Hague Convention and the Geneva Convention as between Germany and Russia." [...]

Of the applicability of the Geneva Convention, the Tribunal said that: " It is to be borne in mind that Russia was not a signatory Power to this Convention. There is evidence in this case derived from a divisional order of a German division that Russia had signified her intention to be so bound. However, there is no authoritative document in this record upon which to base such a conclusion. In the case of Goering, *et al.*, [...] the IMT [...] stated as follows:

"The argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention, is quite without foundation. On 15th September, 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8th September, 1941. He then stated:

"The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R.. Therefore only the principles of general International Law on the treatment of prisoners of war apply. Since the eighteenth century these have gradually been established along the lines that

war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people... The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint."

"Article 6 (b) of the Charter provides that "ill-treatment... of civilian population of or in occupied territory ... killing of hostages ... wanton destruction of cities, towns, or villages" shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: "Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected."

"It would appear from the above quotation that Tribunal accepted as International Law the statement of Admiral Canaris to the effect that the Geneva Convention was not binding as between Germany and Russia as a contractual agreement, but that the general principles of International Law as outlined in those Conventions were applicable. In other words, it would appear that the IMT in the case above cited, followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of International Law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint."

The Tribunal next dealt with two points of interpretation as follows:

"One serious question that confronts us arises as to the use of prisoners of war for the construction of fortifications. It is pointed out that the Hague Convention specifically prohibited the use of prisoners of war for any work in connection with the operations of war, whereas the later Geneva Conventions provided that there shall be *no direct* connection with the operations of war. This situation is further complicated by the fact that when the proposal was made to definitely specify the exclusion of the building of fortifications, objection was made before the conference to that limitation, and such definite exclusion of the use of prisoners, was not adopted. It is no defence in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under International Law, such evidence is pertinent. At any rate, it appears that the illegality of such use was by no means clear. The use of prisoners of war in the construction of fortifications is a charge directed against the field commanders on trial here. This Tribunal is of the opinion that in view of the uncertainty of International Law as to this matter, orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face, but a matter which a field commander had the right to assume was properly determined by the legal authorities upon higher levels.

"Another charge against the field commanders in this case is that of sending prisoners of war to the Reich for use in the armament industry. The term for the

armament industry appears in numerous document. While there is some question as to the interpretation of this term, it would appear that it was used to cover the manufacture of arms and munitions. It was nevertheless legal for field commanders to transfer prisoners of war to the Reich and thereafter their control of such prisoners terminated. Communications and orders specifying that their use was desired by the armament industry, or that prisoners were transmitted for the armament industry are not in fact binding as to their ultimate use. Their use subsequent to transfer was a matter over which the field commander had no control. Russian prisoners of war were in fact used for many purposes outside the armament industry. Mere statements of this kind cannot be said to furnish irrefutable proof against the defendants for the illegal use of prisoners of war whom they transferred. In any event, if a defendant is to be held accountable for transmitting prisoners of war to the armament industry, the evidence would have to establish that prisoners of war shipped from his area were in fact so used.

"Therefore, as to the field commanders in this case, it is our opinion that upon the evidence, responsibility cannot be fixed upon the field commanders on trial before us for the use of prisoners of war in the armament industry."

The Tribunal then returned to the question of the declaratory character of the Hague and Geneva Conventions:

"In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement. But since the violation of these provisions is not in issue in this case, we make no comment thereon, other than to state that this judgment is in no way based on the violation of such provisions as to Russian prisoners of war.

"Most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia. These concern (1) the treatment of prisoners of war; [...].

[Here the Court provides twenty-four quotations of parts of some of the provisions of the 1907 Hague Regulations and the 1929 Geneva Convention on Prisoners of War, which it considers to be binding as customary law.]

3. Decision of the International Military Tribunal for the Far East

Document No. 82, The Tokyo War Crimes Trial

[**Source:** International Military Tribunal for the Far East, The Tokyo War Crimes Trial, November 1948, reprinted from Friedman, L. (ed.), *The Law of War: A Documentary History*, New York, Random House, vol. 2, 1972, pp. 1037-1040.]

[...]

(b) Responsibility for War Crimes Against Prisoners

Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognised and the customary law to this effect was formally embodied in the Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of who we will refer to as "prisoners") rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to prevented by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general the responsibility of prisoners held by Japan may be stated to have rested upon:

(1) Members of the Government;

(2) Military or Naval Officers in command of formations having prisoners in their possession;

(3) Officials in those departments which were concerned with the well-being of prisoners;

(4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. such persons fail in this duty and become responsible for ill-treatment of prisoners if:

(1) They fail to establish such a system.

(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

Departmental officials having knowledge of ill-treatment of prisoners are not responsible by reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they had or should had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future then they are responsible for such future crimes.

4. Decisions of National Tribunals

Case No. 83, US, *Ex Parte* Quirin *et al.*

THE CASE

[**Source:** Supreme Court of the United States, 317 US 1 (1942); footnotes omitted.]

***EX PARTE* QUIRIN *ET AL.*;**
UNITED STATES EX REL. QUIRIN, *ET AL.* v. COX, PROVOST MARSHAL [...]

OPINION: MR. CHIEF JUSTICE STONE delivered the opinion of the Court. [...]

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. [...]

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners [...] boarded a German submarine which proceeded

across the Atlantic to [...] New York. The four were there landed from the submarine in the hours of darkness [...] carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City. [...]

All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. [...]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War [...]. On the same day, by Proclamation, the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals." [...]

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. [...]

Specification 1 states that petitioners, "being enemies of the United States and acting for [...] the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States [...] and went behind such lines, contrary to the law of war, in civilian dress [...] for the purpose of committing [...] hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying

property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [...] Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. [...] It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused. [...]

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for *habeas corpus* in this Court should be denied. [...]

DISCUSSION

For the purpose of this discussion please consider the Conventions and Protocol I applicable.

1. a. Who is entitled to prisoner-of-war status under IHL? Only combatants? (*Cf.* Art. 28 (2) of Convention I, Art. 4 of Convention III, Arts. 44 (4)-(5) and 45 of Protocol I.)

   b. Does citizenship affect the status of an individual otherwise entitled to prisoner-of-war status? Even if the individual holds the citizenship of the Detaining Power? May he, even if he is a prisoner of war, be punished for the act of treason consisting of having participated in a war against his country or

having fought in the armed forces of the enemy? (*Cf.* Arts. 4, 16 and 85 of Convention III and Art. 43 of Protocol I.)

2. Why does the Court specifically mention the enemy combatant's absence of a uniform? What status has a combatant who fails to distinguish himself from the civilian population? (*Cf.* Art. 1 of the Hague Regulations, Art. 4 (A) (2) of Convention III and Art. 44 (3)-(4) of Protocol I.) What purpose does this principle of distinction serve? Does this explain why IHL rules do not provide combatant status to spies? (*Cf.* Arts. 29-31 of the Hague Regulations and Arts. 44 (4), 45 (3) and 46 of Protocol I.) Are saboteurs treated the same as spies under IHL? What is the difference between a saboteur and a spy?
3. Could this decision have been issued if Protocol I had been applicable?

Case No. 84, US, Johnson v. Eisentrager

THE CASE

[*See also* **Case No. 218**, US, Rasul v. Bush, p. 2340.]

[**Source:** U.S. Supreme Court JOHNSON v. EISENTRAGER, 339 U.S. 763 (1950); June 5, 1950; available on http://laws.findlaw.com/us/339/763.html]

U.S. Supreme Court
JOHNSON v. EISENTRAGER, 339 U.S. 763 (1950)

JOHNSON, SECRETARY OF DEFENSE, *ET AL.* v. EISENTRAGER, ALIAS EHRHARDT, *ET AL.*

***CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 306**

Argued April 17, 1950

Decided June 5, 1950

[...]

MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-a-vis military authorities in dealing with enemy aliens overseas. The issues come here in this way:

Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of *habeas corpus*. They alleged that, prior to May 8, 1945, they were in the service of German armed forces in China. [...] On May 8, 1945, the German High Command [...] executed an act of unconditional surrender, expressly obligating all forces under German control at once to cease active hostilities. These prisoners have been convicted of violating laws of war, by

engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces. They, with six others who were acquitted, were taken into custody by the United States Army after the Japanese surrender and were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theater, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government. The proceeding was conducted wholly under American auspices and involved no international participation. After conviction, the sentences were duly reviewed [...].

The prisoners were repatriated to Germany to serve their sentences. [...]

The petition prays an order that the prisoners be produced before the District Court, that it may inquire into their confinement and order them discharged from such offenses and confinement. It is claimed that their trial, conviction and imprisonment violate Articles I and III of the Constitution, and the Fifth Amendment thereto, and other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war. [...]

I

[...]

It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. While his lot is far more humane [...] and endurable than the experience of our citizens in some enemy lands, it is still not a happy one. But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage. [...]

American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. [...] Conscription, compulsory service and measures to mobilize every human and material resource and to utilize nationals - wherever they may be - in arms, intrigue and sabotage, attest [...] this Court's earlier teaching that in war "every individual of the one nation must acknowledge every individual of the other nation as his own enemy - because the enemy of his country." [...] And this without regard to his individual sentiments or disposition. [...] The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, [...] regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign. [...]

The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied. [...] A unanimous

Court recently clarified both the privilege of access to our courts and the limitations upon it. We said: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today." [...]

But the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy. [...]

II

[...]

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied [...] protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States. [...]

A basic consideration in *habeas corpus* practice is that the prisoner will be produced before the court. [...] To grant the [...] writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands.[...] [T]he writ of *habeas corpus* is generally unknown. [...]

Despite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their [...] support and to show some reason in the petition why they should not be subject to the usual disabilities of nonresident enemy aliens. [...] After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of *habeas corpus* appears. [...]

DISCUSSION

1. a. Did a German national continuing to fight, together with Japan, against the US after 8 May 1945 violate the "laws of war"? IHL?
   b. Under Convention III, would the petitioners have been prisoners of war once fallen into the power of the US? If they had been prisoners of war, could they have been sentenced for what they did? Without a possibility to petition the US Supreme Court? (*Cf.* Arts. 82, 84, 85, 99, 102 and 106 of Convention III.)
   c. If the petitioners had been civilians protected by Convention IV, could they have been sentenced for what they did? Without a possibility to petition the U.S. Supreme Court? (*Cf.* Arts. 64, 66, 70 and 73 of Convention IV.)
2. How do you consider the restrictions put under US law against "enemy aliens"? Are they in conformity with the rules of IHL? (*Cf.* Arts. 35-43 of Convention IV, Art. 23 (h) of the Hague Regulations.)
3. May a protected person introduce legal action before the courts of the adverse party in whose power he or she is? Even if he or she is not on the enemy's own territory? (*Cf.* Art. 14 (3) of Convention III, Art. 38 of Convention IV, Art. 23 (h) of the Hague Regulations.)
4. May a prisoner of war introduce a *habeas corpus* petition before the courts of the detaining power? May an enemy civilian alien introduce a *habeas corpus* petition before the courts of the detaining power? Is every enemy national either prisoner of war or protected civilian? (*Cf.* Arts. 4 and 5 of Convention III, Art. 4 of Convention IV.)

Case No. 85, US, Trial of Lieutenant General Harukei Isayama and Others

THE CASE

[**Source:** Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, 1979, pp. 345-348.]

TRIAL OF LIEUTENANT GENERAL HARUKEI ISAYAMA AND SEVEN OTHERS

(U.S. Military Commission, Shanghai, July 25, 1946)

SOURCE
5 LRTWC 60

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

[...]

When taken together, the charge and accompanying Bill of Particulars, which specified the offences asserted that the accused Lieutenant-General Harukei Isayama did "permit, authorize and direct an illegal, unfair, unwarranted and false trial" before a Japanese Military Tribunal of certain American prisoners of war, did "unlawfully order and direct a Japanese Military Tribunal" to sentence to death these American prisoners of war, and did, "unlawfully order, direct and authorize the illegal execution" of the American prisoners of war. [...] With respect to the [other] accused [...], the Charges and Bills of Particulars asserted that they as members of the Japanese Military Tribunals did knowingly, wrongfully, unlawfully and falsely try, prosecute and adjudge certain charges "against the several American prisoners of war" upon false and fraudulent evidence and without affording said prisoners of war a fair hearing," did "knowingly, unlawfully and wilfully sentence" the several American Prisoners of war to be put to death resulting in their unlawful death. Several of the accused were further charged in their capacities as chief judge and prosecutors and those who acted as judges were further charged with the wrongful and wilful failure to perform their duties as such judges and with the failure and neglect to provide a fair and proper trial.

The accused pleaded not guilty.

2. THE EVIDENCE BEFORE THE COMMISSION

The evidence showed that fourteen United States airmen were captured by the Japanese Formosan Army and interrogated for alleged violations of the Formosa Military Law relating to the punishment of enemy airmen for acts of bombing and strafing in violations of International Law. These fourteen airmen were for the most part radiomen, photographers and gunners, and were captured between 12th October, 1944, on which the Military Law was issued, and 27th February, 1945. The senior members of the plane crews - the pilots and co-pilots - were sent to Tokyo for intelligence purposes and were not tried by the Japanese with their fellow crew-members.

The Law in question provided that its terms would apply to all enemy airmen within the jurisdiction of the 10th Area Army and that punishment would be meted out to all enemy airmen who carried out any of the following: bombing and strafing with intent to destroy or burn private objectives of non-military nature; bombing and strafing non military objectives apart from unavoidable circumstances; disregarding human rights and carrying out inhuman acts; or entering into the jurisdiction with intentions of carrying out any of the foregoing. Death was provided as the punishment, but this, according to circumstances, could be changed to imprisonment for life or for not less than 10 years. The law stated that the punishment would be carried out by the appropriate Commander; and provided for the establishment of a Military Tribunal at Taihoku composed of officers of the 10th Area Army and other units under its command, and for the applicability of the regulations of the special court-martial to the Military Tribunal. It was further provided that anyone violating this law would be tried by Military Tribunal; that the commander would be in charge of the Tribunal and that the Tribunal would be composed of three judges - two ordinary army officers and one judicial officer - to be appointed by the commander.

All of the fourteen were interrogated by members of the 10th Area Army Judicial Department. There was some evidence that, during the investigation, the chief of the judicial Department, the accused Furukawa, inquired in Tokyo as to the disposition of the captured airmen, and that he was told that the fourteen should be tried if they came within the scope of the Military Law. On his return to Formosa he instructed his subordinates to complete the investigations. The evidence before the United States Military Commission disclosed that the records of the interrogations of several of the American airmen were falsified before the trial by the Japanese Court or before the Japanese Court records were completed.

The interpreter who was present when the falsified statements were taken testified that none of the airmen concerned made any admissions of indiscriminate bombing or strafing. This evidence was supported by the testimony of certain of those who had the task of recording the interrogations. The accused denied the falsification and claimed that admissions of guilt had been made by the airmen.

It was the contention of the accused in the present trial that, in accordance with Japanese War Department directives, the 10th Areas Army asked instructions of the Central Government during the pre-trial investigations and forwarded statements of opinion prior to referring the cases for trial. A reply came back from Tokyo stating that if the opinions given were correct, severe judgement should be meted out. The accused Isayama, Chief of Staff, 10th Area Army, was advised of all proceedings. [...]

The fourteen Americans were tried in units according to the planes of which they were crew members. There were six cases, all brought to trial on 21st May, 1945. The American airmen were not afforded the opportunity to obtain evidence or witnesses on their own behalf. The defence attempted to justify this, first on the ground that lack of personnel and facilities made it impossible to permit the airmen to go to the scenes of their alleged indiscriminate bombings and

strafings, and secondly on the ground that the airmen were given full opportunity in court to make whatever statements they wished. Some testimony was adduced by the prosecution in the United States trial to show that, except for the charges, no other document or evidence was interpreted to the airmen, and that they were not defended by counsel.

There was some evidence indicating that, under the Japanese system of military justice, an accused was not allowed defence counsel in time of war; the evidence before a tribunal was largely documentary, based on admissions and statements of the accused in pre-trial interrogations and reports of damage and investigations by the gendarmerie; and the accused might testify before the tribunal and might introduce evidence on his behalf. It was the contention of the defence that this was the procedure followed in each of the trials of the fourteen American airmen, and this procedure, it was testified, was the normal one.

It was the contention of the defence that since an intention on the part of the Japanese Prosecution to demand the death penalty had been approved by Tokyo, and since the death penalty had been demanded at the trials, the military tribunal had to adjudge death and the commander had to order its execution [...]. The commander [...] issued an order for the execution of all fourteen after final instructions were received from Tokyo. On the morning of 19th June, 1945, the American fliers were lined up in front of an open ditch, shot to death and then buried in that ditch.

The Japanese records of trial relating to these American airmen, and which were turned over to American authorities in September 1945, were not completed until after the Japanese surrender. [...] The accused did not sign the records of the trials until after the war.

3. THE FINDINGS AND SENTENCES

All of the accused were found guilty.

DISCUSSION

1. Were the American Prisoners of War denied a fair trial as the US Court concluded? If so, because the trial violated the rules of IHL applicable then? Even though, Japan was not a State Party to the 1929 Convention relative to the Treatment of Prisoners of War? Were the accused here denied a fair trial according to the rules of IHL applicable today? (*Cf.* Arts. 82-89 and Arts. 99-108 of Convention III.)

2. a. Under contemporary IHL, may or must POWs be punished by the Detaining Power for acts such as those criminalized by the Formosa Law, even though they were committed prior to capture? (*Cf.* Art. 85 of Convention III and Arts. 51 and 85 of Protocol I.)

   b. According to contemporary IHL, did the Formosa Military Law apply to the accused? Was that law compatible with IHL? If not, was it due to the fact that the Law was enacted without proper notification to the Protecting Powers? At least, could the Law have been applicable to the fourteen airmen who were captured on the same day that it was enacted ? Was it because the Law was

enacted without the consent of the Power on which the prisoners of war depended? Or because the law called for the death penalty as a punishment? Or because the law applied only to enemy airmen? (*Cf.* Arts. 82, 87, 88 and 100 of Convention III.)

3. a. Was the Japanese trial conducted according to the judicial guarantees stipulated by contemporary IHL? If not, were the accused validly sentenced? (*Cf.* Arts. 84, 102 and 105 of Convention III.)
   b. Was the evidence against the airmen properly attained? (*Cf.* Art. 99 (2) of Convention III.)
   c. Should the accused have been granted the opportunity to obtain evidence or witnesses? (*Cf.* Art. 105 of Convention III.)
   d. Although the Japanese system of military justice did not allow an accused defense counsel, should the accused here have been provided a defense counsel? (*Cf.* Arts. 99 (3) and 105 of Convention III.)
   e. Should the Court have granted the accused the right of appeal? Did they have such a right? (*Cf.* Art. 106 of Convention III.)
4. Could the Japanese and the US trial have taken place, even though the Protecting Power had not been notified of the proceedings? (*Cf.* Art. 104 of Convention III.)
5. Would it have been consistent with contemporary IHL to carry out the executions so quickly following the sentence? Must not the Protecting Power first be notified? Which information must such a communication contain? (*Cf.* Arts. 100 (3), 101 and 107 of Convention III.)
6. Under contemporary IHL, would the US have had the right or the obligation to punish the Japanese judges for their participation in the sentencing of the airmen? Were the Japanese judges under US jurisdiction when they committed their crimes? May a judge be sentenced for a judgement he has given? (*Cf.* Art. 130 of Convention III.)

Case No. 86, US, *In re* Yamashita

THE CASE

[**Source:** Supreme Court of the United States 327 US 1 (1946); footnotes partially omitted.]

[...]

Mr. Chief Justice Stone delivered the opinion of the court.

[...]

The charge. Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between october 9, 1944 and september 2, 1945, in the

Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he [...] thereby violated the laws of war."

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4,28,46, and 47, annex to the Fourth Hague Convention, 1907 [...]. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. [...]

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the annex to the fourth hague convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of

lawful belligerents, that it must be "commanded by a person responsible for his subordinates." [...] And Article 26 of the Geneva Red Cross Convention of 1929 [...] for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing Articles, (of the Convention) as well as for unforeseen cases ..." and, finally, Article 43 of the Annex of the Fourth Hague Convention [...] requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. [...]

We do not make the laws of war but we respect them so far as they do not conflict with the commands of congress or the constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.

[Footnote 4 reads: In its findings the commission took account of the difficulties "faced by the accused with respect not only to the swift and overpowering advance of american forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply ... , training, communication, discipline and morale of his troops," and the "tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character ... of his troops." It nonetheless found that petitioner had not taken such measures to control his troops as were "required by the circumstances."]

We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation. [...] It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt. [...]

Mr. Justice Murphy, dissenting. [...]

[...] I find it impossible to agree that the charge against the petitioner stated a recognized violation of the laws of war. [...]

[R]ead against the background of military events in the Philippines subsequent to october 9, 1944, these charges amount to this: "We, the victorious american forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain

effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."

Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. [...]

The court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague Convention No. IV of October 18, 1907 [...] to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are "commanded by a person responsible for his subordinates," has no bearing upon the problem in this case. Even if it has, the clause "responsible for his subordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on international law. In Oppenheim, International Law (6th ed., rev. by Lauterpacht, 1940, vol. 2, p. 204, fn. 3) it is stated that "the meaning of the word 'responsible'... is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed from above or elected from below; ..." Another authority has stated that the word "responsible" in this particular context means "presumably to a higher authority," or "possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts." Wheaton, International Law (7th ed., by keith, london, 1944, p. 172, fn. 30). Still another authority, Westlake, International Law (1907, part II, p. 61), states that "probably the responsibility intended is nothing more than a capacity of exercising effective control." Finally, Edmonds and Oppenheim, Land Warfare (1912, p. 19, par. 22) state that it is enough "if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority ..." It seems apparent beyond dispute that the word "responsible" was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his

command under such circumstances. The provisions of the other conventions referred to by the court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X [...] nor Article 26 of the Geneva Red Cross Convention of 1929 [...] refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV [...] that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that. [...]

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice. [...]

DISCUSSION

1. a. At that time was the charge against the petitioner a recognized violation of the laws of war? Or was it merely the administration of victor's justice?

   b. Is such a charge a recognized violation of IHL today? (*Cf.* Arts. 86 and 87 of Protocol I.)

2. a. If a military commander is personally responsible for the criminal misconduct of the members of his command directed against protected persons if he fails to take the necessary steps to prevent such misconduct before it occurs (and to bring it to a halt and to punish offenders if it does occur), what are the necessary steps sufficient to avoid personal responsibility? How is this to be assessed? Will the minimum necessary steps vary with the circumstances?

   b. In order to be found culpable is a subjective or objective standard applied, *i.e.,* must the commander *know* that his subordinates are going to commit a breach of IHL or have information which *should have* enabled him to so conclude? Which is the higher standard of *mens rea*?

3. a. Is Mr. Justice Murphy correct in his dissent that a commander should not be held responsible for the actions of his troops when "under constant and overwhelming assault"? Is it militarily unrealistic? Does that matter? Should it matter?

   b. Can an intense combat situation really be fairly assessed in review? Particularly by victors of a conflict? If not, can soldiers thus never be fairly prosecuted and punished? (*See also* **Case No. 101**, US, US v. William L. Calley, Jr. p. 1129.)

Case No. 87, Burma, Ko Maung Tin v. U Gon Man

THE CASE

[**Source:** *AD*, vol. 14, 1947, pp. 233-235.]

KO MAUNG TIN
v.
U GON MAN.

Burma, High Court (Appellate Civil).
(Roberts, C.J., Ba U, Blagden, Wright, and E. Maung, JJ.)
May 3, 1947

THE FACTS. During the Japanese occupation of Burma the appellant advanced Rs. 1,000 in Japanese notes to the respondent, who executed a promissory note in favour of the appellant promising to repay Rs. 1,000 only in Japanese notes with interest, and deposited title deeds of his properties with intent to create a mortgage by deposit of title deeds. After the British reoccupation appellant filed a suit against the respondent on the promissory note. For the respondent it was contended that the issue of the Japanese currency was unlawful and that Rs. 1,000 (Japanese currency) was not currency within the meaning of "sum certain" in the definition of a promissory note. [...]

Held: that the action on the promissory note must be dismissed [...]. The Japanese Military Authorities acted in excess of their authority under international law, in issuing a system of currency parallel to the currency established by the lawful Government.

Per E. Maung, J.: "In holding that the Japanese Military Authorities in occupation of Burma acted in excess of their legitimate authority at international law in setting up a parallel system of currency and relating the same to the system established by the lawful Government for Burma, I am not unmindful of the precedents set in the War of 1914-18 by Germans in France and Belgium and Austrians in Serbia, repeated in the War of 1939 onwards by Germany and powers associated with her. German jurists and the *Reichsgericht* sought to justify these actions on the theory that in an effective occupation of enemy territory the power of the occupying country totally excludes and replaces the State power of a lawful Government. This theory has not received general acceptance and is not in consonance with modern views on the status of the occupying power. The right of an occupant in occupied territory is merely a right of administration. *See* McNair, *Legal Effects of War* (2nd ed.) at page 337.

"Articles 42 to 56 of the Hague Regulations of 1907 clearly cannot be invoked in support of the exercise of the occupying power of effecting a change in the currency system of the occupied territory and to make that change binding on the lawful Government.

[...]

DISCUSSION

1. May an occupying power legislate for a territory it occupies? On what matters? Under which conditions? (*Cf.* Art. 64 of Convention IV and Art. 43 of the Hague Regulations.)

2. May an occupying power introduce in an occupied territory its own currency as a legal currency? At least parallel to the local currency? May it create a separate legal currency for the occupied territory? When does the introduction of a currency constitute an act of legislation?

Case No. 88, Netherlands, *In re* Pilz

THE CASE

[**Source:** *AD,* vol. 17, 1950, pp. 391-392, original report in *NJ,* No. 681, 1950.]

PUNISHMENT OF WAR CRIMES

In re PILZ

Holland, District Court of The Hague (Special Criminal Chamber). December 21, 1949

Special Court of Cassation. July 5, 1950

THE FACTS. In occupied Holland a young Dutchman who had enlisted in the German army attempted to escape from his unit and was fired on while so doing. The accused, a German military doctor, was prosecuted after the war for having refused to allow German personnel to give the wounded man medical attention and for having abused his authority by ordering, or at least permitting, a subordinate to shoot him. In its judgment of December 21, 1949, the Special Criminal Chamber of the District Court of The Hague held that it had no jurisdiction to take cognizance of a case of this nature. On appeal by the Public Prosecutor,

Held (by the Special Court of Cassation): that the appeal must be dismissed. The Court of Cassation agreed with the Court below that the Netherlands courts would have jurisdiction in this case only if the German doctor had committed a war crime, and that, therefore, it was necessary to enquire whether the acts for which he was prosecuted constituted a violation of the laws of war. The Hague Regulations of 1907 concerning the laws and customs of war had not, however, been violated, since the object of the Regulations, and in particular of Article 46, was to protect the inhabitants of an enemy-occupied country and not members of the occupying forces. The legal position of the latter was regulated not by international convention, but by the military law of the occupying Power. As the Court below had established as a fact, the wounded person belonged to the

occupying army. Under these conditions his nationality, or former nationality, was irrelevant, since by his enlistment in the Occupant's army he had forfeited the protection of the law of nations and had voluntarily submitted himself to the laws of the occupying Power. Nor did the Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field apply, since this Convention only protected members of an army against acts by members of the opposing army. Denial of medical aid to the wounded soldier in this case and permitting his murder were, if proved, abominable crimes on the part of a military doctor, contrary to all humanitarian principles and to the calling of a physician. They did not, however, constitute war crimes, but were crimes in the domestic sphere of German military law and jurisdiction. Nor were the acts for which the German doctor was prosecuted in Holland crimes against humanity in the sense of the Charter of the International Military Tribunal, since the victim no longer belonged to the civilian population of occupied territory, and the acts committed against him could not be considered as forming part of a system of "persecutions on political, racial or religious grounds".

DISCUSSION

Please assume, for the purpose of this discussion, that the Conventions and Protocol I apply.

1. Does Convention I only apply to treatment by the enemy? Protocol I? Does an enemy national voluntarily joining the armed forces of the power in whose hands he is lose protected person status? (*Cf.* Arts. 7/7/7/8 respectively of the four Conventions, Arts. 10, 11 and 75 of Protocol I.) Is it a violation of IHL to refuse medical attention to such a person? To summarily execute such a person? (*Cf., e.g.,* Art. 5 (3) of Convention IV, Arts. 50/51/130/147 respectively of the four Conventions and Arts. 10 and 75 of Protocol I.)
2. Is denial of medical attention a grave breach of IHL? Even in this case? (*Cf.* Art. 13 of Convention III, Arts. 50/51/130/147 respectively of the four Conventions and Art. 11 (1) and (4) of Protocol I.)
3. Does an officer permitting a subordinate to shoot at a deserter who is *hors de combat* violate IHL? (*Cf.* Art. 3 common to the Conventions and Arts. 75 and 85 (3) (e) of Protocol I.)

Case No. 89, Singapore, Bataafsche Petroleum v. The War Damage Commission

THE CASE

[**Source:** *AJIL*, vol. 51(4), 1957 pp. 802-815; footnotes omitted.]

N.V. DE BATAAFSCHE PETROLEUM MAATSCHAPPIJ & ORS.
v.
THE WAR DAMAGE COMMISSION.

22 Malayan Law Journal 155 (1956).
Court of Appeal, Singapore,
April 13, 1956. Whyatt, C.J., Mathew, C.J., and Whitton, J.

Oil stocks in the Netherlands East Indies, which were owned by Dutch corporations, were seized by Japanese armed forces and used for Japanese civilian and military purposes. They were not, however, requisitioned by the Japanese under the Hague Regulations. Large quantities of these stocks were found in Singapore at the end of the war, and were seized by the British Army as war booty. The Dutch corporations claimed compensation. Their claim was dismissed below, but on appeal was allowed. Whyatt, C.J., in an opinion stating the facts more fully, said in part:

[...] The appellants contend that the petroleum was their property and not, as the respondents allege, the property of the Japanese State and in support of their contention, they rely upon two broad submissions, first, that they had a valid title to the petroleum under municipal law, and secondly, that they were never lawfully deprived of their title by the Japanese belligerent occupant.

Before examining these submissions in detail, it will be convenient to set out the relevant facts which have been proved or admitted in the course of these lengthy proceedings. The appellants are three oil companies, incorporated in Holland, who prior to the outbreak of the war with Japan in 1941, carried on the business of producers and refiners of oil in Sumatra. [...] By the end of 1941, the appellants had established production in 32 oil reservoirs, as they are technically known, situated in various places in the concession areas [...].

For the evidence of the events which occurred during the Japanese occupation, [...] the testimony of Japanese naval and military officers [...] may be summarised as follows: When the Japanese armed forces occupied Sumatra, they immediately seized the appellants' installations in the field and also their refineries at Palembang because, as a Japanese naval officer, Admiral Watanabe, called by the respondents, put it, "oil was the most vital war material at that time, and personally, I thought we started the war for the sake of the oil." The installations had been badly damaged as part of the Netherlands Indies Government's denial policy, and the Japanese military authorities organized a special technical unit under military discipline to repair them. By the end of the first year of the Japanese occupation, they were all in working order again and crude oil was once more being extracted from the reservoirs and being

processed in the appellants' refineries. The Japanese military authorities did not bring any new oilfields into production but continued to extract oil from the existing reservoirs throughout the period of the occupation. The oil so extracted, or at least a substantial part of it, was shipped as refined products, and sometimes as crude, to Singapore where it was kept in storage tanks, belonging in some cases to the appellants' associated companies, until eventually it was forwarded to various destinations [...] to meet not only military demands but also civilian requirements in those areas. The Japanese colonel in charge of the Shipping Department of the Petroleum Office in Singapore [...] gave no estimate of the respective quantities allocated to military and civilian consumers. When the British landed in Singapore on the 5th September 1945, they found in the storage tanks [...] refined petroleum and [...] crude oil, all of which, as is admitted by the respondents, had been extracted from the oil reservoirs in Sumatra by the armed forces of the belligerent occupant [...]. The British military forces seized the petroleum stocks as war booty. [...]

I now proceed to consider whether the Japanese belligerent occupant had a right, under international law, to seize the crude oil in the ground and so deprive the appellants of their title to it. It was common ground that if such a right did exist in the belligerent occupant, it was derived from Article 53 of the Hague Regulations. Before, however, I examine this Article, it is necessary to consider a formidable submission advanced by the appellants which, if sound, renders a detailed examination of the Hague Regulations academic. The appellants contended that Japan commenced the war, or at least launched an invasion against the Netherlands Indies, in order to secure the oil supplies of that country, because oil is an indispensable raw material in conditions of modern warfare. Therefore the Japanese invading armies, as soon as they had established the necessary military superiority, seized the appellants' installations, "lock, stock and barrel," and then proceeded, as speedily as possible, to repair and put them into operation, using for that purpose civilian technicians, [...] who were attached to the army and placed under service discipline. The whole operation, according to the appellants' argument, was prepared and executed by the Japanese military forces in accordance with Japan's Master Plan to exploit the oil resources of the Netherlands Indies in furtherance of their war of aggression. The plan was successful and enabled the Japanese forces in South East Asia in the course of the war to distribute vast quantities of oil, both crude and refined, to meet the needs of military and civilian consumers in the territories under their control and in Japan proper. This exploitation of the oil resources of the Netherlands Indies was, so the appellants contend, premeditated plunder of private property by the Japanese State on a totalitarian scale and, as such, it was contrary to the laws and customs of war.

The appellants rely upon the evidence of Japanese naval and military officers to prove the facts upon which this submission is based. The Chief of the Fuel Section of the Supply Depot of the Ministry of the Navy in Tokyo stated that he was concerned in the spring of 1942 with plans for restoring the oil fields of the Netherlands Indies and later he toured the captured oil fields and arranged for personnel and material to be sent to repair them and put them into working order again. [...] Further details concerning the processing, refining and distribution of

the oil were given by the Japanese military officers who were stationed at Palembang and at the Headquarters of the Petroleum Office in Singapore which clearly show that it [sic] addition to supplying military requirements, the oil was also used to meet civilian demands. In my view this evidence establishes that the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

These facts being proved, the next question to be determined is whether seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war. On this point there is, fortunately, considerable authority available from decisions arising out of the war in Europe. First, there is the decision of the Nuremberg Tribunal, delivered in 1946, in which the principle is laid down that to exploit the resources of occupied territories in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws and customs of war. This principle has been approved and further expounded in the cases of *In re Flick*, (1947) U.S. Military Tribunal, Nuremberg, and *In re Krupp*, (1948) U.S. Military Tribunal, Nuremberg [*See* **Case No. 78**, US Military Tribunal at Nuremberg, US v. Alfried Krupp *et al* p. 1030.], and *In re Krauch*, (1948) U.S. Military Tribunal, Nuremberg, where it was applied to the acts of German industrialists who systematically plundered the economy of occupied territories by acquiring substantial or controlling interests in private property contrary to the wishes of the owners. The present case is much stronger as the plunder of the appellants' property was committed not by Japanese industrialists but by the Japanese armed forces themselves, systematically and ruthlessly, throughout the whole period of occupation. In my opinion, these authorities fully support the appellants' submission. Accordingly I reach the conclusion that the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants in Sumatra was in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

I now turn to the alternative argument urged by the appellants under this head, namely, that in any event the seizure was illegal as the crude oil in the ground was not "*munitions-de-guerre*" within the meaning of Article 53 of the Hague Regulations because it was then a raw material and, moreover, an immoveable raw material. According to the British Manual of Military Law issued by the Army Council pursuant to the provisions of Article I of the Hague Regulations, "*munitions-de-guerre*" are such "things as are susceptible of direct military use." The respondents accept this interpretation of "*munitions-de-guerre*," as indeed they are bound to do since they are, in fact, the Crown although not appearing as the Crown *eo nomine* in these proceedings. Consequently they are compelled to argue that crude oil in the ground, although a raw material, is susceptible of direct military use or at least had a sufficiently close connection with direct military use to bring it within Article 53. No direct authority was cited

for the proposition that raw materials could be "*munitions-de-guerre*" but the respondents referred to a passage in *Oppenheim's* International Law (7th Edition) at page 404 where it is said that "all kinds of private moveable property which can serve as war material, such as .... cloth for uniforms, leather for boots ... may be seized ... for military purposes ..." which they contend supports the view that raw materials can be "*munitions-de-guerre.* " On the other hand, *Professor Castren*, a Finnish Professor, in "Law of War and Neutrality," at page 236, says that "Raw materials and semi-manufactured products necessary for war can hardly be regarded as munition of war". It may be that certain types of raw material or semi-manufactured products, such as cloth for uniforms and leather for boots, which could possibly be made up into finished articles by army personnel without the assistance of civilian technicians and outside plant can, without stretching the meaning of "*munitions-de-guerre*" unduly, be regarded as having a sufficiently close connection with direct military use to bring them within Article 53. It is not, however, necessary to decide this point as the facts of this case show that there is no such close connection in the present instance. According to the evidence, elaborate installations and civilian technicians were needed by the army to enable them to appropriate this oil and prepare it for use in their war machines. It had to be extracted from underground reservoirs, and then transported to a refinery, and then subjected to a complicated refining process before it was of any use to any one. In these circumstances, it cannot be said, in my opinion, that at the moment of its seizure in the ground, the oil had a sufficiently close connection with direct military use to bring it within the meaning of *"munitions-de-guerre"* in Article 53.

A further argument advanced by the appellants was that "*munitions-de-guerre*" does not include an immoveable and as the crude oil when seized, was part of the realty, it was not a "*munitions-de-guerre.*" The appellants conceded that certain things included in the categories specified in Article 53 which partake of the character of the realty, as for example, a railway transportation system, are seizable but they contended that oil in the ground could not be regarded as an exceptional case and in support of this view, reliance was placed on a *dictum* of Lord Simon in *Schiffahrt-Treuhand* v. *Procurator General*, (1953) A.C. 232, (at page 262) to the effect that "it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting)... ." Lord Simon was not, of course, intending to give an exhaustive interpretation of "*munitions-de-guerre*" but, it would, I think, be a startling extension of his phrase "arms or ammunition which could be used against the enemy in fighting" to say that it could include minerals *in situ.* In my judgment, Article 53 was intended to apply, generally speaking, to moveables and only in those categories where the description is wide enough to include things which may belong, in part, to the realty, as, for example, "appliances for the transport of persons or things" mentioned at the beginning of the second paragraph of the Article, is it permissible to interpret it so as to include immoveables. *"Munitions-de-guerre"* is not, in my view, such a category. Accordingly I hold that crude oil in the ground, being an immoveable and not susceptible of direct military use, is not a "*munitions-de-guerre*" within the meaning of Article 53.

The appellants, who were nothing if not prolific in preferring alternative arguments, contended that even if crude oil in the ground could be seized as "*munitions de guerre*" under Article 53, the seizure in this case was invalid because no receipt was given to the owners or any one representing them. Article 53 does not in terms require a receipt whereas Article 52 (which deals with requisitioning) expressly provides for one; consequently it might be said, as a matter of pure construction, that the omission in Article 53 was deliberate on the part of those who framed the Regulations and such a requirement ought not to be implied. This, however, is not the view taken by municipal courts which have construed this Article. In the case of *Billotte*, (1948) Netherlands District Court, Arnhem ... it was held that the failure of German military personnel to give a receipt when seizing a car rendered the seizure invalid. The Court of Cassation at the Hague took a similar view in *Hinrichsen's* case in 1950. In that case a German Customs Frontier Guard seized two motor cycles without giving a receipt to the owner and the Court held that "this may not be done without in some way being officially acknowledged, in order to ensure compliance with the rule that such goods must be returned and compensation fixed when peace is made." In reaching their decision the Court of Cassation referred to the report of the proceedings at the First Hague Peace Conference (1899) in which it was stated that although it had not seemed opportune to make a special stipulation with regard to a receipt, the Committee nevertheless were of the opinion that the fact of seizure should be clearly stated one way or another if only to furnish the owner with an opportunity to claim an indemnity. [...] The respondents sought to distinguish these authorities from the present case on the ground that a receipt or acknowledgement was not required when the seizure was otherwise notorious. No authority was cited in support of this view, but in any case it does not meet the case where, as here, the fact of seizure is notorious but the quantity seized is unknown. The appellants do not know and have no means of discovering how much crude oil was seized from their oil reservoirs during the Japanese occupation and even if everything else had been done according to law, it would not now be possible for them to claim the compensation expressly provided for in Article 53. It would have been quite a simple matter for the Japanese belligerent occupant to have given an official acknowledgment to the Custodian of Enemy Property who [...] was appointed by the Japanese in Sumatra to represent absent owners, and to have furnished him with proper records of the crude oil they extracted; but nothing of the kind was done and the failure to do so, was, in my opinion, an infringement of Article 53 and renders the seizure invalid.

The last alternative argument advanced by the appellants on the construction of Article 53 was that even where the seizure is valid in all respects, the belligerent occupant obtains only a provisional title to seized property and must restore it to the original private owner if it still *in esse* at the cessation of hostilities. They contended that in the present instance the seized property was still *in esse* when hostilities ended and therefore the rights of the appellants revived and the property should have been restored to them. In support of this proposition, the appellants relied, first, upon the express words of the Article which states that "seized articles must be restored ... when peace is made," secondly, upon the views of *Westlake* (War, Vol. II, page 115) and *Rolin* (Le Droit Moderne de la

guerre, paragraph 492), and lastly on two cases decided in municipal courts in 1943 and 1947 [...]. The respondents conceded that the provisions about restoration apply to some seizures and that if, for example, the seized article had been a motor lorry, the belligerent occupant would have been bound to restore it to the owner; but they contended that it would be contrary to common sense to apply these provisions to consumable war materials, such as petroleum, which are not readily identifiable as belonging to any particular owner. Such a distinction does not appear to be based on any principle but rather on the supposed difficulty of carrying out the provisions of the Article in practice. But if, in fact, there is no practical difficulty in identifying the owner of the property, as was the position in this case, I can see no justification for departing from the plain words of Article 53. The respondents further objected that if there was a duty to restore these petroleums stocks, it did not arise until peace was actually made. It is obvious, however, that the right of the belligerent occupant to use *"munitions-de-guerre"* must cease with the cessation of hostilities, and it appears to me that when this occurs, the only right then remaining in the belligerent occupant is a right to retain possession of the property on behalf of the owner, all other rights in the property revesting in the original owner. Accordingly I am of the opinion that, on any view of the matter, the appellants were entitled to require the belligerent occupant to hold these surplus petroleum stocks on their behalf until such time as they could be restored in accordance with the provisions of Article 53.

I have now dealt with the many contentions put forward by the appellants in respect of the Hague Regulations. At the outset of his argument, counsel for the appellants claimed that in seizing this crude oil, the Japanese military forces had contravened the rules of international law in every single particular. It was a sweeping claim but I am bound to say that I think he has made it good [that] the seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a *"munitions-de-guerre"*, the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled. In all these matters, the belligerent occupant, in my judgment, contravened the laws and customs of war and consequently failed either to acquire a valid title for himself or to deprive the appellants of the title which I have found existed in them prior to the seizure. [...]

For these reasons I am of the opinion that the appeal should be allowed. The appellants should have the costs of the appeal and of the proceedings before the Board. [Other opinion omitted.] [...]

DISCUSSION

1. If proven that Japan waged an invasion in order to take private property (the oil) solely for the war effort, why does this make, as the Court states, examination of Art. 53 of the Hague Regulations merely academic? Does such action by Japan violate the laws and customs of war? Does it mean that Japan cannot exercise the rights of an occupying power under IHL? That all its actions become unlawful? To which laws and customs of war does the Court refer? Is the Court's reasoning confusing *ius ad bellum* and *ius in bello*?

2. a. When may an army take property from the territory it occupies? May the occupying army seize property for its own use? For the use of its civilian population? (*Cf.* Arts. 23 (g), 46 (2), 52, 53 and 55 of the Hague Regulations.)

   b. What property may an occupying army seize, utilize, or destroy? Does it matter whether the property is state or privately owned? What other characteristics of the property are determinative in assessing appropriate seizure or requisition by an occupier? (*Cf.* Arts. 23 (g), 46 (2), 52, 53 and 55 of the Hague Regulations.)

3. a. Does crude oil not constitute a munition of war? What constitutes munitions of war (*munitions-de-guerre*) under Art. 53 of the Hague Regulations? To constitute munitions of war must an item fulfill two requirements: to be susceptible for direct military use and to be moveable? Is the British Manual of Military Law's definition of munitions of war binding on all?

   b. If accepting the definition of munitions of war provided by the British Manual of Military Law, was the Court's analysis of the facts of this case, determining oil as a raw material not susceptible for direct military use, convincing? Are raw materials never munitions of war?

   c. Need munitions of war be moveable property? Does the Court convincingly interpret the language of Art. 53 of the Hague Regulations on this point? Is oil really immovable?

4. What is the distinction between the seizure and the requisition of items? What is permissible for an occupant to seize? To requisition? Are there different rules governing each under IHL? Does the Court correctly interpret requirements necessary for compliance with Art. 53 of the Hague Regulations concerning seizure? Are these directly stated in the Article or implicitly? (*Cf.* Arts. 52 and 53 of Hague Regulations.) Was Japan's failure to give a receipt "a fatal omission," as the Court writes?

5. Must seized property be returned? If so, when? "When peace is made"? (*Cf.* Art. 53 of the Hague Regulations.) When is that exactly? At the cessation of hostilities?

6. Does the appropriation in this Case not violate Art. 147 of Convention IV? Is Art. 147 alone sufficient to make the Japanese appropriation a grave breach of IHL or is a substantive rule protecting such property necessary for that Article's application?

Case No. 90, US, Extradition of Demjanjuk

THE CASE

[**Source:** United States District Court for the Northern District of Ohio, Eastern Division, 612 F. Supp. 544 (1985); footnotes omitted.]

IN THE MATTER OF THE EXTRADITION OF JOHN DEMJANJUK [...],

Misc. No. 83-349, April 15, 1985

"On October 31, 1983, the Government of the State of Israel requested the extradition of John Demjanjuk [hereinafter referred to as "respondent" or "the respondent"] from the United States of America pursuant to an Israeli arrest warrant issued on October 18, 1983. The warrant charges Demjanjuk with "the crimes of murdering Jews, [which are] offenses under sections 1 to 4 of the Nazi and Nazi Collaborators (Punishment) Law" of the State of Israel. State of Israel's Request for the Extradition of John Demjanjuk at 11-12.

The Government of the United States pursuant to its obligation under the Convention on Extradition between the Government of the United States of America and the Government of the State of Israel, T.I.A.S. 5476, 14 U.S.T. 1717 (signed December 10, 1962) (entered into force December 5, 1963) [hereinafter "the Treaty"], filed on November 18, 1983 a complaint [hereinafter the "Government's Complaint"] seeking the extradition of the respondent to Israel. In its Complaint, the Government states that respondent is charged with "the crimes of murder and malicious wounding; inflicting grievous bodily harm" which are among the enumerated offenses in Article II of the Treaty, which is still in full force and effect. Government's Complaint at 1-2.

This Court must determine whether respondent can be extradited to the State of Israel pursuant to 18 U.S.C. at 3184.

PRIOR HISTORY

The respondent, a native of the Ukraine of the Union of Soviet Socialist Republics [hereinafter referred to as "U.S.S.R."], entered the United States on February 9, 1952; [...] On November 14, 1958, he was naturalized as a United States citizen by the United States District Court in Cleveland, Ohio. [...]

On June 23, 1981, this Court found that respondent had made material misrepresentations in his visa application by failing to disclose his service for the German SS at the Trawniki and Treblinka prison camps in 1942-43. It was ordered that repondent's United States citizenship be revoked and his certificate of naturalization cancelled. [...]

On December 6, 1982, the Immigration and Naturalization Service began deportation proceedings against respondent. On May 23, 1984, Immigration Judge Adolph P. Angellili found respondent deportable and designated the U.S.S.R. as the country of deportation. However, the immigration judge also

granted the respondent the option of voluntary departure from the United States. On February 14, 1985, the Board of Immigration Appeals dismissed respondent's appeal of the deportation order; the Board affirmed the finding of respondent's deportability and reversed the grant of voluntary departure. [...]

On July 17, 1984, this Court ruled that, despite respondent's appeal of his deportation, the extradition and deportation proceedings are independent and, as a result, respondent's extradition hearing could proceed. The Court also stated that the United States Government was under no obligation to elect deportation or extradition as the exclusive means of proceeding against respondent.

II.

[...] Three issues were considered at the March 12, 1985 extradition hearing. They are:

1. Whether the respondent is the party named in the complaint issue of identification;
2. Whether the crimes for which respondent's extradition is sought are offenses "within the treaty" [issues of treaty interpretation]; and
3. Whether there is "competent and adequate evidence" or "probable cause" to believe respondent committed the acts with which he is charged [issue of probable cause].

Each of these issues will be examined and resolved below.

[...]

IV.

TREATY INTERPRETATION

Turning to the second element an extradition court must consider, this Court will decide whether respondent has been charged with having committed, within the jurisdiction of the State of Israel, any of the crimes provided for in the Treaty. [...]

A. Israeli Jurisdiction

Respondent asserts that Israel lacks jurisdiction under "recognized principles of International Law" to bring him to trial. Respondent's Motion to Terminate at 11 (filed April 2, 1984). If Israel lacks jurisdiction, the United States can not extradite respondent to Israel. Israel's assertion of jurisdiction over respondent, however, is proper under both Israeli municipal law and international law. Furthermore, Israeli jurisdiction does not violate United States jurisdictional principles or practices in any way. [...]

International law does not generally prohibit the application of a state's laws (so-called "jurisdiction to prescribe") or the jurisdiction of its courts ("jurisdiction to enforce") over non-citizens or acts committed outside of its territory. The Case of S.S. Lotus (France v. Turkey), [1927] P.C.I.J. Ser. A, No. 10 at 19. Rather, states have a "wide measure of discretion which is only limited in certain cases by prohibitive rules." Id. In other cases, every state remains "free to adopt the

jurisdictional principles which it regards as best and most suitable". Id. The exercise of extraterritorial criminal jurisdiction over non-citizens in certain circumstances does not violate a state's international obligations, such as the duty to respect the sovereignty of other states. See id. at 20. It need not be decided here whether international law permits all that it does not forbid. Israel's assertion of jurisdiction over respondent based on the Nazi statute conforms with the international law principles of "universal jurisdiction".

International law provides that certain offenses may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment." [...]

The principle that the perpetrators of crimes against humanity and war crimes are subject to universal jurisdiction found acceptance in the aftermath of World War II. The wartime Allies prosecuted persons accused of war crimes and crimes against humanity in several forums. In a number of instances, they exercised extraterritorial jurisdiction over the accused. The International Military Tribunal at Nuremberg tried major war criminals "whose offences had no particular geographical location". [...] Numerous individual defendants were convicted of "war crimes" and "crimes against humanity", many of which were committed outside of the territory of the four Allies. The international community affirmed and endorsed the work of the tribunals and the principles of law they envoked, through a General Assembly Resolution. G.A. Res. 95 (A/64/Add. 1) p. 188 (1946) [...].

In a number of cases brought before United States military tribunals, defendants accused of war crimes objected to the assertion of jurisdiction because the crimes were not committed on United States territory or in the United States territorial zone of occupation in Germany. These defenses were uniformly rejected. In asserting jurisdiction, the United States military courts discussed the universality of jurisdiction over war crimes. For example, in United States v. Waldeck, et al., Case No. 000-50-9 (DJAWC, Nov. 15, 1947), the defendants were physicians, guards and officials of the Buchenwald concentration camp in Germany. They were, variously, charged with and found guilty of "killings, beatings, tortures, starvation" and other abuses. In finding jurisdiction over acts in violation of the law of war committed against the nationals of any country, at any place, prior to the entry of the United States into the war, the Court stated

Any violation of the law of nations encroaches upon and injures the interests of all sovereign states. Whether the power to punish for such crimes will be exercised in a particular case is a matter resting within the discretion of a state. However, it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. This is true, irrespective of when or where the crime was committed, the belligerency status of the punishing power, or the nationality of the victims. [...]

Both France and Norway enacted legislation which provided for the trial of war criminals who committed extraterritorial offenses against their nationals or their state interests. [...] No evidence has been presented or found which indicates that the international community objected to the Allies' assertion of jurisdiction over extraterritorial war crimes and crimes against humanity.

The work of the United Nations and its various organizations after World War II further shows the interest of the international community in the prosecution of war crimes, including crimes against humanity, which occurred in execution of or in connection with other war crimes. At the request of the United Nations General Assembly, the International Law Commission of the United Nations formulated "Nuremberg Principles", Report of the International Law Commission covering its Second Session, 5 U.N. GAOR, Supp. 12, pt. 111, U.N. Doc. A/1316 (1950), which described crimes against peace, war crimes, and crimes against humanity as "international crime[s]." [...] In addition, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 78 UN.T.S. 277 (opened for signature December 9, 1948) [hereinafter "Genocide Convention"], was adopted by the United Nations General Assembly in 1948, G.A. Res. 260(A), U.N. Doc. A/810 at 174 (1948) and has been ratified by 93 nations. The Convention "confirms" that genocide is "a crime under international law" and defines genocide to include various acts, including "killing" and "causing serious bodily or mental harm" which were committed "with intent to destroy ... a national, ethnical, racial or religious group". Convention, arts. 1, 2. The Contracting Parties undertake "to prevent and to punish" genocide. Convention, art. 1. [...]

B. Charges Within the Treaty

[...] The Arrest Warrant-Exhibit J charges respondent with "Crimes against the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950". The Warrant Request-Exhibit J more fully sets forth the charges: Details of the offense(s): The suspect, nicknamed "Ivan the Terrible", was a member of the S.S., and in the years 1942 - 1943 operated the gas chambers to exterminate prisoners at the Treblinka death camp in the Lublin area of Poland, which was occupied by the Nazis during the Second World War. The suspect murdered tens of thousands of Jews, as well as non-Jews, killing them, injuring them, causing them serious bodily and mental harm and subjected them to living conditions calculated to bring about their physical destruction. The suspect committed these acts with the intention of destroying the Jewish people and to commit crimes against humanity. Paragraph(s) of the charges: Paragraphs 1, 2, 3, and 4 of the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950. In addition, the eyewitness statements in the Israeli Extradition Request allege specific instances of killings, beatings, and injuries inflicted by respondent. For the reasons set forth below, this Court finds that some of the charges alleged against Demjanjuk are offenses for which he is extraditable under Article III of the Treaty and are offenses mentioned in Article II of the Treaty. [...]

2. Article III

[...] If the extraterritorial offense charged is punishable in the requested State "under similar circumstances", the requested state must extradite the accused subject to the other articles of the Treaty. If the offense charged is not prosecutable under the laws of the requested party, extradition "need not" be granted i.e., extradition is discretionary. Nonetheless, the extradition court must

make a legal determination as to the accused's extraditability pursuant to the treaty involved [...]. [...]

The United States does recognize the criminality of the alleged acts. The United States participated in the Nuremberg trials where individuals were punished for atrocities they had committed in exterminating civilian populations. [...] In addition, United States military tribunals tried individuals for the horrible acts they committed in concentrations camps. [...] Furthermore, both Congress and the Executive Branch, through the State Department, made clear that they regarded wholesale murder, torture and other inhumane treatment of civilians as prosecutable crimes. [...] Current United States law, however, does not provide for the trial and punishment of persons accused of murdering civilians in Nazi concentration camps in Europe during World War II. "Similar circumstances", therefore, are lacking. Thus, the decision to extradite respondent is discretionary. Pursuant to Article III, it is the Court's duty to certify whether respondent can be extradited. The Executive branch must determine whether a respondent actually will be extradited. [...]

VI.

DEFENSES

All of the prerequisites for extradition pursuant to the Treaty and 18 U.S.C. at 3184 have been met. Thus, the only remaining issue before this Court is whether this case falls within any of the provisions of the Treaty which prohibit or limit extradition. Respondent has raised several defenses to a finding of extraditability. As will be shown below, these defenses lack merit.

A. Israeli Statute is not Ex Post Facto

Respondent argues that Demjanjuk is not extraditable under 18 U.S.C. at 3184 because the Israeli statute breaches Israel's obligations in international law and violates the United States Constitution because the statute is ex post facto. See Motion to Terminate at 7-11. Respondent's arguments and conclusion are erroneous.

Under international law, a law which renders an act criminal when the act was not criminal at the time it was committed may be a forbidden ex post facto law. This issue need not be reached today because the Nazis and Nazis Collaborators (Punishment) Law is not an ex post facto law. The Israel statute does not declare unlawful what had been lawful before; rather, it provides a new forum in which to bring to trial persons for conduct previously recognized as criminal. Defendants prosecuted under the statute would have been subject to the criminal jurisdiction of the state where the acts occurred, as well as the jurisdiction of the Allies' military tribunals and possibly German courts. See supra at 20-24; Order of March 8, 1985 at 10-12.

Respondent is charged with offenses that were criminal at the time they were carried out. At the time in question, the murder of defenseless civilians during wartime was illegal under international law. The Hague Conventions of 1899 and 1907 Respecting the Laws and Customs of War on Land, [...] both expressly forbid the killing of defenseless persons, even when they are enemy nationals,

article 23(b), (c), and forbid "general penalties" against populations, article 50. The Convention's rules were binding on parties to the Convention, including Germany, and, by 1939, were recognized by all civilized nations and regarded as declaratory of the laws and customs of war. [...] Furthermore, it is absurd to argue that operating gas chambers, and torturing and killing unarmed prisoners were not illegal acts under the laws and standards of every civilized nation in 1942-43. [...]

The Israeli statute merely provides Israeli courts with jurisdiction to try persons accused of certain crimes committed extraterritorially and establishes judicial procedures and applicable penalties. [...] Similarly, the Nuremberg International Military Tribunal provided a new forum in which to prosecute persons accused of war crimes committed during World War II pursuant to an agreement of the wartime Allies [...]. That tribunal consistently rejected defendants' claims that they were being tried under ex post facto laws. [...] Thus, Israel has not violated any prohibition against the ex post facto application of criminal laws which may exist in international law. [...]

The murder of Jews, gypsies and others at Treblinka was not part of a political disturbance or struggle for political power within the Third Reich. The murders were committed against an innocent civilian population in Poland after the invasion of Poland was completed. No allegations have been advanced, or could be sustained, claiming that those Jews and non-Jews killed were part of an active attempt to change the political structure or overthrow the occupying government. [...]

Rather, the members of an innocent civilian population were the intended victims of the "Final Solution". The alleged crimes were committed without regard for the political affiliations or governmental or military status of the victims. [...] The civilian status of the victims is also significant because the United States does not regard the indiscriminate use of violence against civilians as a political offense. [...] Respondent's claim that the killing of defenseless civilians at Treblinka was part of the Nazi war effort, and therefore is political in character, is frivolous and offensive. In any event, mere simultaneity between the alleged murders at Treblinka and World War II is insufficient to render the offense "political" within the meaning of the Treaty. [...]

In another recent extradition case, involving members of the Provisional Irish Republican Army, the political offense exception to the Treaty of Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227 (1977), was construed to require only that no act be regarded as political where the nature of the act is such as to be violative of international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception to the Treaty. [...] The Court need not address at this time whether political offense exceptions in United States extradition treaties are to be interpreted as broadly as the Doherty court construes the exception. Nonetheless, it is clear that even this very inclusive definition of "political offense" does

not include the crimes charged against Demjanjuk. The crimes alleged are inconsistent with international standards of civilized conduct. [...]

The murdering of numerous civilians while a guard in a Nazi concentration camp, as part of a larger "Final Solution" to exterminate religious or ethnic groups, is not a crime of a "political character" and thus is not covered by the political offense exception to extradition. [...]

CONCLUSION

Pursuant to 18 U.S.C. at 3184, this Court certifies to the Secretary of State:

[...] [T]hat the charges of "murder" contained in the Request to Issue Warrant of Arrest and the Warrant of Arrest are extraditable offenses pursuant to Articles II and III of the Treaty; and that competent and sufficient evidence has been presented to sustain the charges of "murder" against respondent as set forth in the Request to Issue Warrant of Arrest and the Warrant of Arrest.

[...] **IT IS SO ORDERED**.

Frank J. Battisti Chief Judge

DISCUSSION

1. Under which laws were the alleged acts of Demjanjuk unlawful in the 1940s?
2. Could the Court have based Israel's jurisdiction over Demjanjuk on the jurisdiction provisions of the 1949 Geneva Conventions? Or would that have been an application of an *ex post facto* law? Could the case have been handled as the Court did under the 1949 Geneva Conventions? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)
3. Could Demjanjuk have been punished for his World War II crimes in the US: Under US laws? Under IHL? Does the absence of a statute giving the US jurisdiction over Demjanjuk violate IHL? Does the failure of the US to punish Demjanjuk violate IHL? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)
4. Could a grave breach of IHL ever be a political offense barring extradition?

III. CHINESE CIVIL WAR

Case No. 91, China, Military Writings of Mao Tse-Tung

THE CASE

[**Source:** *Selected Military Writings of Mao Tse-Tung*, Peking, Foreign Language Press, 1963, p. 341; footnotes omitted.]

ON THE REISSUE OF THE THREE MAIN RULES OF DISCIPLINE AND THE EIGHT POINTS FOR ATTENTION-INSTRUCTION OF THE GENERAL HEADQUARTERS OF THE CHINESE PEOPLE'S LIBERATION ARMY

October 10, 1947

1. Our Army's Three Main Rules of Discipline and Eight Points for Attention [...] have now been unified and are hereby reissued. It is expected that this version will be taken as the standard one for thorough education in the army and strict enforcement. As to other matters needing attention, the high command of the armed forces in different areas may lay down additional points in accordance with specific conditions and order their enforcement.

2. The Three Main Rules of Discipline are as follows:
   (1) Obey orders in all your actions.
   (2) Do not take a single needle or piece of thread from the masses.
   (3) Turn in everything captured.

3. The Eight Points for Attention are as follows:
   (1) Speak politely.
   (2) Pay fairly for what you buy.
   (3) Return everything you borrow.
   (4) Pay for anything you damage.
   (5) Do not hit or swear at people.
   (6) Do not damage crops.
   (7) Do not take liberties with women.
   (8) Do not ill-treat captives.

DISCUSSION

1. Are these Rules of Discipline and Points for Attention consistent with IHL?
2. With specific attention to Art. 3 common to the Conventions, what provisions of IHL are missing from these Rules and Points?
3. In what areas do these Rules and Points extend beyond IHL? (*Cf.* Art. 3 common to the four Conventions and Protocol II.)
4. Which are the mechanisms of implementation foreseen by these rules and points?
5. Regarding Rule (1), must a member of the army always obey orders? Even if such orders are inconsistent with other Rules or Points?

IV. KOREAN WAR

Case No. 92, US, US v. Batchelor

THE CASE

[**Source:** United States Army Board of Review, 19 CMR 452 (1955).]

UNITED STATES
v.
Corporal CLAUDE J. BATCHELOR [...] CM 377832
Petition for review by USCMA pending.

August 1, 1955

PRIOR HISTORY: Sentence adjudged September 30, 1954. Approved sentence:

Dishonorable discharge, total forfeiture, and confinement for twenty (20) years.

OPINION: [...]

I

Upon trial by general court-martial, the case being treated as non-capital by direction of the convening authority, the accused pleaded not guilty to but was convicted of two offenses of communicating with the enemy without proper authority (Charge I, Specifications 1 and 2), uttering a certain letter, which was disloyal to the United States, with design to promote disloyalty and disaffection among the civilian populace of the United States (Charge II and its specification), misconduct as a prisoner of war (Additional Charge I, Specification 2), and unlawfully participating in a "trial" of a fellow prisoner of war and recommending that he be shot (Additional Charge II and its specification), all offenses having been committed at Camp 5, Pyoktong, North Korea, while the accused was in the hands of the enemy as a prisoner of war, in violation of Articles 104, 134, 105 and 134, respectively, of the Uniform Code of Military Justice.[...]

II

The accused was convicted of knowingly, and without proper authority, communicating, corresponding and holding intercourse with the enemy, while in their hands as a prisoner of war, from on or about 1 July 1951 until on or about 1 September 1953, by joining with, participating in and leading discussion groups conducted by the enemy proposing, developing, discussing and reflecting certain views and opinions that the United States conducted bacteriological warfare in Korea, was an illegal aggressor in the Korean conflict, and that Communism should be embraced by the prisoners of war; by making speeches favoring Communism; by circulating petitions criticizing the United

States for participating in the Korean conflict; by urging United Nations prisoners of war to sign said petitions; and by aiding and assisting the enemy to influence other United Nations prisoners of war to accept and follow the philosophies and tenets of Communism, in violation of Article 104 of the Code (Charge I, Specification 2). [...]

VIII

[...]

c. Denial of Motions Predicated on Claimed Inapplicability of Code of Prisoners of War (Nos. II and III)

Appellate defense counsel contend, in substance, that all charges, being based on acts done while the accused was a prisoner of war of the Chinese Communists, should be dismissed because the Geneva Prisoner of War Convention of 1929 vests all authority over prisoners of war in the captor power and withdraws such authority from the home power (No. III) [...]

(1) Jurisdiction as to offenses committed while prisoner of war

[...] [A]ppellate defense counsel apparently contend that the Geneva Prisoner of War Convention of 1929, as supplemented by TM 19-500, OPERATES to preclude any such jurisdiction. It is, of course, true that the United States is legally bound to adhere to this Convention [...], and, although the Geneva Prisoner of War Convention of 1949 was not ratified until recently, July 14, 1955 to be exact, it is noted that a letter of July 6, 1951 from the representative of the United States in the Security Council to the Secretary-General of the United Nations states that "The United Nations Forces in Korea have been and are under instructions to observe at all times the Geneva Conventions of 1949 on ... the treatment of prisoners of war ..." (UN Doc. S/2232, 25 Dept/State Bull. 189 (1951). But these Prisoner of War Conventions (hereinafter cited by year and article, e.g. 1929-2) were not intended to, and do not, produce the effect ascribed by appellate defense counsel. They did not purport to affect the jurisdiction of the home power, once the prisoner of war has been repatriated, as to offenses committed in violation of its laws while in enemy captivity. Nor do they purport to authorize or condone any acts such as are alleged in the specifications of the charges. On the other hand, the express purpose of the Conventions is to assure humane treatment and eliminate cruel and inhuman treatment of victims of warfare (1929-preamble; 1949-3) and, in effecting this purpose, they merely accept the inevitable temporary disciplinary control by the captor-enemy (1929-9, 18, 45, 50, 51, 548 62, 66; 1949-21, 39, 82, 87-94, 98, 100) while giving expression to the principle that prisoners of war continue in the service of their own country (Oppenheim's International Law, 7th Ed., Lauterpacht, Vol. II, sec. 127e), and most certainly recognizing the continuance to allegiance to the home country (1929-19, 27, 31, 49, 75; 1949-5, 18, 22, 40, 43, 49, 50, 54, 68, 87, 118) without any duty of allegiance to the captor-enemy of whom they are not nationals (1929-45, 66; 1949-87, 100; Oppenheim's International Law, supra, secs. 128, 128b). Nor do the portions of Articles 2 and 45 of the 1929 Convention, which are particularly relied upon, support the contention of appellate

defense counsel. Thus, the provision in Article 2 that "Prisoners of War are in the power of the hostile power, but not of the individual or corps who have captured them" merely assures humane treatment and protection by the captor-enemy power (see Winthrop's Military Law and Precedents, [2d. Ed., 1920 reprint], p. 790), Article 2 itself recognizing this by further providing that "They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity... ." The provision in Article 45 that "Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining power" - Article 45 being the first Article of "General Provisions" under "Chapter 3 - Penalties Applicable to Prisoners of War" - is but the expressed recognition of what we have previously termed the inevitable temporary disciplinary control by the captor-enemy power. The same is patently true of paragraph 57 of TM 19-500 (Change 7, August 29, 1945) providing that "Prisoners are subject to the laws, regulations, and orders in force in the Army of the United States including the Articles of War. They are not subject to the laws, regulations, or orders of the country in whose Armed Forces they served, except as prescribed in this manual", such paragraph 57 falling under the principal heading of "Discipline and Control", and TM 19-500 being expressly intended to supplement the Geneva Convention of 1929 (par. 2a, Change 3, August 9, 1945). [...]

Manifestly, therefore, the first contention is devoid of merit and it is so determined.

(2) Applicability of Article 104 of the Code of prisoners of war [...]

Nor does the Geneva Prisoner of War Convention of 1929, or that of 1949, even purport to authorize such communications as are alleged in the specifications of Charge I. On the other hand, those Conventions appear to go no further than to require a prisoner of war "to give, if he is questioned on the subject, his true name and rank, or else his regimental number" (1929-5; 1949-17) and to permit complaints because of the conditions of captivity either directly (1929-42; 1949-78) or through their prisoner of war representatives (1929-43; 1949-79). Prisoners of war may not be coerced into giving other information (1929-5; 1949-17). Thus, it has been said:

"Obviously, prisoners are not bound to furnish information on matters other than their rank and identity. It would be unlawful to inflict punishment or hardships on those prisoners who refuse to give such information. ..." (Wheaton's International Law - War, 7th Ed., 1944, p. 184)

and

"The Convention lays down in detail the information which a prisoner may be required to give. This is restricted to his surname, first names and rank, date of birth, and army, regimental, personal or serial number. ..." (Oppenheim's International Law, Lauterpacht, Vol. II, 127)

Patently, an authorization to declare identity and to complain about conditions of captivity can, by no stretch of the imagination, be construed as a license to engage in the activity charged against the accused herein. [...]

Can it now be fairly said, for the first time, that Congress itself intended these Articles to include such an unexpressed exception simply because the rule of non-intercourse was stated, in the mentioned texts, to be "absolute" whereas, under those Prisoner of War Conventions legally binding upon us, certain minor deviations, such as declaration of identity and complaints, may have been recognized in the case of prisoners of war? We think not. [...]

[...]

IX

The board of review having found the findings of guilty and sentence as approved by proper authority correct in law and fact and having determined, on the basis of the entire record, that they should be approved, such findings of guilty and sentence are hereby affirmed.

DISCUSSION

1. May a prisoner of war invoke Convention III against his own country? Does Convention III regulate the relations between a prisoner of war and his own country?

2. Is a prisoner of war subject to the laws of the Detaining Power or to those of the power on which he depends? (*Cf.* Arts. 82 and 99 of Convention III.) What if the two laws contradict each other?

3. a. Does IHL protect a duty of allegiance of a prisoner of war towards the Power on which he depends? May a Detaining Power allow a prisoner of war to violate this duty? May it encourage him to do so? May it promise him advantages going beyond those provided for by Convention III if he does so? May a Detaining Power allow a prisoner of war to make propaganda against his own country among the other prisoners of war? In the media? (*Cf.* Art. 87 of Convention III.)

   b. If a prisoner of war changes his allegiance and professes, out of his free will, allegiance to the Detaining Power, does he lose his rights under Convention III? May he be accepted to enroll into the armed forces of the (former) Detaining Power? (*Cf.* Arts. 7, 23, 52 and 130 of Convention III.)

V. HUNGARY

Case No. 93, Hungary, War Crimes Resolution

THE CASE

[**Source:** 53/1993. (X. 13.) AB (On War Crimes); original published in Hungarian in *Magyar Közlöny,* 1993, p. 147; English translation by courtesy of the staff of the Court. http://www.cicr.org/ihl-nat]

RESOLUTION IN THE NAME OF THE REPUBLIC OF HUNGARY
Constitutional Court Docket No: 288/A/1993

On the basis of the petition submitted by the President of the Republic concerning the constitutional review of the provisions of the law passed by the National Assembly but not yet proclaimed, the Constitutional Court has made the following resolution:

1. In the application of article 33 (2) of [...] the Penal code [...] it is a constitutional requirement that the non-applicability of statutory limitations may only be determined with respect to those criminal offenses which have not lapsed according to Hungarian law in effect at the time of the commission of the offense; except if international law classifies the offense as a war crime or crime against humanity, declares or makes possible the non-applicability of statutory limitations, and Hungary has assumed the obligation by international law to preclude the applicability of statutory limitations.
2. The Constitutional Court holds that it is consistent with the Constitution if article 33 (2) of the Penal Code is applied without regard of the Hungarian statutory limitations in effect at the time of the commission of the following offenses defined by international law:

- "Grave violations of rights" as defined by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, concluded in Geneva on August 12, 1949, applied to all cases of declared war or of any other armed conflict between two or more of the High Contracting Parties, as determined by common article 2 of the Geneva Conventions, concluded on August 12, 1949;

- prohibited acts in the case of armed conflict not of an international character occurring in the territory of one of the High Contraction Party, [....] as determined by common Article 3. [...]

REASONING

I.

1. On February 16, 1993, the National Assembly enacted the law "concerning the procedures in the matter of certain criminal offenses committed during

the 1956 October revolution and freedom struggle," (hereinafter referred to as "the Law").

The text of the Law is the following: [...]

Article 2, section (1): Of the Geneva Conventions on the protection of the victims of war, concluded on August 12, 1949 and acceded to by Law 32 of 1954, in connection with:

a) article 130 of the August 12, 1949 Convention Relative to the Treatment of Prisoners of War, based on article 3 (1); and

b) article 147 of August 12, 1949 Convention Relative to the Protection of Civilian Persons in Time of War, defining "grave violations of rights", based on article 3 (1), concerning the applicability of statutory limitations for the punishment of criminal offenses committed during the 1956 October revolution and freedom struggle -also noting article 1 (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, accepted by the United Nations Assembly on November 26, 1968, and entered into force by Law I of 1971, article 33 (2) of the Penal Code must be applied. [...]

2. According to article 33 (2) of the Penal Code, no statutory limitation of punishment may be applied to the following offenses:

a) war crimes, [...]

b) other crimes against humanity (Chapter XI); [...]

IV.

The particular characteristics of war crimes and crimes against humanity

In the presently discussed case the interpretation of both the Constitution and domestic law must proceed in light of the fact that the norms regulating war crimes and crimes against humanity comprise a particular part of international law, one which involves not merely responsibilities of nations with respect to one other, but also the determination of obligations and imposition of criminal liability onto individuals as well. By this action, therefore, international law touches upon such an area which otherwise falls within the sovereign state's domestic penal power, and it does so, with respect to war crimes and crimes against humanity, in a manner which, in many respects, diverges from the basic principles and application of domestic penal law.

1. In the cases of war crimes and crimes against humanity, such criminal offenses are involved whose classification did not arise as part of the domestic law's criminal taxonomy, but are deemed to constitute criminal offenses by the international community which defines their elements. [...]

2. The international community prosecutes and punishes war crimes and crimes against humanity; it does so by international trials and, second, by insisting that those states which desire to be members of the international community prosecute such offenders. [...]

3. Therefore, the state which prosecutes and punishes crimes against humanity and war crimes, acts upon the mandate given to it by the

community of nations, according to the conditions imposed by international law. The community of nations occasionally may also demand, through the action of international organizations, to review and reject that domestic legal practice which does not comply with international law. [...]

4. The prosecution and punishment of war crimes and crimes against humanity may only proceed within a framework of legal guarantees; it would be self-contradictory to protect human rights without such guarantees. But these international guarantees cannot be replaced or substituted by the legal guarantees of domestic law.

   a) [...] [T]he development of international law has since continuously separated the sphere of "international humanitarian law" from the war context, and has also made the prosecution and punishment of these crimes independent of the requirements and conditions of the domestic penal, including with respect to statutory limitations of the applicability of punishment, so much so that two conventions have been concluded on the non-applicability of statutory limitations for war crimes and crimes against humanity.

   b) [...] The aim of the 1968 New York Convention (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73 [available on http://www.icrc.org]) was precisely the termination of the uncertainties and randomness associated with various domestic laws when the Convention declared that the war crimes and crimes against humanity enumerated therein "do not lapse irrespective of the date of their commission". (Translated from the Hung. ed.) From the Convention's preamble it is evident that war crimes and crimes against humanity, on the one hand, and "ordinary criminal acts," on the other hand, cannot be treated in an identical manner. [...]

Article 7 (2) of the European Convention [for the Protection of Human Rights and Fundamental Freedoms] and article 15 (2) of the International Convention [on Civil and Political Rights] permit in principle for signatory states not to apply the domestic statutory limitations for crimes defined by the community of nations. In contrast, the New York Convention replaces this permissive provision with a mandatory one. Moreover, the New York Convention is retroactive. [...]

V.

Criminal offenses defined by international law and the Constitution

1. [...] The regulations of war crimes and crimes against humanity are undoubtedly part of customary international law; they are general principles recognized by the community of nations or, in the parlance of the Hungarian Constitution, they are among "the rules generally recognized by international law." [...]

4. [...]

   b) It is "on the basis" of the "grave violation of rights" defined in the August 12, 1949, Geneva Convention relative to the Protection of Civilian

Persons in Time of War, and by considering article 1 (a) of the New York Convention of 1968 which prohibits the application of statutory limitations for prosecuting and punishing war crimes and crimes against humanity, that article 2 of the Law orders the application of article 33 (2) of the Penal Code to the criminal offenses committed during the 1956 October revolution and freedom struggle.

The "grave violations of rights" of common article 2 of the Geneva Conventions refer to international armed conflict. For armed conflict of non-international (domestic) in nature, the behaviors deemed prohibited are defined by common article 3. In separate articles, the Conventions define precisely and in a detailed manner the sphere of protected persons; only against these categories of persons can the "grave violation of right" be committed. [...]

In contrast, common article 3 applies "at any time and in any place whatsoever" to all persons "taking no active part in the hostilities".

The drafting of the Law conflates several regulations of the Geneva Conventions addressing different subject matters and categories of protected persons and creates a connection among them which does not appear in the Conventions. Domestic regulation may not alter the content of an international agreement. Hence, the constitutional concerns raised concerning the text of the Laws is justified.

The Constitutional Court points out that the New York Convention of 1968 imposes the non-applicability of statutory limitations requirement not only on those behaviors prohibited under the Geneva Conventions which qualify as "grave violations or rights". Article I (a) of the New York Convention - upon whose "consideration" the Law mandates the application of article 33 (2) of the Penal Code - does, indeed, refer to "grave violations of rights," but as an example of the war crimes defined by the Nuremberg International Military Tribunal. According to article I, "independent of their commission, the statutes of limitations of the following criminal offenses do not lapse: a) the war crimes defined by the August 8, 1945, Charter of the Nuremberg International Military Tribunal, especially those which are enumerated as "grievous violations of rights". (tran. from Hung. -ed.).

The activities enumerated in common article 3 of the Geneva Conventions constitute crimes against humanity and they contain those minimal requirements which every State Party in an armed conflict is obligated to comply with and which are "at any time and in any place" are prohibited (in contrast with the scope of application of "grievous violations of rights"). According to the common article 3 (2) of the Geneva Conventions, the States Parties to a conflict may enter into force other provisions of the Conventions by separate agreement and, indeed, State Parties shall endeavour to do so. Thus, the punishment of the "grievous violations of rights" in article 3 requires a separate agreement.

But according to the International Court of Justice, the prohibitions registered in article 3 are based on "elementary consideration of humanity" and may not be breached in the course of any armed conflict, irrespective whether it is international or domestic in nature.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J.4 (June 27) at 114 [*See* **Case No. 130**, ICJ, Nicaragua v. US, p. 1365.]. It is also by reference to the definition of crimes against humanity that article 3 of the Conventions is invoked by the U.N. Report (para. 47) authorizing the creation of an International Tribunal for the prosecution of crimes committed in the territory of the Former Yugoslavia.

Thus, the statute of limitation for the punishment of the activities enumerated in common article 3 of the Geneva Conventions does not expire either; in case these offenses do not fall within the category of war crimes defined by article I (a) of the New York Convention - either with respect to the scope of protected persons or because of the manner of the commission of the act -they would be unavoidably covered by the non-applicability of statutory limitations requirement imposed by article I (b) of the Convention on crimes against humanity.

c) [...] The Constitutional Court points out that the appropriateness of classifying a specific criminal offense a war crime or crime against humanity is, in the last instance, supervised by the community of nations, in the event those cases are submitted to international human rights committees or tribunals.

d) [...] Thus, whether the proclamation of the Geneva Conventions has properly taken place is of no moment, nor whether the obligation assumed by the Hungarian state to implement them had occurred prior to the date designated by the Law as the temporal limit of its scope (October 23, 1956, that is). The criminal liability of the commissioners remains by international law and subsequent domestic legislation may give effect to the full scope of liability. [...]

Budapest, 1993 October 12

[...]

DISCUSSION

1. Art. 2 of the Hungarian law addresses crimes occurring in what type of conflict? Is the type of conflict relevant to the application of IHL? If so, how? Does the Court implicitly or explicitly qualify the events that occurred in 1956 in Hungary?

2. a. In what type of conflict are the provisions on "grave breaches" (or "grave violations of rights," the phrase translated from Hungarian used by the Court), as defined by the Conventions (Arts. 50/51/130/147 respectively of the four Conventions), applicable?

   b. Does the concept of grave breaches also cover violations of Article 3 common to the Conventions? If not, does the Hungarian law make this distinction? Does the Court? What does the Court mean when it says that "the Law conflates several regulations of the Geneva Conventions addressing different subject matters and categories of protected persons and creates a connection among them which does not appear in the Conventions?" (*See* section V 4.b. of the decision.)

3. According to the Court discussion, to which classification of crimes are statutory limitations non-applicable? Are violations of Article 3 common to the Conventions considered to be such crimes? If so, under which classification?

4. Are all violations of Art. 3 common to the Conventions crimes against humanity? (*See also* **Case No. 180**, ICTY, The Prosecutor v. Tadic, B., Trial Chamber, Merits, paras. 626-659, 700 and Appeals Chamber, Merits, paras. 238-304, p. 1804.)

5. Does international law obligate that certain crimes preclude application of a statute of limitations? (*Cf., e.g.* Art. 7 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15 (2) of the International Covenant on Civil and Political Rights, and the 1968 New York Convention (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity).) Does the obligation provided for by IHL to repress grave breaches preclude application of a statue of limitations?

VI. GOA

Case No. 94, India, Rev. Mons. Monteiro v. State of Goa

THE CASE

[**Source:** India, Supreme Court Reports, 87-102 (1970); footnotes omitted.]

REV. MONS. SEBASTIAO FRANCISCO XAVIER DOS REMEDIOS MONTEIRO

v.

STATE OF GOA

March 26, 1969

[...]

The Judgment of the Court was delivered by

Hidayatullah, C.J. The appellant (Rev. Father Monteiro) is a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He choose the latter and was registered as a foreigner. He also obtained a temporary residential permit [...]. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. [...] Rev. Father Monteiro disobeyed the order, and in consequence was prosecuted [...]. He was convicted and sentenced [...]. He now appeals by special leave of this Court [...].

The defence of Rev. Father Monteiro was that he was protected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was *ultra vires* the Act and that he had committed no offence. The Judicial Commissioner and the two courts below have held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India can give him no redress against an Act of State. In the appeal before us Mr. Edward Gardner Q. C. appeared for Rev. Father Monteiro with the leave of this Court.

To understand the case, a brief history of the annexation of Goa and what happened thereafter is necessary. Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by the Indian Armed Forces following a short military action. It then came under Indian Administration [...], March 27 1962, the Constitution (Twelfth Amendment) Act, 1962 was enacted and deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and a reference to Goa was inserted in Art. 240 of the Constitution. Many Acts in force in India were then extended to Goa and many Regulations and Orders were promulgated. [...]

At the outset it may be stated that Mr. Gardner [the defence attorney] concedes that he does not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt. Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation during occupation which has not validly come to an end, and, therefore, no offence was committed by him.

The argument overlooks one cardinal principle of International Law and it is this. Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. [...]

This proposition being settled, Mr. Gardner sought support for his plea from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions. Mr. Gardner relies on the provisions of the Fourth Schedule relative to the protection of certain persons in time of war. He refers in particular to Articles 1, 2, 4, 6, 8, 47 and 49. By Arts. 1 and 2 there is an undertaking to respect and ensure respect for the Conventions in all circumstances of declared war or any other armed conflict even if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance. Article 4 defines a protected person and the expression includes those who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 then lays down the beginning and end of application of the Convention. The Convention applies from the outset of any conflict or occupation. In the territory of Parties to the conflict, the application of the Convention ceases on the general close of Military operations. In the case of occupied territories it ceases one year after the general close of military operations but the occupying Power is bound for the duration of occupation , to the extent that such Power exercises the functions of Government in such territory, by Arts. 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-73 and 143.

We next come to Arts. 47 and 49 which are the crux of the matter and are relied upon for the protection. Mr. Gardner points out that under Art. 8 even protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the Conventions. The case, therefore, depends on whether Arts. 47 and 49 apply here. We may now read Arts. 47 and 49:

"47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement concluded

between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

"49. Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country occupied or not, are prohibited, regardless of their motive. [...]"

The point of difference between the parties before us in relation to Art. 47 is whether the occupation continues, the annexation of the territory notwithstanding; and in relation to Art. 49 whether the order of the Lt. Governor amounts to deportation of a protected person.

Mr. Gardner's submissions are: the order that has been made is a deportation order and it is therefore *ultra vires* the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as occupation continues these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abandoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in International Law by the use of force does not confer any title. Occupation, therefore, can only be of *terra nullius,* not now possible. He [...] says that the history of the making of the Geneva Conventions shows that this was precisely the mischief sought to be met and the Conventions now become a part of the laws of India through Parliamentary Legislation. He concedes that the war of liberation of Goa and the annexation were lawful but he contends that annexation does not deprive protected persons of the protection. According to him, once there is military action and occupation, occupation cannot cease by a unilateral act of annexation by incorporating the territories of Goa with India. If India did not care to be bound by the Conventions, there was a method of denunciation in Art. 158 but since the Convention is registered under Art. 159 even denunciation at a late stage was not possible. He relies upon Art. 77 and says that "Liberated" means when the occupation comes to an end. The amendment of the Constitution only legalises annexation so far as India is concerned but in International Law the territory remains occupied. The occupation is not at an end and it cannot be brought about unilaterally. The words of Art. 47 themselves are clear enough to establish this. In short, the contention is that occupation does not come to end by annexation and, therefore, the protection continues till there is either cession of the territory or withdrawal of the Occupying Power from the territory, both of which events have not taken place. [...]

The contention on behalf of the State is that by occupation is meant occupation by armed forces or belligerent occupation and occupation comes to an end by conquest followed by subjugation. [...] We have to decide between these two submissions.

This is the first case of this kind [...]. We are of opinion that the pleas of Mr. Gardner that the Geneva Conventions Act makes dispunishable the conduct of Rev. Father Monteiro, must fail.

To begin with, the Geneva Conventions Act gives no specific right to any one to approach the Court. [...] What method an aggrieved party must adopt to move the Municipal Court is not very clear but we need not consider the point because of our conclusions on the other parts of the case. We shall consider the Conventions themselves. [...]

[T]he Geneva Conventions Act of 1960 [...] is divided into five Chapters. [...] The Act then sets out the Conventions in its schedules and the Conventions which are four in number are set out in as many Schedules to the Act.

It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for breaches of Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless [...].

The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence. We may, therefore, say a few words about the Geneva Conventions, particularly Schedule IV, which deals with the protection of civilian persons in time of war. In the past protection of civilian population was inadequately provided in Conventions and treaties. [...] The Fourth Hague Convention of 1907 contained Arts. 42-56, but this protection was restricted to occupation by an enemy army. The Regulations merely stated the principles and enjoined maintenance of law and order and regard for family rights, lives of persons and private property, and prohibited collective punishments. In effect, these were confined to the 'forward areas of war' and did not apply when 'total war' took place and the civilian population was as much exposed to the dangers of war as the military. [...]

[...] The 1949 Conventions are additional to the Regulations and it is expressly so laid down in Art. 154 of the Geneva Conventions.

The Hague Regulations, Arts. 42-56, contained some limited and general rules for the protection of inhabitants of occupied territory. The Regulations are supplementary. Regulations 43 and 55 which have no counter-part in the Geneva Conventions must be read. They are not relevant here. Similarly, as there is no definition of 'occupation' in the Geneva Conventions, Art. 42 of the Regulation must be read as it contains a definition:

"42. A territory is considered as occupied when it finds itself in fact placed under authority of a hostile army".

The Regulations further charge the authority having power over the territory to take all measures to establish and assure law and order. The Regulations generally charged the occupying power to respect the persons and property of the inhabitants of the occupied territory. There was no provision showing when occupation commenced and when it came to an end. It is because of this omission that is claimed in this case that occupation continues so long as there is

no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions [...] [continues]. However Art. 6 which provides about the beginning and end of the application of the Conventions throws some light on this matter.

The question thus remains, what is meant by occupation ? This is, of course, not occupation of *terra nullius* but something else. Since there is no definition of occupation in the Geneva Conventions, we have to turn to the definition in the Hague Regulations, Article 154 of the 4th Schedule [...].

The definition of 'occupation' in the Regulations must be read since the Regulations are the original rules and the Conventions only supplement the Regulations. We have already quoted the definition and it shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authoriteis [sic]. In the *Justice* case it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation.

The question thus resolves itself into this: Is occupation in Art. 47 belligerent occupation or occupation which continues after the total defeat of the enemy ? In this connection courts must take the Facts of State from the declaration of State authorities. Military occupation is a temporary *de facto* situation which does not deprive the Occupied Power of its sovereignty nor does it take away its statehood. All that happens is that *pro tempore* the Occupied Power cannot exercise its rights. In other words, belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a *de jure* right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. [...] [M]ilitary occupation must be distinguished from subjugation, where a territory in not only conquered, but annexed by the conqueror.

There is, however, a difference between true annexation on the one hand and premature annexation, or as it is sometimes called anticipated annexation, on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated [...].

The Conventions rightly lay down that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word 'alleged' before 'annexation' in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only

the *de facto* but also the *de jure* title passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims *during conflict* to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. It may be asked why does Art. 6 then mention a period of one year ? The reason given is that if the Occupied Power turns victorious the land would be freed in one year and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. [...]

The question, when does title to the new territory begin, is not easy to answer. [...]

[A]lthough the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Art. 2 para. 4), events after the Second World War have shown that transfer of title to territory by conquest is still recognised. [...] If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.

In the present case the facts are that the military engagement was only a few hours' duration and then there was no resistance at all. [...] The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. It must be remembered that Mr. Gardner concedes that the annexation was lawful. Therefore, since occupation in the sense used in Art. 47 had ceased, the protection must cease also. We are, therefore, of opinion that in the present case there was no breach of the Geneva Conventions. [...]

The Geneva Conventions ceased to apply after December 20, 1961. The Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was therefore, rightly prosecuted under the law applicable to him. Since no complaints is made about the trial as such; the appeal must fail. It will be dismissed.

G.C. *Appeal dismissed.*

DISCUSSION

1. When is territory considered occupied? What definition of occupation do the Geneva Conventions utilize? (*Cf.* Art. 154 of Convention IV and Art. 42 of the Hague Regulations, *See* **Document No. 1**, The Hague Regulations, p. 517.)

2. a. What is the distinction between "belligerent occupation" and "occupation"? Why is this distinction relevant in the Court's analysis of Article 47?

b. Does IHL prohibit the annexation of an occupied territory by the occupying power? Under IHL does annexation of a territory end its occupied status and thus the applicability of the Conventions? Does it matter whether it is "true annexation" or "premature annexation"? Does Art. 47 of Convention IV make a distinction between types of annexation, *e.g.*, specifying application only to "premature annexations"?

c. Does the appellant's concession on the legality of annexation actually undermine his argument? Would the Court's decision have been different if the appellant had not conceded to the legality of the annexation?

3. a. Does the Court's argument incorporating distinctions between "occupation" and "belligerent occupation" and "true annexation" and "premature annexation" effectively address the appellant's contention that "so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions [continues]"? How can the applicability of Convention IV end in an occupied territory? Is Art. 2 common to the Conventions consistent with the Court's use of the distinction between "occupation" and "belligerent occupation" in determining the applicability of the Conventions?

b. If one does not follow the Court but the appellant's argument, when would Convention IV cease to apply in Goa? What are the advantages and the disadvantages of such an interpretation?

4. Does the Court provide an adequate answer to the question it posed regarding the period of one year (after the general close of military operations) application of the Conventions mentioned in Art. 6 of Convention IV?

5. Is an occupying power free to regulate the presence of aliens in an occupied territory? concerning nationals of the occupied State? Concerning other aliens? Under IHL what are the possibilities and the limits of an occupying power in this matter? (*Cf.* Arts. 4, 48, 49 and 64 of Convention IV and Art. 43 of the 1907 Hague Regulations.)

6. a. Is the prohibition of deportations out of occupied territories "self-executing"? Does the answer matter in the Indian legal system? Has Art. 49 of Convention IV been incorporated into Indian legislation? Why can the appellant not invoke it before the Indian Supreme Court?

b. Does an act incorporating the Geneva Conventions into the domestic law "give no specific right to any one to approach the Court" to seek remedy against a violation? Are the Conventions not made enforceable through such an act "by Government against itself"? Should not at the minimum a defendant in a criminal court be entitled to claim that his alleged crime is justified by the incorporated international treaty?

c. What other purposes could the Act then have? How should the Act have been formulated in order to permit courts to enforce the Geneva Conventions, according to the Court?

VII. CUBA

Case No. 95, Cuba, Status of Captured "Guerrillas"

THE CASE

[**Source:** Chapelle, D., "How Castro Won," in Greene, T.N. (ed.), *The Guerrilla-And How to Fight Him: Selections from the Marine Corps Gazette, 1965*, p. 233. Also cited in Walzer, M., *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York, Basic Books, 1977, 360 pp.]

That same evening, I watched the surrender of hundreds of *Batistianos* from a small-town garrison. They were gathered within a hollow square of rebel Tommy-gunners and harangued by Raul Castro:

"We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation -and I am not going to repeat it- you will be delivered to the custody of the Cuban Red Cross tomorrow. Once you are under Batista's orders again, we hope that you will not take arms against us. But, if you do, remember this:

"We took you this time. We can take you again. And when we do, we will not frighten or torture or kill you ... If you are captured a second time or even a third ... we will again return you exactly as we are doing now."

DISCUSSION

1. Under IHL do those participating in hostilities in a non-international armed conflict, if captured, receive prisoner-of-war status? What could Raul Castro have done with those captured here? May they be convicted for having fought for the wrong cause?

2. Is what he did lawful? Do his actions extend beyond even the law applicable in international armed conflicts?

3. a. Does IHL protect a duty of allegiance of a prisoner of war towards the power on which he depends? May a Detaining Power allow a prisoner of war to violate this duty? May it encourage him to do so? (*Cf.* Art. 87 of Convention III.)

   b. If a prisoner of war changes his allegiance and professes, out of his free will, allegiance to the Detaining Power, does he lose his rights under Conven-tion III? May he be accepted to enroll into the armed forces of the (former) Detaining Power? (*Cf.* Arts. 7, 23, 52 and 130 of Convention III.)

4. May prisoners of war once repatriated again take up arms according to IHL? (*Cf.* Art. 14 of Convention I and Art. 117 of Convention III.) What is their fate if they are recaptured?
5. What are the risks and advantages of doing what Raul Castro did? Will it facilitate his victory?
6. Is the role here assigned to the Cuban Red Cross appropriate? Would it have been more appropriate for the International Committee of the Red Cross to undertake this function? Why? (*Cf.* Arts. 3 and 5 of **Document No. 20**, Statutes of the International Red Cross and Red Crescent Movement, p. 648.)

VIII. YEMEN

Case No. 96, ICRC Report on Yemen, 1967

THE CASE

[**Source:** *Annual Report 1967*, ICRC, pp. 15-17.]

Yemen

The ICRC's medical activity in North Yemen. Giving medical assistance to the wounded and sick in the part of the Yemen under Royalist control was the ICRC's main action in that area during 1967. [...]

This mission's work was, however, rendered extremely difficult by several incidents. First of all there was that of Ketaf in the Jauf in January, when about 120 persons, many of the them women and children, were killed as a result of an air raid on the village on January 5, 1967.

As a result of this attack, the ICRC made the following appeal on January 31 to the belligerents:

["]The International Committee of the Red Cross in Geneva is extremely concerned about the air-raids against the civilian population and the alleged use of poisonous gas recently in the Yemen and the neighbouring regions.

In view of the suffering thereby caused, the ICRC earnestly appeals to all authorities involved in this conflict for respect in all circumstances of the universally recognized humanitarian rules of international morality and law.

The ICRC depends on the understanding and support of all the powers involved in order to enable its doctors and delegates in the Yemen to continue under the best conditions possible to carry out their work of impartial assistance to the victims of this conflict.

The ICRC takes the opportunity to affirm that, in the interest of the persons in need of its assistance, it has adopted as a general rule to give no publicity to the observations made by its delegates in the exercise of their functions. Nevertheless, these observations are used to back up the appropriate negotiations which it unfailingly undertakes whenever necessary.["]

A further raid on May 12 having caused 75 deaths, an ICRC medical mission went to give its aid there, after having itself been attacked from the air. On June 2 a report, drawn up by the doctors of the ICRC, was sent to the governments parties to the conflict giving their observations and engaging them in no circumstances to resort to methods of fighting prohibited by the Geneva Protocol of 1925.

Since then, no further incident of this kind has been reported to the ICRC.

At the end of June, one of the ICRC delegates was the victim of a serious accident. Mr. Laurent Vust who was accompanying a consignment of medicines

in the aircraft on the Najran-Gizan line was seriously hurt after a crash landing. He was the only survivor and suffering from bad burns. Mr. Vust was still undergoing treatment at the end of December 1967.

Another accident befell this mission. On August 26 an ICRC convoy was ambushed by Bedouins in the Jauf desert. A young doctor, Dr. Frédéric de Bros was hit by a bullet in the left arm causing an open fracture and resulted in partial paralysis in that limb.

In the autumn, as a result of agreements concluded in Khartoum, the ICRC had, in principle, arranged to terminate its medical action by the end of the year.

However, in December fighting again broke out around Sanaa. Consequently, the medical action had to be continued in the rear of the Royalist positions. After a journey of 600 kilometres on tracks between Najran and Jihanah with all the difficulties involved, an ICRC medical team was installed in the town of Jihanah which worked at night and took cover in a case during the day. In Jihanah where it expected to find only a small number of wounded, the ICRC team discovered some thirty wounded abandoned and in indescribable conditions of distress of whom about twenty were seriously wounded, most of them women and children, and savagely mutilated.

In such conditions, it can be understood that the task of the ICRC doctors was one of the utmost difficulty, if one adds the fact that medical teams protected by the red cross emblem were twice bombed and attacked during the course of 1967. The courage of their members deserves high praise for risking their lives for others.

Finally, in view of the renewal of the fighting, a second appeal made by the ICRC in the last days of 1967 to the two parties in conflict for them to respect the fundamental humanitarian principles contained in the Geneva Conventions.

DISCUSSION

1. a. Does every attack willfully killing and wounding civilians violate IHL? If not, in which cases is IHL violated? Are the conditions different under IHL of international conflicts and IHL of non-international conflicts? What if such attacks seek to scare the civilian population? (*Cf.* Art. 51 (2) of Protocol I and Art. 13 (2) of Protocol II.) Does every attack directed at civilians violate either Protocols I or II? (*Cf.* Art. 25 of the Hague Regulations, Art. 51 of Protocol I and Art. 13 of Protocol II.)

   b. Are not women and children due special protection under IHL of non-international armed conflicts? (*Cf.* Art. 4 (2) (e) and (3) of Protocol II.) Is this protection relevant in the present case?

2. a. What protection does IHL of non-international conflict provide to the sick and wounded? To what care are they entitled? (*Cf.* Art. 3 (2) common to the Conventions and Art. 7 of Protocol II.) Does IHL of non-international armed conflicts offer protection and care to the sick and wounded as extensive as IHL of international armed conflicts?

b. Which findings by the ICRC delegates in Yemen concerning the wounded correspond to clear violations of IHL? If only Article 3 common to the Conventions is applicable? If we apply IHL of international armed conflicts?

c. What protection does IHL provide to those caring for the sick and wounded or those providing relief? (*Cf.* Arts. 11 and 18 of Protocol II.) If hospitals and medical personnel are frequently attacked, as ICRC units and personnel here, when should an humanitarian organization pull out? Particularly when it is clear that the emblem is not respected? (*Cf.* Art. 12 of Protocol II.) What if that means that no one remains to aid the victims?

3. a. Is the use of chemical weapons prohibited by customary international law? Or purely through conventional law? (*Cf.* Art. 23 (a) and (e) of the Hague Regulations, Arts. 35 and 51 of Protocol I and **Document No. 2**, The 1925 Geneva Chemical Weapons Protocol, p. 524.) Yet, do those provisions apply in this situation? Why is IHL of non-international armed conflicts so vague regarding prohibited weapons? Because customary IHL prohibits such weapons? Because this prohibition can be derived from the "Martens clause" and somehow through Article 3 common to the Conventions? Or does Protocol II expect reference to be made to IHL of international armed conflicts? To all aspects? If only some aspects, which ones? (*Cf.* Art. 23 (a) and (e) of the Hague Regulations, Arts. 63 (4)/62 (4)/142 (4)/158 (4) respectively of the four Conventions, Arts. 1 (2) and 35 (2) of Protocol I and Para. 4 of the Preamble to Protocol II.)

b. Regardless of the origin of the rule, as a State party to the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 1925 (*See* **Document No. 2**, The 1925 Geneva Chemical Weapons Protocol, p. 524.) is not Yemen prohibited from using chemical weapons?

4. a. Does a public ICRC appeal mean that the normal and specific mechanisms for the implementation of IHL do not function in certain situations?

b. What criteria would you suggest to the ICRC for deciding whether to launch a public appeal to the parties to the conflict on violations in a specific situation? Is such an appeal effectively an appeal to all States Parties to "ensure respect" of IHL?

c. Did this appeal respect the Red Cross principles of neutrality and impartiality? Was it necessary for the ICRC under those principles to criticize the belligerents? Because of continuing violations? Under those two principles, may the ICRC never criticize only one side of an armed conflict?

d. What explains why the ICRC has adopted the policy, as a general rule, of giving no publicity to the observations made by its delegates? Is it a consequence of the Red Cross principles of neutrality and impartiality? Or a simple working modality?

IX. MALAYSIA

Case No. 97, Malaysia, Public Prosecutor v. Oie Hee Koi

THE CASE

[**Source:** Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War,* Naval War College, R.I., Naval War College Press, vol. 60, Document No. 155, 1979, pp. 737-744.]

PUBLIC PROSECUTOR V. OIE HEE KOI (AND ASSOCIATED APPEALS), Privy Council, December 4, 1967

1 All E.R.419 [1968], A.C. 829 [1968], 42 ILR 441 (1971)

[...]

LORD HODSON: In these associated appeals the main question is whether the accused were entitled to be treated as protected prisoners of war by virtue of the Geneva Conventions Act, 1962, to which the Geneva Conventions of 1949 are scheduled.

The accused are so-called Chinese Malays either born or settled in Malaysia but in no case was it shown whether or not they were of Malaysian nationality. [...]

They were captured during the Indonesian confrontation campaign. All but two were dropped in Malaysia by parachute as members of an armed force of paratroopers under the command of Indonesian Air Force officers. The main party was dropped in Johore wearing camouflage uniform. Each man carried a fire-arm, ammunition, two hand grenades, food rations and other military equipment. Of the main party thirty-four out of forty-eight were Indonesian soldiers and fourteen Chinese Malays which included twelve of the accused. One was dropped from a different plane similarly equipped. The remaining two accused landed later by sea and were captured and tried. One of these likewise claimed the protection of the Geneva Convention.

All the accused were convicted of offences under the Internal Security Act, 1960 of the Federation of Malaya and sentenced to death. [...]

* * * *

All the accused appealed against their convictions [...] and their appeals were dismissed by the Federal Court of Malaysia save in two cases namely that of Oie Hee Koi (Appeal No. 16 of 1967) and that of Ooi Wan Yui (Appeal No. 17 of 1967) in both of which the appeals were allowed on the ground that the accused were prisoners of war within the meaning of the Geneva Conventions Act, 1962, of the Federation of Malaya (herein referred to as "the Act of 1962") and as such were entitled to protection under the Geneva Convention relative to the treatment of prisoners of war (Sch. 3 to the Act of 1962).

In these two cases the public prosecutor appeals by special leave from the decision of the Federal Court. In the remaining cases the accused appeal by special leave against the decisions of the Federal Court upholding their convictions.

* * * *

[...]

Article 5 [of the 1949 Convention] so far as material provides:

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

Article 5 of the Convention is directed to a person of the kind described in art. 4 about whom "a doubt arises" whether he belongs to any of the categories enumerated in art. 4. By virtue of art. 5 such a person is given the protection of the Convention for the time being, i.e., until such time as his "status has been determined by a competent tribunal". [...]

In the two cases in which the public prosecutor is appellant that is to say that of Oie Hee Koi and that of Ooi Wan Yui, [...], the Federal Court, on the point being taken on appeal from the trial judge, held that the accused were entitled to protection. By decision of the Federal Court in the other cases where the convictions were upheld, [...] no point had been raised at the trial, and therefore no "doubt arose" so as to bring s. 4 into operation.

Their lordships are of the opinion that on the hearing of their appeals by the Federal Court no burden lay on the prosecution to prove that those of the accused who had raised no doubt at their trials as to the correctness of the procedure followed were not entitled to be treated as protected prisoners of war. Although the burden of proof of guilt is always on the prosecution, this does not mean that a further burden is laid on it to prove that an accused person has no right to apply for postponement of his trial until certain procedural steps have been taken. Until "a doubt arises" art. 5 does not operate, and the court is not required to be satisfied whether or not this safeguard should be applied. Accordingly where the accused did not raise a doubt no question of mistrial arises.

The only authority to which their lordships' attention was drawn which supports the view that the Geneva Convention, or rather its predecessor which used similar language, applied so to speak automatically without the question of protection or no protection being raised is the case of *R. v. Guiseppe.* Twelve Italian prisoners of war were tried by a magistrate and convicted on a charge of theft, no notice having been given to the representative of the protecting power as required by the Convention. It was held on an application for review at the special request of the Crown that the conviction and sentences should be set aside. Thus it appears that the Crown asked for review in a case where the prisoners of war were nationals of the opposing forces and plainly entitled to the

protection of the Convention. Their lordships do not regard this decision as good authority for the proposition that there was a mistrial in the cases under review.

* * * *

[...]

It was not proved that the accused were citizens of Malaysia nor that they owed allegiance to Malaysia, tough in many cases there was evidence which, if the issue had directly arisen, might have suggested that they did; but further findings of fact would have been required to decide either question. Except in the one case where the accused claimed the protection of the Convention at the trial there was no mistrial in proceedings without the notices required by s. 4 [of the Act of 1962] having been given. There was nothing to show that the accused were protected prisoners of war or to raise a doubt whether they were or were not. The mere fact that they landed as part of the Indonesian armed forces did not raise a doubt and no claim was made to provide any basis for the court, before whom the accused were brought for trial, applying s. 4 of the Act except in the one case.

In this single case, that of *Teo Boon Chai v. The Public Prosecutor* (No. 15 of 1967), it appears from the record that the accused's counsel claimed that his client was not a Malaysian citizen, and not an Indonesian citizen either, and that he should therefore be treated as a prisoner of war under the Geneva Convention. The claim was brushed aside on the wrong basis, videlicet that jurisdiction was in question. In the Federal Court the point was taken that it was for the accused to prove that he was entitled to protection and that he did not do so. The claim, having been made to the court before whom the accused was brought up for trial in the circumstances already stated, was in their lordships' opinion sufficient to raise a doubt whether he was a prisoner of war protected by the Convention. The court should have treated him as a prisoner of war for the time being and either proceeded with the determination whether he was or was not protected, or refrained from continuing the trial in the absence of notices. In this case only their lordships consider that there was a mistrial and that justice requires that the appeal be allowed and the convictions quashed and the case remitted for retrial.

In the remaining cases there was no mistrial by reason of the absence of the notices required by s. 4. [...]

* * * *

Their lordships accordingly reported to the Head of Malaysia that the [Holding] appeals in Nos. 16 and 17 of 1967 be allowed; [...] that the appeal in case No. 15 be allowed. [...]

DISCUSSION

1. According to IHL must the accused affirmatively assert a claim to prisoner-of-war status and to the protections of the Conventions in order to be accorded them?

(*Cf.* Art. 5 of Convention III.) If so, in all cases? Only in those where no "doubt arose"?

2. a. Which standard should be used for assessing whether "doubt arose" or perhaps should have arisen to a court's attention? Should not the fact of membership in the enemy armed forces always raise the doubt to which Art. 5 (2) of Convention III refers? Or even lead to the presumption of prisoner-of-war status?

   b. Do you agree that the facts of this case raise no doubt as to the status of the accused? Particularly, the circumstances of their capture?

Case No. 98, Malaysia, Osman v. Prosecutor

THE CASE

[**Source:** *Law Reports,* vol. 1, 1969, Appeal Cases, pp. 430-455 (P.C.).]

HOUSE OF LORDS
[PRIVY COUNCIL]
OSMAN BIN HAJI MOHAMED ALI AND
ANOTHER
APPELLANTS
AND
THE PUBLIC PROSECUTOR RESPONDENT
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

[...]

On March 10, 1965, two girl secretaries at a bank in Singapore were killed by an explosion caused by a bag containing 25lb. of nitroglycerine, placed by the two appellants on the stairs of the building. The appellants were not wearing uniform and they had no identification papers nor were they wearing uniform when arrested. They were charged under the Penal Code with the murder of the two girl secretaries and of another person injured by the explosion who died later, and tried in the High Court of Singapore [...]. The appellants claimed to be members of the Indonesian armed forces and entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949. The trial judge ruled that they were not entitled to the status of prisoners of war and convicted them. [...]

[It was argued for the appellants:] Thirdly, the appellants were prisoners of war within the Geneva Convention and were accordingly entitled to the protection of the Convention, and as there was no evidence that the notification required by article 104 of the Geneva Convention and section 4 of the Geneva Convention Act, 1962, had been given there was a mistrial and the appellants' convictions ought to be quashed. The propositions in support of this submission are:

A. [...]

This appeal must proceed on the basis that the Convention applied to Singapore [at that time part of Malaysia] and that at the relevant time there was a state of armed conflict between Indonesia and Malaysia.

B. If a "doubt" about status arises, an inquiry into status as distinct from a trial can be held without service of a notice. [...] Unless status is determined or notice is given, the trial cannot proceed: article 5 of the Convention. A "doubt" as to status arose on the very day the appellants were arrested and claimed to be members of the Indonesian armed forces. A "doubt" arises within the meaning of article 5 where there is an armed conflict and the accused on capture claim to be members of the armed forces. There may be circumstances which make it obvious that the claim to status is obviously untrue but the circumstances of this case were sufficient to raise a "doubt" that the appellants may be able to obtain the protection of the Convention. There was nothing in the circumstances which made it obvious that the appellants were not members of the armed forces of Indonesia. Article 5 is a holding provision, and the court will give it a wider interpretation. It is wrong to say that the "doubt" did not arise until counsel claimed the protection of the Convention. Accordingly, there was a mistrial as no notice was served and the status of the appellants was not determined. "A belligerent act" within article 5 is any act in the course of war, lawful or unlawful. It is not confined to only a legitimate act of war. It cannot be decided summarily by the authority on the spot. "Status" within article 5 would depend on questions which only a competent tribunal could determine. In any case a "doubt" did arise when the protection of the Convention was claimed by counsel at the commencement of the trial, and the trial court rightly held an inquiry as to status and found the appellants not entitled to the protection of the Convention. That finding on the preliminary issue has been proved to be wrong; accordingly the trial court was not justified in proceeding with the trial without notices being served. By reason of the new evidence only now available and which was not available at the time of the trial, there should be a new trial. If the trial was not adjourned under article 104, then it was a mistrial and the appellants' convictions cannot be allowed to stand.

C. Under article 4A (1) members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces are in the category of "prisoners of war", and this applies equally to members of the armed forces captured out of uniform. The requirements of article 4A (2) are not to be read by implication into article 4A (1). The absence of a distinctive sign does not prevent members of the armed forces not in uniform from claiming the protection of the Convention. Under the Convention the identification mark is limited to the possession of an identity card. The questions contemplated by article 17 were never put to the appellants. Article 85 of the Convention applies to prisoners of war convicted of war crimes, so that they are entitled to the status and protection of the Convention even after conviction of a war crime; a fortiori they are entitled to that protection before conviction and while suspected and accused. [...]

Fourthly, sabotage is a mere species of war crime. Saboteurs are not to be equated with spies. A member of the armed forces in civilian clothes is to be treated as a war criminal, if his acts are to be regarded as unlawful. A spy is one who is secretly gathering information in disguise and is in a special position and has no protection on capture, whereas a member of the armed forces out of uniform and civilian clothes is liable to be tried for a hostile act destroying life or property as having committed a crime contrary to the laws of war and not contrary to domestic law. The Convention of 1949 in contrast to the Convention of 1929 expressly gives protection and status of prisoners of war to members of guerrilla forces. The tendency of law is to extend the protection of the Convention. It is a branch of law developing very rapidly. There is no distinction between an attack on military buildings and on civilian buildings. Indiscriminate bombing does not involve breach of the laws of war. It is impossible to find any principle by which an attack on civilian buildings can now be regarded as a breach of the laws of war in conditions of modern warfare. Unprivileged belligerency is something that is done which is not permitted by the rules of war; but treatment as privileged, or unprivileged, belligerent cannot be at the pleasure of the captor. [...]

[It was argued for the respondent:]

First, assuming that the appellants were members of the Indonesian armed forces, they had forfeited any right to treatment as prisoners of war under the protection of the Geneva Convention in that (a) they divested themselves of their uniforms; (b) they assumed civilian clothing; (c) they attacked a civilian target; and (d) they caused death and injury to peaceful civilians. The authorities on the Convention support the following propositions: (1) Members of the armed forces who divest themselves of their uniform for hostile purposes are not entitled to the status of "prisoner of war" under article 4A of the Convention or otherwise. (2) Spies and saboteurs out of uniform are within the above category and so are not entitled to the status of "prisoner of war" on capture. (3) Spies and saboteurs out of uniform are not guilty of war crimes properly so called by being out of uniform for hostile purposes. (4) Spies and saboteurs out of uniform are subject to trial and punishment under the municipal law of the captor state. (5) The killing of peaceful civilians and attacking non-military buildings is contrary to the laws and customs of war. (6) Indiscriminate bombing and the use of V1 and V2 weapons is contrary to the laws and customs of war. (7) Saboteurs may be (a) ordinary civilian volunteers, (b) members of militias or volunteer corps organisations engaged in sabotage, and (c) members of armed forces under orders to commit sabotage. (8) The conditions prerequisite in article 4A (2) are also prerequisite in article 4A (1) by necessary implication. [...]

The judgement of their Lordships was delivered by VISCOUNT DILHORNE.

On October 20, 1965, the appellants were convicted in the High Court of Singapore under Penal Code of the murder of three civilians and sentenced to death. Their appeals to the Federal Court of Malaysia were dismissed on October 5, 1966, and they now appeal by special leave. [...]

[T]he appellants were rescued from the sea some distance from Singapore by a bumboat man. He saw them in the sea clinging to a plank. [...] He swore that

neither of the appellants was wearing uniform and that one of them was bare bodied and wearing a pair of darkish trousers and the other a sports shirt and pair of long trousers. [...]

At 2.35 p.m. the same day the first appellant was charged with the murder of the three persons killed by the explosion. He was again cautioned and he then made a statement saying that he had come to Singapore at 11 a.m. on March 10, that he had gone with the second appellant to look for a target, than he and the second appellant had placed "two bundles of explosives on stairs before reaching the first floor", that the second appellant had lit the fuse and that after that they had left and taken a bus. [...]

At 6.15 p.m., the first appellant had an interview with Mr. Yeo, then Fourth Magistrate. He told him that he was a member of the Indonesian Army and that he had come to give the magistrate information with regard to the duties he had been instructed to perform by his superiors. [...]

At the opening of the trial counsel for the appellants asserted that they were both members of the Indonesian armed forces and that they were entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949. In 1962 the Geneva Conventions Act was passed in the Federation of Malaya to give effect to this, among other, Conventions.

Section 4 (1) of this Act provides, inter alia, that the court before which a protected prisoner of war is brought up for trial for any offence shall not proceed with the trial until it is proved to the satisfaction of the court that a notice giving the full name and description of the accused and other details about him including the offence with which he is charged and the court before which the trial is to take place and the time and place of trial has been served not less than three weeks previously on the protecting power and on the accused and the prisoner's representative.

In support of this contention the first appellant gave evidence that he was a member of the Indonesian armed forces, a corporal in the "Korps Kommando Operasi" regular force. He swore that when they has been rescued from the sea, he and the second appellant had been wearing uniform. He said that his and the second appellant's identity cards had been in plastic bags which were lost when their sampan sank. The second appellant also gave evidence that he was a member of the "Korps Kommando Operasi" and that he was wearing military uniform when he was rescued. He also said that he had not been allowed by his commander to wear his identity disk. After hearing evidence from the bumboat man and the other witnesses who had seen the appellants shortly after their rescue as to the appellants' clothing, the learned judge ruled that the appellants were not entitled to the status of prisoners of war. He said that the evidence was overwhelming that when they were rescued they were not wearing uniform. He also found that they first claimed to be fishermen while later on one claimed to be a farmer. [...]

He added that if they were members of the Indonesian armed forces, they were not in his opinion entitled to the status of prisoners of war.

> "In my view" he said "members of enemy armed forces who are combatants and who come here with the assumption of the semblance

> of peaceful pursuits divesting themselves of the character or appearance of soldiers and are captured, such persons are not entitled to the privileges of prisoners of war."

After hearing of the appeal by the Federal Court affidavits were filed on behalf of the appellants sworn by two officers of the Indonesian Army, stating that the appellants had since March, 1965, been members of the Indonesian armed forces and serving in units under the "Kommando Mandala Siaga" and documents purporting to be their personal military records were produced. [...]

Mr. Le Quesne also argued that the appellants were prisoners of war within the Geneva Convention and that the requirements of that Convention were not complied with, with the result that there was a mistrial.

Article 2 of the Convention provides that it shall apply to all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. At the commencement of the trial Crown Counsel submitted that there was no state of war or armed conflict between Indonesia and Malaysia at the time but when Chua J. said that in his view there was a state of armed conflict, Crown counsel did not pursue the matter. [...]

The appeal was therefore heard on the basis that the Convention applied to Singapore and that at the time there was a state of armed conflict between Indonesia and Malaysia.

The issue to be determined is whether in the circumstances of this case, the appellants were entitled to the protection of the Convention. The view of Chua J. on this has already been stated. The Federal Court held that there could not

> "be the least doubt that the explosion at MacDonald House was not only an act of sabotage but one totally unconnected with the necessities of war".

They went on to say:

> "It seems to us clear beyond doubt that under International Law a member of the armed forces of a party to the conflict who, out of uniform and in civilian clothing, sets off explosives in the territory of the other party to the conflict in a non-military building in which civilians are doing work unconnected with any war effort forfeits his right on capture to be treated as a prisoner of war."

They consequently held that the appellants were not prisoners of war within the meaning of the Convention.

It is first necessary to consider the regulations annexed to the Hague Convention concerning the Laws and Customs of War on Land of 1907. The first section of those regulations is headed "Of Belligerents" and article 1 is the first article in that section and in the chapter headed "The Status of Belligerents." It reads as follows:

> "The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions: (1) They must be commanded by a person responsible for his subordinates; (2) To

> have a fixed distinctive sign recognisable at a distance; (3) To carry arms openly; and (4) They must conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

Chapter II of this section is headed "Prisoners of War." The regulations do not in terms say that a person with the status of belligerent is on capture entitled to be treated as a prisoner of war but that is clearly implied. As Dr. Jean Pictet said in the "Commentary on the Geneva Convention" published by the Red Cross in 1960 [The Geneva Conventions, Commentary, published under the direction of Jean S. Pictet, III: The Geneva Convention Relative to the Treatment of Prisoners of War, ICRC; Geneva, 1958; available on http://www.icrc.org/ihl.] at p. 46;

> "Once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most important of these is the right, following capture, to be recognised as a prisoner of war."

Article 29 of the regulations reads as follows:

> "A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Accordingly, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies..."

Article 31 says:

> "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war..."

These two articles show that soldiers who spy and are captured when wearing a disguise are not entitled to be treated as prisoners of war. [...]

Article 4 of the Geneva Convention added a number of new categories of persons entitled to treatment as prisoners of war. It is only necessary to refer to Article 4A, sub-pargraphs (1), (2) and (3). They read as follows:

> "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; (2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions: (*a*) that of being commanded by a person responsible for his subordinates; (*b*) that of having a fixed distinctive sign recognisable at a distance; (*c*) that of carrying arms openly; (*d*) that of conducting their operations in accordance with the laws and customs of

> war; (3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the detaining power."

The wording of sub-paragraphs (1) and (2) is clearly modelled on article 1 of the Hague Regulations. The conditions which have to be fulfilled by militias and volunteer corps not forming part of the army or armed forces are the same.

There is no indication in the Convention that its intention was to extend the protection given to soldiers beyond that given by the regulations; and in the Manual of Military Law, Part III (1958), in paragraph 96 it is stated:

> "Should *regular* combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war."

On this basis the conclusion must be drawn that it does not suffice in every case to establish membership of an armed force to become entitled on capture to treatment as a prisoner of war.

In neither the Hague Regulations nor in the Geneva Convention is it expressly stated that a member of the armed forces has to be wearing uniform when captured to be entitled to be so treated. In the case of certain militias and volunteer corps certain conditions have to be fulfilled in relation to those bodies for a member of them to be entitled to treatment as a prisoner of war. It is not, however, stated that such a member must at the time of his capture be wearing "a fixed distinctive sign recognisable at a distance".

International law, however, recognises the necessity of distinguishing between belligerents and peaceful inhabitants. "The separation of armies and peaceful inhabitants" wrote Spaight in War Rights on Land at p. 37, "is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable". Although paragraph 86 of the Manual of Military Law recognises that the distinction has become increasingly blurred, it is still the case that each of these classes has distinct rights and duties.

For the "fixed distinctive sign to be recognisable at a distance" to serve any useful purpose, it must be worn by members of the militias or volunteer corps to which the four conditions apply. It would be anomalous if the requirement for recognition of a belligerent, with its accompanying right to treatment as a prisoner of war, only existed in relation to members of such forces and there was no such requirement in relation to members of the armed forces. All four conditions are present in relation to the armed forces of a country or, as Professor Lauterpacht in Oppenheim's International Law, 7th ed. (1952), volume II, at p. 259, calls them "the organised armed forces." In War Rights on Land Mr. Spaight says, at p. 56, in relation to article 1 of the Regulations: "The four conditions must be united, to secure recognition of belligerent status. "Pictet in the Commentary on the Geneva Convention says, at p. 48: "The qualification of belligerent is subject to these four conditions being fulfilled," and, at p. 63, in relation to sub-paragraph (3) of Article 4A:

> "These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organised hierarchy and they know and respect the laws and customs of war."

In relation to troops landed behind enemy lines, Professor Lauterpacht in Oppenheim's International Law says, at p. 259, that so long as they

> "...are members of the organised forces of the enemy and wear uniform, they are entitled to be treated as regular combatants even if they operate singly."

Thus considerable importance attaches to the wearing of uniform or a fixed distinctive sign when engaging in hostilities. [...]

In this appeal it is not necessary to attempt to define all the circumstances in which a person coming within the terms of article 1 of the Regulations and of article 4 of the Convention as a member of an army or armed force ceases to enjoy the right to be treated as a prisoner of war. The question to be decided is whether members of such a force who engage in sabotage while in civilian clothes and who are captured so dressed are entitled to be treated as protected by the Convention.

In paragraph 96 of the Manual of Military Law it is stated that:

"Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies." And in paragraph 331:

> "If they are disguised in civilian clothing or in the uniform of the army by which they are caught or that of an ally of that army, they are in the same position as spies. If caught in their own uniform, they are entitled to be treated as prisoners of war."

In the Law of Land Warfare (1956) the American equivalent to the Manual of Military Law, the following paragraph appears:

> "74. Necessity of Uniform. Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces."

In *Ex parte* Quirin [*See* **Case No. 83**, US, *Ex Parte* Quirin *et al.* p. 1053.], the United States Supreme Court had to consider motions for leave to file petitions for writs of *habeas corpus*. [Footnote 2 reads: (1942) 317 U.S. 1.] The case related to a number of Germans who during the course of the last war landed in uniform on the shores of the United States with explosives for the purpose of sabotage. On landing they put on civilian clothes. They were captured. In the course of delivering the judgment of the Supreme Court, Chief Justice Stone said: [footnote 3 reads: (1942) 317 U.S. 1, 31.]

> "The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war..."

and: [footnote 4 reads: Ibid, 37.]

> "By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."

In the light of the passages cited above, their lordships are of the opinion that under international law it is clear that the appellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they had placed the explosives and lit them and when they were arrested. [...]

Mr. Le Quesne further contended that the appellants' act in placing the explosives was a legitimate act of war and that they could not therefore be tried for murder. The Federal Court in rejecting the appellants' plea, appear to have done so partly on the ground that placing the explosives in MacDonald House "a non-military building in which civilians are doing work unconnected with any war effort" was not a legitimate act of war. "The immunity of non-combatants from direct attack is one of the fundamental rules of the International Law of war" and "Non-combatants are not, under existing International Law, a legitimate military objective" (Professor Lauterpacht in Oppenheim, at p. 524 and 525).

As, if they were members of the Indonesian armed forces, in their Lordships' opinion, they forfeited their right under the Convention by engaging in sabotage in civilian clothes, it is not necessary to consider whether they also forfeited them by breach of the laws and customs of war by their attack on a non-military building in which there were civilians. Having forfeited their rights, there was in their lordships' view no room for the application of article 5 of the Convention and, not being entitled to protection under the Convention, the appellants' conviction for murder committed by them when dressed as civilians and within the jurisprudence of Singapore cannot be invalidated.

For these reasons, their Lordships were of the opinion that the appeal should be dismissed. [...]

DISCUSSION

1. Did an international armed conflict exist between Indonesia and the Federation of Malaysia (to which Singapore then belonged)? Was the sole fact that members of Indonesian armed forces carried out attacks in Singapore, under orders of their superiors, sufficient to make IHL applicable? (*Cf.* Art. 2 common to the Conventions.)

2. a. Under the Geneva and the Hague Conventions, must a member of regular armed forces permanently distinguish himself from the civilian population? May he be punished for failing to do so? Must he be punished for failing to do so? Does he lose combatant status if he fails to do so? How does the situation change with the applicability of Protocol I? (*Cf.* Art. 1 of the Hague Regulations, Art. 4 (A) of Convention III, and Arts. 44 (3)-(4) and 85 of Protocol I.)

   b. May a member of regular armed forces attack civilian targets? May he be punished if he does? Must he be punished if he does? Does he lose combatant status if he does so? (*Cf.* Arts. 23 (g), 25 and 27 of the Hague Regulations, Art. 85 of Convention III, and Arts. 44 (2), 48, 51, 52, 57 of Protocol I; Arts. 146-147 of Convention IV and Art. 85 of Protocol I.)

   c. If appellants had worn uniforms at the time of attack, could they have been sentenced? What would have been different in their legal situation?

   d. Could this decision have been rendered if Protocol I had been applicable? Would the result have been different? Which part of the court's reasoning would have been different? (*Cf.* Art. 44 of Protocol I.)

3. Should the appellants have benefited from the presumption provided for in Art. 5 (2) of Convention III? What would be the consequence of that presumption for their trial? Was Art. 104 of Convention III applicable?

X. CONGO

Case No. 99, Belgium, Public Prosecutor v. G.W.

THE CASE

[**Source:** Brussels War Council 18 May 1966, partially reported in *Revue Juridique du Congo*, 1970, p. 236 and in *Revue de Droit Pénal et de Criminologie*, "Chronique annuelle de Droit pénal militaire", 1970, p. 806; original in French, unofficial translation.]

BRUSSELS,
CONSEIL DE GUERRE

***in re* Public Prosecutor *v.* G.W., May 18, 1966**

[...]

JUDGMENT

[...]

II. Facts

On 5 October 1965 the accused, G.W., a senior member of the Belgian staff providing assistance to the Democratic Republic of the Congo, was driving in a jeep in the company of M. and M., soldiers belonging to the Congolese national army, coming from a checkpoint set up on Opala road and going towards Lubunga, an outlying district of Stanleyville [...]

The jeep had just left an area out of bounds to civilians and entered a non-forbidden zone, when the vehicle's occupants saw [...] two Congolese crossing the road, carrying "Beretta" submachine-guns; [...]

A Congolese woman, Z.S., appeared on the threshold of the hut from which, according to W., the second rebel had come out; the accused interrogated her, with the help of his driver, N., but got no intelligible reply; [...]

The accused - as he himself stated - then started to push the woman; he knocked her over, she fell on her side; he lifted her head with his foot because she persisted in turning her head to face the ground; he did not actually kick her, but he put his foot on her head and pressed down.

The accused declares that he then ordered her to accompany him to the camp; the woman rolled on the ground without obeying him. He ordered the two soldiers, as he himself said, to put her in the jeep, which they did not manage to do; as soon as he heard the engine start - the jeep being out of sight - he fired a revolver shot into the head of the victim, who was lying at his feet. The accused then went back to the camp and informed the Congolese and Belgian authorities of what had happened and asked that a patrol be sent out to look for the rebels.

The autopsy showed that the victim had two bullet wounds, one of them [...] in the head. [...]

The material facts of the case against the accused have been established beyond doubt. It has also been established that the accused fired the shot into the victim's head with intent to kill.

III. On grounds for justification [...]

(a) Order from higher authority

The accused invokes the order issued by Major O. to "shoot all suspect elements on sight" in the area forbidden to civilians.

Elements of the file show, and this is not disputed by the accused, that the victim was not in the forbidden zone; the order invoked by the accused was therefore not applicable in the case in point.

The accused maintains however that there being no clear demarcation of the zone in question, he was convinced that he was inside the forbidden zone; [...]

Moreover, the order [invoked by the accused] certainly does not have the scope attributed to it by the accused, namely "the order to take no prisoners and to 'kill' everything we come across in there".

The file and the investigation carried out during the hearing show that in fact it was an "authorization" to shoot suspect elements on sight, without warning, but definitely not an order to take no prisoners or to kill prisoners.

As interpreted by the accused in practice - *viz.* the right or even the obligation to kill an unarmed person in his power - the order was patently illegal. Executing or causing to be executed without prior due trial a suspect person or even a rebel fallen into the hands of the members of his battalion was obviously outside the competence of Major O., and such an execution was a manifest example of voluntary manslaughter. The illegal nature of the order thus interpreted was not in doubt and the accused had to refuse to carry it out. [...]

The act perpetrated by the accused constitutes not only murder within the meaning of Articles 43 and 44 of the Congolese Criminal Code and Articles 392 and 393 of the Belgian Criminal Code, but is also a flagrant violation of the laws and customs of war and of the laws of humanity.

From the legal, military and human standpoint such an act was inadmissible and unjustifiable.

ON THESE GROUNDS

The Court-martial, ruling after due hearing of both parties, [...]

finds G.W. guilty of the charges brought against him,

sentences him to five years' imprisonment. [...]

DISCUSSION

1. Did the acts of the defendant violate IHL independently of whether the Belgian operations in Congo were subject to the laws of international or to those of non-international armed conflict? (*Cf.* Art. 3 common to the Conventions and Arts. 27 and 32 of Convention IV.)

2. Is it lawful to prohibit a zone to civilians? What might the defendant lawfully have done with a civilian found in such a zone? Was the order, as interpreted by the Court, permitting to fire within the prohibited zone on "all suspect elements on sight", lawful according to International Humanitarian Law: if we retroactively apply Protocols I and II? (*Cf.* Arts. 50 (1) and 51 (2) of Protocol I and Art. 4 (1) of Protocol II.) If we do not apply those instruments? (*Cf.* Art. 23 (d) of the Hague Regulations.) Is it lawful to fire on combatants on sight? Would the defendant's conduct have been lawful within the "prohibited zone" with regard to a person positively identified as a combatant? (*Cf.* Arts. 40 and 41 of Protocol I.)

3. When may a superior order provide a defense against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation?

XI. VIETNAM

Case No. 100, US, Screening of Detainees in Vietnam

THE CASE

[**Source:** Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, Document No. 155, 1979, pp. 748-751.]

UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM.
DIRECTIVES NO. 381-46, MILITARY INTELLIGENCE:
COMBINED SCREENING OF DETAINEES
(27 December 1967)

SOURCES
National Archives of the United States
62 AJIL 766 (Annex only)
12 Santa Clara Law. 236 (1972) (Annex only)
12 Wm. & Mary L. Rev. 798 (1971) (Annex only)

[...]

1. ***PURPOSE*** This directive provides policy guidance for the combined screening of detainees, and for the activation, as required, of Combined Tactical Screening Centers (CTSC).

2. ***GENERAL***
   a. The forces that capture or detain suspect personnel are responsible for the prompt screening and classification of detainees.
   b. Criteria for determination of status and classification of detainees is contained in paragraphs 3 and 4 of Annex A.
   c. Disposition of detained personnel who have been classified will be made in accordance with paragraph 5 of Annex A.

[...]

4. ***DISCUSSION*** [...] All detainees must be classified into one of the following categories:
   a. Prisoners of War.
   b. Non-Prisoners of War.
      (1) Civil Defendants.
      (2) Returnees.
      (3) Innocent Civilians.

5. ***CONCEPT***

[...]

   b. Combined screening of detainees will be conducted at the lowest echelon of command practical; normally at the brigade or division

Prisoner of War (PW) collecting points. Screening centers should be located near sector/sub-sector headquarters for ease of access to both military and civilian files.

c. The mission of the CTSC is to optimize the screening and classification of a large number of detained personnel to permit effective exploitation of knowledgeable sources for immediate tactical information and to expedite the proper disposition of PW's and Non-Prisoners of War.

* * * * *

8. *SCREENING PROCEDURES*

a. The detaining unit will insure that the proper documentation is initiated and maintained on every individual detained. It is imperative that data reflect circumstances of capture and whether documents [or] weapons were found on the detainee.

b. Maximum use must be made of interrogators and interpreters to conduct initial screening and segregation at the lowest possible level. Participation in the initial screening by all agencies represented in CTSC is encouraged. However, the sole responsibility for determining the status of persons detained by US forces rests with the representatives of the United States Armed Forces.

c. Detainees will be classified in accordance with the criteria established in Annex A. [...]

d. To preclude rejection by the PW camp commanders of PW's of questionable status, evidence gathered to substantiate the determination that the detainee is entitled to PW status must be forwarded with the prisoner. Improperly documented PW's will not be evacuated to PW camps.

* * * * *

ANNEX A

CRITERIA FOR CLASSIFICATION AND DISPOSITION OF DETAINEES

1. *PURPOSE* To establish criteria for the classification of detainees which will facilitate rapid, precise screening, and proper disposition of detainees.

2. *DEFINITIONS*

a. Detainees. Persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provision of the Geneva Conventions.

b. Classification. The systematic assignment of a detainee in either PW or Non-Prisoner of War category.

c. Prisoners of War. All detainees who qualify in accordance with paragraph 4a, below.

d. Non-Prisoners of War. All detainees who qualify in accordance with paragraph 4b, below.

3. *CATEGORIES OF FORCES*

a. Viet Cong (VC) Main Force (MF). [...]
b. Viet Cong (VC) Local Force (LF). [...]
c. North Vietnamese Army (NVA) Unit. [...]
d. Irregulars. Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.
   (1) Guerrillas. Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.
   (2) Self-Defense Force. A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These forces do not leave their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.
   (3) Secret Self-Defense Force. A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

4. *CLASSIFICATION OF DETAINEES*

a) Detainees will be classified PW's when determined to be qualified under one of the following categories:
   (1) A member of one of the units listed in paragraph 3a, b, or c, above.
   (2) A member of one of the units listed in paragraph 3d, above, who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.
   (3) A member of one of the units listed in paragraph 3d, above, who admits or for whom there is a proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.

b) Detainees will be classified as Non-Prisoners of War when determined to be one of the following categories:
   (1) Civil Defendants

(a) A detainee who is not entitled to PW status but is subject to trial by GVN for offenses against GVN law.
(b) A detainee who is a member of one of the units listed in paragraph 3d, above, and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or belligerent act under arms.
(c) A detainee who is suspected of being a spy, saboteur, or terrorist.

(2) Returnees (Hoi Chanh). All persons regardless of past membership in any of the units listed in paragraph 3, above, who voluntarily submit to GVN control.
(3) Innocent Civilians. Persons not members of any units listed in paragraph 3, above, and not suspected of being civilian defendants.

5. *DISPOSITION OF CLASSIFIED DETAINEES*

a. Detainees who have been classified will be processed as follows:
(1) US captured PW's and those PW's turned over to the US by FWMAF will be detained in US Military channels until transferred to the ARVN PW Camp.
(2) Non-Prisoners of War who are suspected as civilian defendants will be released to the appropriate GVN civil authorities.
(3) Non-Prisoners of War who qualify as returnees will be transferred to the appropriate Chieu Hoi Center.
(4) Non-Prisoners of War determined to be innocent civilians will be released and returned to the place of capture.

* * * * *

DISCUSSION

1. a. Are the criteria stipulated in this directive for determining prisoner-of-war status consistent with Convention III? Who qualifies for prisoner-of-war treatment under IHL? For which category of detainees does the directive go beyond what Convention III stipulates? (*Cf.* Art. 1 of the Hague Regulations, Art. 28 (2) of Convention I, Art. 4 of Convention III and Art. 44 (5) of Protocol I.)

   b. Are the persons qualified as non-prisoners of war protected by Convention IV? (*Cf.* Arts. 4 and 5 of Convention IV.)

   c. Are the dispositions of the various classified detainees in section 5 of the above document consistent with IHL? May some or all of those detainees be handed over to the government of South Vietnam? (*Cf.* Art. 12 of Convention III and Arts. 4, 5 and 45 of Convention IV.)

2. a. Why does Art. 5 (2) of Convention III exist? Why must a "competent tribunal" decide upon a detained person's status? What constitutes a "competent" tribunal? Does a military tribunal qualify?

   b. Is the status of persons to whom the directive denies prisoner-of-war status to be determined under Art. 5 (2) of Convention III by a competent tribunal?

3. Is the implementation of this directive consistent with Art. 5 (2) of Convention III? May State Parties create such directives? Must they? Does a screening center, such as the Combined Tactical Screening Centers, satisfy Art. 5 (2) of Convention III? Does failing to provide a trial for the determination of a person's status constitute

a violation of the Conventions? Is it considered a "grave breach"? (*Cf.* Arts. 49/50/130/146 respectively of the four Conventions and Art. 5 (2) of Convention III.)

4. While an individual's status is being determined, to what kind of treatment is the person entitled? Only humane treatment as stated here in Annex A, para. 2 (a)? Or is the person entitled to prisoner-of-war treatment until it is determined or even proven by a competent tribunal, even though the person may not qualify? What does Art. 5 (2) of Convention III mean by "the protection of the present Convention"?

5. If Protocol I was applicable, which elements of the directive would comply and violate the Protocol? Does this directive contribute to make those aspects in Protocol I customary international law? (*Cf.* Arts. 4 and 5 of Convention III and Arts. 43-45 of Protocol I.)

Case No. 101, US, US v. William L. Calley, Jr.

THE CASE

[**Source:** Levie, H.S. (ed.), *International Law Studies, Documents on Prisoners of War,* Naval War College, R.I., Naval War College, vol. 60, Document No. 171, 1979, pp. 804-811.]

UNITED STATES v. WILLIAM L. CALLEY, JR.
(U.S. Court of Military Appeals, 21 December 1973)

SOURCES
22 USCMA 534 (1973)
48 CMR 19 (1973)
(Habeas corpus granted *sub nomine* CALLEY v. CALLOWAY, 382 F. Supp. 650 (1974); rev'd 519 F 2d. 184 (1975); cert. den. *sub. nomine* CALLEY v. HOFFMAN, 425 U.S. 911 (1976))

[...]

EXTRACTS

OPINION

QUINN, Judge:

First Lieutenant Calley stands convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age. All the killings and the assault took place on March 16, 1968 in the area of the village of My Lai in the Republic of South Vietnam. The Army Court of Military Review affirmed the findings of guilty and the sentence, which, as reduced by the convening authority, includes dismissal and confinement at hard labor for 20 years. The accused petitioned this Court for further review, alleging 30 assignments of error. We granted three of these assignments.

Lieutenant Calley was a platoon leader in C Company, a unit that was part of an organization known as Task Force Barker, whose mission was to subdue and

drive out the enemy in an area in the Republic of Vietnam known popularly as Pinkville. Before March 16, 1968, this area, which included the village of My Lai 4, was a Viet Cong stronghold. C Company had operated in the area several times. Each time the unit had entered the area it suffered casualties by sniper fire, machine gun fire, mines, and other forms of attack. Lieutenant Calley had accompanied his platoon on some of the incursions.

On March 15, 1968, a memorial service for members of the company killed in the area during the preceding weeks was held. After the service Captain Ernest L. Medina, the commanding officer of C Company, briefed the company on a mission in the Pinkville area set for the next day. C Company was to serve as the main attack formation for Task Force Barker. [...] Intelligence reports indicated that the unit would be opposed by a veteran enemy battalion, and that all civilians would be absent from the area. The objective was to destroy the enemy. Disagreement exists as to the instructions on the specifics of destruction.

Captain Medina testified that he instructed his troops that they were to destroy My Lai 4 by "burning the hootches, to kill the livestock, to close the wells and to destroy the food crops." Asked if women and children were to be killed, Medina said he replied in the negative, adding that, "You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use commonsense." However, Lieutenant Calley testified that Captain Medina informed the troops they were to kill every living thing - men, women, children, and animals - and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages enroute to their final objective. Other witnesses gave more or less support to both versions of the briefing.

On March 16, 1968, the operation began with interdicting fire. C Company was then brought to the area by helicopters. Lieutenant Calley's platoon was on the first lift. [...] The unit received no hostile fire from the village.

Calley's platoon passed the approaches to the village with his men firing heavily. Entering the village, the platoon encountered only unarmed, unresisting men, women, and children. The villagers, including infants held in their mother's arms, were assembled and moved in separate groups to collection points. Calley testified that during this time he was radioed twice by Captain Medina, who demanded to know what was delaying the platoon. On being told a large number of villagers had been detained, Calley said Medina ordered him to "waste them." Calley further testified that he obeyed the orders because he had been taught the doctrine of obedience throughout his military career. Medina denied that he gave any such order.

One of the collection points for the villagers was in the southern part of the village. There, Private First Class Paul D. Meadlo guarded a group of between 30 to 40 old men, women, and children. Lieutenant Calley approached Meadlo and told him, "'You know what to do,'" and left. He returned shortly and asked Meadlo why the people were not yet dead. Meadlo replied he did not know that Calley had meant that they should be killed. Calley declared that he wanted them dead. He and Meadlo then opened fire on the group, until all but a few children

fell. Calley then personally shot these children. He expended 4 or 5 magazines from his M-16 rifle in the incident.

Lieutenant Calley and Meadlo moved from this point to an irrigation ditch on the east side of My Lai 4. There, they encountered another group of civilians being held by several soldiers. Meadlo estimated that this group contained from 75 to 100 persons. Calley stated, "'We got another job to do, Meadlo,'" and he ordered the group into the ditch. When all were in the ditch, Calley and Meadlo opened fire on them. Although ordered by Calley to shoot, Private First Class James J. Dursi refused to join in the killings, and Specialist Four Robert E. Maples refused to give his machine gun to Calley for use in the killings. Lieutenant Calley admitted that he fired into the ditch, with the muzzle of his weapon within 5 feet of people in it. He expended between 10 to 15 magazines of ammunition on this occasion.

With the radio operator, Private Charles Sledge, Calley moved to the north end of the ditch. There, he found an elderly Vietnamese monk, whom he interrogated. Calley struck the man with his rifle butt and then shot him in the head. Other testimony indicates that immediately afterwards a young child was observed running toward the village. Calley seized him by the arm, threw him into the ditch, and fired at him. Calley admitted interrogating and striking the monk, but denied shooting him. He also denied the incident involving the child.

Appellate defense counsel contend that the evidence is insufficient to establish the accused's guilt. They do not dispute Calley's participation in the homicides, but they argue that he did not act with the malice of *mens rea* essential to a conviction of murder; that the orders he received to kill everyone in the village were not palpably illegal; that he was acting in ignorance of the laws of war; that since he was told that only "the enemy" would be in the village, his honest belief that there were no innocent civilians in the village exonerates him of criminal responsibility for their deaths; and, finally, that his actions were in the heat of passion caused by reasonable provocation.

* * * * *

The testimony of Meadlo and others provided the court members with ample evidence from which to find that Lieutenant Calley directed and personally participated in the intentional killing of men, women, and children, who were unarmed and in the custody of armed soldiers of C Company. If the prosecution's witnesses are believed, there is also ample evidence to support a finding that the accused deliberately shot the Vietnamese monk whom he interrogated, and that he seized, threw into a ditch, and fired on a child with the intent to kill.

Enemy prisoners are not subject to summary execution by their captors. Military law has long held that the killing of an unresisting prisoner is murder. [...]

Conceding for the purposes of this assignment of error that Calley believed the villagers were part of "the enemy," the uncontradicted evidence is that they were under the control of armed soldiers and were offering no resistance. In his testimony, Calley admitted he was aware of the requirement that prisoners be treated with respect. He also admitted he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for

themselves, and evacuate the suspect among them for further examination. Instead of proceeding in the usual way, Calley executed all, without regard to age, condition, or possibility of suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offences before us.

At the trial, Calley's principal defense was that he acted in execution of Captain Medina's order to kill everyone in My Lai 4. [...] Captain Medina denied that he issued any such order [...]. Resolution of the conflict between his testimony and that of the accused was for the triers of the facts. [...]

* * * * *

We turn to the contention that the judge erred in his submission of the defense of superior orders to court. After fairly summarizing the evidence, the judge gave the following instructions pertinent to the issue: [...]

I [...] instruct you, as a matter of law, that if unresisting human beings were killed at My Lai (4) while within the effective custody and control of our military forces, their deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus, if you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order.

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the order [sic] hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

* * * * *

[...]

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on this question do not focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.

[...]

Appellate defense counsel contend that these instructions are prejudicially erroneous [...]. They urge us to adopt as the governing test whether the order is so palpably or manifestly illegal that a person of "the commonest understanding"

would be aware of its illegality. They maintain the standard stated by the judge is too strict and unjust; that it confronts members of the armed forces who are not persons of ordinary sense and understanding with the dilemma of choosing between the penalty of death for disobedience of an order in time of war on the one hand and the equally serious punishment for obedience on the other. Some thoughtful commentators on military law have presented much the same argument. [...]

In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder. Appellate defense counsel [...] say that Lieutenant Calley should not be held accountable for the men, women and children he killed because the court-martial could have found that he was a person of "commonest understanding" and such a person might not know what our law provides; that his captain had ordered him to kill these unarmed and submissive people and he only carried out that order as a good disciplined soldier should.

Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here. [...]

Consequently, the decision of the Court of Military Review is affirmed. [...]

DISCUSSION

1. a. What law applies in this case? Is it IHL of international or non-international armed conflicts?

   b. Does the determination of whether IHL of international or non-international armed conflicts applies greatly impact this case? Are not the actions of Lieutenant Calley prohibited under both? Does it matter whether the victims were innocent villagers, had previously supported the Vietcong, or were (lawful or unlawful) Vietcong fighters before they fell into the hands of Calley and his soldiers? (*Cf., e.g.,* Art. 23 (c) - (d) of the Hague Regulations, Art. 3 common to the Conventions, Arts. 50/51/130/147 respectively of the four Conventions, Arts. 11, 40, 41, 51, 75, 77 and 85 of Protocol I and Arts. 4, 6 (2) and 13 of Protocol II.)

2. a. When may a superior order provide a defense against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation?

   b. Was the standard, with which the Court instructed the jury to use in determining when a superior order provides a defense for a violation of IHL,

consistent with IHL? If not, was the standard suggested by the defense? Neither of them?

c. With which standard should the Court instruct the jury? Which standard, an objective standard or a more subjective standard, provides the fairest outcome? Which standard more effectively restrains violations of IHL? Are these the same?

d. Are the facts that soldiers are indoctrinated to obey orders and are aware that disobedience carries a grave punishment supportive of the application of a more subjective standard? Also when assessing blatantly illegal orders?

e. If a private, such as Private First Class James J. Dursi, grasps the incorrectness of an order and chooses to disobey, should not a lieutenant certainly? Is a lieutenant an unsophisticated soldier? Does ignorance of the laws of war provide an excuse? Even for a lieutenant? If soldiers are ignorant of the laws of war is not the State then also culpable for not having properly instructed their combatants? (*Cf.* Arts. 82, 83 and 87 (2) of Protocol I.)

f. What strength does the argument have that if every subordinate questioned the legality of the commander's orders and each obeyed when he or she decided the structure of the armed forces would crumble and all crucial moments for action in conflict would be missed during this debate? Are there no manifestly clear cases when an order should be disobeyed? Was the situation in this case not such an instance? Or is it much easier to judge from hindsight review? Can an intense combat situation really be fairly assessed in review?

Case No. 102, US, Former Prisoner of War on a Mission to Hanoi

THE CASE

[**Source:** Cloud, D.S., *Chicago Tribune*, April 15, 1997, at N1.]

Former POW on a Mission to Hanoi; U.S. Ambassador Seeks Reconciliation

There was a time when Pete Peterson never imagined returning to Vietnam, certainly not to live and work.

An Air Force pilot shot down on a bombing mission in 1966, Peterson endured 6 1/2 years of torture and isolation, living on grass soup and rice in the dank North Vietnamese prisoner-of-war camp known as the Hanoi Hilton.

Freed in 1973, he vowed to leave Vietnam and its torment buried in his past. It was a conscious act of self-preservation, like preparing for another mission, Peterson says.

"I had enough hate in my life for (the) 6 1/2 years that I sat in a cell," he said in a recent interview. "Had it continued, I would not have been able to function. I essentially put it behind me on the day I walked out of that cell."

Peterson, 61, will be going back to Hanoi, where he once was taken in shackles, as the first U.S. ambassador since the war.

The Senate approved his nomination last Thursday, ending a yearlong delay that left Peterson in limbo while lawmakers squabbled over restoring ties with a former enemy.

The U.S. has never had an ambassador in Hanoi, capital of reunited Vietnam. On April 29, Peterson will be sworn in and he will assume his post in early May.

President Clinton's choice of the ex-POW and three-term Florida congressman has been widely praised-by veterans groups that oppose normalization of relations, by career diplomats at the State Department and even by Vietnam's communist leaders.

The support is recognition that it may take someone like Peterson, who has every reason to harbor hatred, to be the agent for reconciliation between former enemies.

"The experience that he went through led him in the direction of healing and reconciliation, as it did in my case, " said Sen. John McCain (R-Ariz), who spent six years in the same POW camp.

Peterson is "the only person we would have supported for the job, and the reason is that he's been there and he knows the issues that affect Vietnam veterans," said George Duggins, national president of Vietnam Veterans of America.

The last American ambassador in Vietnam, Graham Martin, made a frantic helicopter departure from Saigon, capital of the south, barely ahead of the North Vietnamese troops encircling the city. It was an ignominious close to America's involvement in the conflict, one of many painful images burned in the national psyche.

Peterson's hand sometimes still goes numb, and his elbows bear the scars of rope burns inflicted by his torturers. But he is determined to leave a different mark.

"I really hope that I can use this relationship to bind the hurt that still exists in the populations of both countries," he said. "We're not the only ones who were hurt here. The Vietnamese lost whole age groups of men."

Peterson's first priority is to make further progress in dozens of unresolved cases of U.S. prisoners of war and those listed as missing in action. The Vietnam Veterans of America opposed Clinton's decision to normalize relations last July, saying it would remove leverage in Hanoi for full disclosure.

Peterson disagrees with critics of normalization. He notes that many of the dozens of remaining cases involve servicemen who were operating in mountainous jungle or other remote parts of Vietnam along the border with neighbouring Laos. Hanoi is cooperating, he says, adding that his presence will help speed the identification of remains.

He insists that Hanoi will not get that it really wants - U.S. investment and full commercial ties - unless there is progress.

Despite his years of captivity, Douglas "Pete" Peterson never set out to become an advocate for POWs.

Peterson was piloting his 67th bombing mission Sept. 10, 1966, when his F-4 Phantom was hit by a surface-to-air missile. After ejecting, he landed in a tree, with injuries to his right arm, shoulder and leg. Captured by local militiamen, Peterson was taken to Hoa Lo prison, known as the Hanoi Hilton.

Denied shoes, adequate food, medical treatment and contact with other American prisoners, he was kept in a 12-by-20 foot cell with a board to sleep on. Torture sessions were regular and brutal. Peterson kept his sanity by focusing on imaginary projects, like building a house.

He was transferred twice during his imprisonment.

Peterson's wife and three children waited three years for word of his fate. Then they saw him on a propaganda film released by Hanoi during Christmas 1969. In a package of his belongings the Air Force sent to Peterson's family, there was a jade bracelet and carved wooden cat that Peterson had intended to give his daughter, Paula Blackburn, after returning from his tour. [...]

Now Peterson has a new challenge-bringing the war that he once submerged in his subconscious to a more satisfying conclusion for the country.

Discussing his motivations for accepting the job with his daughter, Peterson said he "could not be a free man without knowing what happened to the other MIAs [missing in action] who did not come home."

DISCUSSION

1. Were the conditions in which Ambassador Peterson was described as living while a prisoner of war consistent with IHL provisions? (*Cf.* Arts. 22, 25, 26 and 29 of Convention III.) The treatment to which he was subjected? (Arts. 13, 17 (4), 87 (3) and 130 of Convention III and Art. 85 (2) of Protocol I.) Did the family have a right to be notified of his whereabouts and state of health? Did he have a right to receive correspondence? (*Cf.* Arts. 70 and 71 of Convention III.)

2. What responsibilities have States Parties under IHL with regard to prisoners of war and missing - thus, aiding Ambassador Peterson in his first priority of resolving cases of US prisoners of war and those still missing? What action does IHL require of States Parties to the Conventions regarding those missing? (*Cf.* Arts. 15-17 of Convention I, Arts. 118, 120, 122 and 123 of Convention III, Arts. 26 and 136-140 of Convention IV and Arts. 32-34 of Protocol I.)

3. a. Should the US refuse to normalize relations with Vietnam if it believes that full disclosure regarding prisoners of war and those missing has not been made? Even after over twenty years? Would reconciliation perhaps facilitate disclosure? Does reconciliation often depend upon the efforts of former victims? Does reconciliation impact the obligations of States Parties under IHL with respect to prisoners of war and those missing?

   b. Does application and enforcement of IHL provisions depend upon individuals with experiences and insight such as Ambassador Peterson's? Is such an outlook typical of a victim? Does the strength of IHL depend upon such individuals?

XII. NIGERIA

Case No. 103, Nigeria, Operational Code of Conduct

THE CASE

[**Source:** Greene, K., *Crisis and Conflict in Nigeria, A Documentary Sourcebook*, vol. I, 1966-69, pp. 455-457.]

OPERATIONAL CODE OF CONDUCT FOR THE NIGERIAN ARMY

[Footnote 1 reads: Not dated, but issued early in July 1967. Reproduced by courtesy of a Nigerian soldier. The English version promised a translation into Hausa, Ibo, Yoruba, Efik, and Ijaw. Tiv was not mentioned.]

RESTRICTED DIRECTIVE TO ALL OFFICERS AND MEN OF THE ARMED FORCES OF THE FEDERAL REPUBLIC OF NIGERIA ON CONDUCT OF MILITARY OPERATIONS

As your Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, I demand from all officers and men the two most important qualities of a fighting soldier - *loyalty* and *discipline*. Nigerian Armed Forces, especially the Army, have established a very high international reputation for high discipline and fighting efficiency since their establishment until the events of 15th January, 1966 spoilt that reputation. Since then it has become most necessary to demand the highest sense of discipline and patriotism amongst all ranks of the Armed Forces. Success in battle depends to a large extent on this-discipline and loyalty of the officers and men and their sense of patriotism.

2. You are all aware of the rebellion of Lt.-Col. C. Odumegwu-Ojukwu of the East Central State and his clique against the Government of the Federal Republic of Nigeria. In view of this defiance of authority, it has become inescapable to use the force necessary to crush this rebellion. The hardcore of the rebels are Ibos. The officers and men of the minority areas (Calabar, Ogoja and Rivers and even some Ibos) do not support the rebellions acts of Lt.-Col. C. Odumegwu-Ojukwu. During the operations of Federal Government troops against the rebel troops many soldiers and civilians will surrender. You should treat them fairly and decently in accordance with these instructions.

3. You must all bear in mind at all times that other nations in Africa and the rest of the world are looking at us to see how well we can perform this task which the nation demands of us. You must also remember that you are not fighting a war with a foreign enemy. Nor are you fighting a religious war or Jihad. You are only subduing the rebellion of Lt.-Col. Odumegwu-Ojukwu and his clique. You must not do anything that will endanger the future unity of the country. We are in honour bound to observe the rules of the Geneva

Convention in whatever action you will be taking against the rebel Lt.-Col. Odumegwu-Ojukwu and his clique.

4. I direct all officers and men to observe strictly the following rules during operations. (These instructions must be read in conjunction with the Geneva Convention):
   a. Under no circumstances should pregnant women be illtreated or killed.
   b. Children must not be molested or killed. They will be protected and cared for.
   c. Youths and school children must not be attacked unless they are engaged in open hostility against Federal Government Forces. They should be given all protection and care.
   d. Hospitals, hospital staff and patients should not be tampered with or molested.
   e. Soldiers who surrender will not be killed. They are to be disarmed and treated as prisoners of war. They are entitled in all circumstances to humane treatment and respect for their person and their honour.
   f. No property, building, etc, will be destroyed maliciously.
   g. Churches and Mosques must not be desecrated.
   h. No looting of any kind. (A good soldier will never loot).
   i. Women will be protected against any attack on their person, honour and in particular against rape or any form of indecent assault.
   j. Male civilians who are hostile to the Federal Forces are to be dealt with firmly but fairly. They must be humanely treated.
   l. All military and civilians wounded will be given necessary medical attention and care. They must be respected and protected in all circumstances.
   m. Foreign nationals on legitimate business will not be molested, but mercenaries will not be spared: they are the worst of enemies.
5. To be successful in our tasks as soldiers these rules must be carefully observed. I will not be proud of any member of the Armed Forces under my command who fails to observe them. He does not deserve any sympathy or mercy and will be dealt with ruthlessly. You will fight a clean fight, an honourable fight in defence of the territorial integrity of your nation- Nigeria.
6. You must remember that some of the soldiers Lt.-Col. Ojukwu has now forced to oppose you were once your old comrade at arms and would like to remain so. You must therefore treat them with respect and dignity except any one who is hostile to you.

Good luck.

MAJOR-GENERAL YAKUBU GOWON,
Head of the Federal Military Government,
Commander-in-Chief of the Armed Forces
of the Federal Republic of Nigeria.

Note. - To be read and fully explained to every member of the Armed Forces. Sufficient copies will be made available to all members of the Armed Forces and Police. It will be carried by all troops at all times.

DISCUSSION

1. a. On which issues does this Code go beyond Art. 3 common to the Conventions? Beyond Protocol II?

   b. Which issues dealt with in Art. 3 common to the Conventions are not mentioned in this Code? What are the reasons and what possible justifications exist for those omissions? Which issues dealt with in subsequent Protocol II are not contained in this Code?

2. a. Does this Code instruct soldiers to apply IHL of international armed conflicts? Does it provide for prisoner-of-war status for captured rebel soldiers? Does it imply a recognition of belligerency for the rebels?

   b. Is the instruction that mercenaries shall not be spared compatible with today's IHL? Do mercenaries benefit from any protection? Under the law of international armed conflicts? Under Art. 3 common to the Conventions? (*Cf.* Arts. 47 and 75 of Protocol I, Arts. 4 and 5 of Convention IV and Art. 3 common to the Conventions.)

3. Through which factors does this Code try to make sure that it is respected by governmental forces? Do any terms risk undermining its chances of being respected? Do you find its language appropriate?

4. Do you see any reason why this Code is labeled "restricted"? Do you see any reasons for instructions on the implementation of IHL not to be known to the enemy?

Case No. 104, Nigeria, Pius Nwaoga v. The State

THE CASE

[**Source:** *ILR*, 1972, pp. 494-497.]

PIUS NWAOGA v. THE STATE

Nigeria, Supreme Court
March 3, 1972

[...]

The appellant was charged with another, for the murder on 20th day of July, 1969, at Ibagwa Nike, of Robert Ngwu. He was convicted and sentenced to death whilst the 2nd accused was discharged. This is an appeal from the conviction.

The incident which led up to the killing of the deceased happened during the civil war in the country. The appellant joined the rebel forces known as Biafran Army. He joined as a private and later become a lieutenant. He was attached to the

BOFF (Biafran Organisation of Freedom Fighters). He was deployed to Nike and at the time Nike was in the hands of the Federal troops.

The deceased was also a soldier in the rebel forces; he and the appellant were both natives of Ibagwa Nike and well-known to each other. Before July 1969, the appellant was posted in command of a rebel company to a town called Olo, near Ibagwa Nike, with the operational headquarters of his brigade at Atta. In July 1969, the appellant was summoned to Atta. There he was instructed to lead Lieutenant Ngwu and Lieutenant Ndu to Ibagwa Nike and to point out the deceased to them. He was told that as he knew the area well and also knew the deceased, his duty was to identify the deceased to the two lieutenants who would eliminate him. His offence was that the deceased was given 800£ to re-open and operate the Day Spring Hotel in Enugu for the benefit of the members of the BOFF, but he had diverted the money to the operation of his contract business and had indeed undertaken a contract with the Federal Government to carry out repairs to the Enugu Airfield which had been damaged by rebel aircraft. [...]

[...] we direct our minds to the following facts.

1. That the appellant and those with him were rebel officers.
2. That they were operating inside the Federal Territory as the evidence shows that the area was in the hands of the Federal Government and Federal Army.
3. That the appellant and those with him were operating in disguise in the Federal Territory, as saboteurs.
4. That the appellant and those with him were not in the rebel army uniform but were in plain clothes, appearing to be members of the peaceful private population.

On these facts, if any of these rebel officers, as indeed the appellant did, commits an act which is an offence under the Criminal Code, he is liable for punishment, just like any civilian would be, whether or not he is acting under orders.

We are fortified in this view by a passage from Oppenheim's International Law, 7th Edition, Volume II, at page 575, dealing with War Treason, which says:

"Enemy soldiers in contradistinction to private enemy individuals-may only be punished for such acts when they have committed them during their stay within a belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge, they may not, when caught, be punished for 'war treason', because their act was one of legitimate warfare. But if they exchanged their uniforms for plain clothes, and thereby appear to be members of the peaceful private population, they are liable to punishment."

In the foot-note under this paragraph, Oppenheim refers to a remarkable case during the Russo-Japanese War in 1904, where two Japanese officers disguised in Chinese clothes were caught attempting to destroy with dynamite a railway bridge in Manchuria. They were tried, found guilty and shot.

We apply the above case to the matter before us. To our mind, deliberate and intentional killing of an unarmed person living peacefully inside the Federal Territory as in this case is a crime against humanity, and even if committed

during a civil war is in violation of the domestic law of the country, and must be punished.

In the event, the conviction of the appellant is upheld and this appeal is dismissed.

[Report: [1972] 1 All Nigeria Law Reports (Part 1), p. 149.]

DISCUSSION

1. Does the court qualify the civil war in Nigeria? Does it apply IHL of international armed conflicts to the case?
2. Did the order to execute the deceased and its execution by the accused as such violate IHL of non-international armed conflicts? IHL of international armed conflicts? (*Cf.* Art. 3 (1) common to the Conventions, Art. 23 (b) of the Hague Regulations and Art. 51 (2) of Protocol I.)
3. Did the way the execution was carried out violate IHL of international armed conflicts? IHL of non-international armed conflicts? Would your answer be different if the execution had been carried out in rebel-controlled territory? If the accused wore a uniform? (*Cf.* Art. 1 of the Hague Regulations, Art. 4 (A) of Convention III and Arts. 43, 44 and 46 of Protocol I.)

XIII. INDO-PAKISTANI CONFLICT

Case No. 105, Bangladesh/India/Pakistan, 1974 Agreement

THE CASE

[**Source:** *ILM*, vol. 74, 1974, pp. 501-505.]

BANGLADESH - INDIA - PAKISTAN: AGREEMENT ON THE REPATRIATION OF PRISONERS OF WAR AND CIVILIAN INTERNEES [Done at New Delhi, April 9, 1974]

BANGLADESH, INDIA, PAKISTAN, AGREEMENT SIGNED IN NEW DELHI ON APRIL 9, 1974

[...]

3. The humanitarian problems arising in the wake of the tragic events of 1971 constituted a major obstacle in the way of reconciliation and normalisation among the countries of the sub-continent. In the absence of recognition, it was not possible to have tripartite talks to settle the humanitarian problems as Bangladesh could not participate in such a meeting except on the basis of sovereign equality. [...]

4. On April 17, 1973, India and Bangladesh [...] jointly proposed that the problem of the detained and stranded persons should be resolved on humanitarian considerations through simultaneous repatriation of all such persons except those Pakistani prisoners of war who might be required by the Government of Bengladesh for trial on certain charges.

5. Following the Declaration there were a series of talks between India and Bangladesh and India and Pakistan. These talks resulted in an agreement at Delhi on August 28, 1973 between India and Pakistan with the concurrence of Bangladesh which provided for a solution of the outstanding humanitarian problems.

6. In pursuance of this Agreement, the process of three-way repatriation commenced on September 19, 1973. So far nearly 300'000 persons have been repatriated which has generated an atmosphere of reconciliation and paved the way for normalisation of relations in the sub-continent.

7. In February 1974, recognition took place thus facilitating the participation of Bangladesh in the tripartite meeting envisaged in the Delhi Agreement, on the basis of sovereign equality. Accordingly, His Excellency Dr. Kamal Hossain, Foreign Minister of the Government of Bangladesh, His Excellency Sardar Swaran Singh, Minister of External Affairs, Government of India and His Excellency Mr. Aziz Ahmed, Minister of State for Defence and Foreign Affairs of the Government of Pakistan, met in New Delhi from April 5 to April 9,

1974 and discussed the various issues mentioned in the Delhi Agreement, in particular the question of the 195 prisoners of war and the completion of the three-way process of repatriation involving Bangalees in Pakistan, Pakistanis in Bangladesh and Pakistani prisoners of war in India. [...]

9. The Ministers also considered steps that needed to be taken in order expeditiously to bring the process of the three-way repatriation to a satisfactory conclusion.

10. The Indian side stated that the remaining Pakistani prisoners of war and civilian internees in India to be repatriated under the Delhi Agreement, numbering approximately 6,500, would be repatriated at the usual pace of a train on alternate days. [...] It was thus hoped that the repatriation of prisoners of war would be completed by the end of April, 1974.

11. The Pakistan side stated that the repatriation of Bangladesh nationals from Pakistan was approaching completion. The remaining Bangladesh nationals in Pakistan would also be repatriated without let or hindrance.

12. In respect of non-Bangalees in Bangladesh, the Pakistan side stated that the Government of Pakistan had already issued clearances for movement to Pakistan in favour of those non-Bangalees who were either domiciled in former West Pakistan, were employees of the Central Government and their families or were members of the divided families, irrespective of their original domicile. The issuance of clearances to 25,000 persons who constitute hardship cases was also in progress. The Pakistan side reiterated that all those who fall under the first three categories would be received by Pakistan without any limit as to numbers. In respect of persons whose application had been rejected, the Government of Pakistan would, upon request, provide reasons why any particular case was rejected. Any aggrieved applicant could, at any time, seek a review of his application provided he was able to supply new facts or further information to the Government of Pakistan in support of his contention that he qualified in one or other of the three categories. The claims of such persons would not be time-barred. In the event of the decision of review of a case being adverse the Governments of Pakistan and Bangladesh might seek to resolve it by mutual consultation.

13. The question of 195 Pakistani prisoners of war was discussed by the three Ministers, in the context of the earnest desire of the Governments for reconciliation, peace and friendship in the sub-continent. The Foreign Minister of Bangladesh stated that the excesses and manifold crimes committed by these prisoners of war constituted, according to the relevant provisions of the U.N. General Assembly Resolutions and International Law, war crimes, crimes against humanity and genocide, and that there was universal consensus that persons charged with such crimes as the 195 Pakistani prisoners of war should be held to account and subjected to the due process of law. The Minister of State for Defence and Foreign Affairs of the Government of Pakistan said that his Government condemned and deeply regretted any crimes that may have been committed.

14. In this connection the three Ministers noted that the matter should be viewed in the context of the determination of the three countries to continue

resolutely to work for reconciliation. The Ministers further noted that following recognition, the Prime Minister of Pakistan had declared that he would visit Bangladesh in response to the invitation of the Prime Minister of Bangladesh and appealed to the people of Bangladesh to forgive and forget the mistakes of the past, in order to promote reconciliation. Similarly, the Prime Minister of Bangladesh had declared with regard to the atrocities and destruction committed in Bangladesh in 1971 that he wanted the people to forget the past and to make a fresh start, stating that the people of Bangladesh knew how to forgive.

15. In the light of the foregoing and, in particular, having regard to the appeal of the Prime Minister of Pakistan to the people of Bangladesh to forgive and forget the mistakes of the past, the Foreign Minister of Bangladesh stated that the Government of Bangladesh had decided not to proceed with the trials as an act of clemency. It was agreed that the 195 prisoners of war may be repatriated to Pakistan along with the other prisoners of war now in the process of repatriation under the Delhi Agreement. [...]

DISCUSSION

1. a. When should the prisoners of war have been repatriated under IHL? Was there a need for an agreement between the parties to implement this repatriation? Was the absence of recognition of Bangladesh by Pakistan under IHL an obstacle to the repatriation of the prisoners of war? (*Cf.* Art. 118 of Convention III.)

   b. Had Bangladesh the right not to repatriate prisoners of war who were charged with grave breaches of IHL? Is its decision "not to proceed with the trials as an act of clemency" compatible with its IHL obligation to prosecute or extradite persons alleged to have committed grave breaches? (*Cf.* Art. 119 (5) of Convention III, Arts. 49/50/129/146 and 51/52/131/148 respectively of the four Conventions.)

2. When should the civilian internees have been repatriated under IHL? Was there a need for an agreement between the parties to implement this repatriation? Was the absence of recognition of Bangladesh by Pakistan under IHL an obstacle to the repatriation of the civilian internees? (*Cf.* Arts. 133 and 134 of Convention IV and Art. 85 (4) (b) of Protocol I.)

3. a. Had non-Bangalees in Bangladesh the right to leave Bangladesh? Those domiciled in former West-Pakistan? Those employed by the Central Government of Pakistan? Those who were members of divided families? (*Cf.* Arts. 26, 35 and 134 of Convention IV.)

   b. Had Pakistan an obligation to accept the repatriation of non-Bangalees from Bangladesh who were domiciled in former West-Pakistan? Those who were employees of the Central Government of Pakistan? Those who were members of divided families? Was there a need for an agreement concerning those repatriations? (*Cf.* Arts. 26, 35 and 134 of Convention IV.)

XIV. Israeli-Arab Conflict

[N.B.: The relatively high number of cases examined in this part of the book reflects both:
a) the variety of legal problems raised during the successive conflicts that have occured in the region, and
b) the unparalleled role played by Israeli courts in the interpretation of IHL.]

Document No. 106, ICRC Appeals on the Near East

A. October 1973 Appeal

[**Source:** IRRC, no. 152, 1973, pp. 583-583.]

Appeals to belligerents

On 9 October 1973, the ICRC issued the following appeal on behalf of the civilians to the parties to the conflict:

> *The International Committee of the Red Cross is extremely concerned at the extent of the new outbreak of violence in the Middle East and especially at its effects in densely populated areas. This tragic turn of events, confirmed by reliable sources and by the protests which it has received from various parties to the conflict, has lead the ICRC to repeat its pressing overtures of twenty-four hours previously to the Governments involve, urging them to abide by the four Geneva Conventions of 12 August 1949. It stresses the necessity of sparing the civilian population in all circumstances.*

On 11 October, in view of the alarming news reaching it on the plight of the civilian population, the ICRC urged all the belligerents (Iraq, Israel, Arab Republic of Egypt and Syrian Arab Republic) to observe forthwith the provisions of Part IV ("Civilian Populations") of the draft Additional Protocol to the Geneva Conventions of 12 August 1949 for the protection of victims of international armed conflicts, in particular Article 46 ("Protection of the Civilian Population"), Article 47 ("General Protection of Civilian Objects") and Article 59 ("Precautions in Attack"). [Corresponding respectively to Articles 51, 52 and 57 of Protocol I of 1977.]

The Government of the Syrian Arab Republic and Iraq replied favourably to the ICRC, as did the Government of the Arab Republic of Egypt, the latter provided that Israel did the same.

Israel replied thus on 19 October: "In response to the ICRC appeal, the Government of Israel states that it has strictly respected and will continue to so to respect the provisions of public international law which prohibit attacks on civilians and civilian objects."

As the ICRC considered that this statement did not answer the question it had asked, on 1 November the Government of Israel - through Mr. R. Kidron, *Political Advisor to the Minister for Foreign Affaires* - supplemented its reply as follows:

> "As you are aware following the extensive conversations which we held on 30 and 31 October, the Government of Israel was both surprised and

disappointed by the negative ICRC reaction to its statement. I explained that the ICRC proposal was examined in Jerusalem with the utmost seriousness and attention, and that the statement reproduced above was formulated after most careful consideration.

However, in order to remove any doubts as to its attitude on this matter, I am instructed to state that it is the view of the Government of Israel that the statement of its position transmitted to the ICRC on 19 October 1973 includes and goes well beyond the obligations of Articles 46, 47 and 50 of the Draft Additional Protocol mentioned in the ICRC note of 11 October 1973 in that it comprises the entire body of public international law, both written and customary, relative to the protection of civilians and civilian objects from attack in international armed conflicts.

I trust that this explanation of my Government's position will be accepted by the ICRC in the positive spirit in which it is made, and that the record will be corrected accordingly."

B. November 2000 Appeal

[**Source:** ICRC, Press Release 00/42, 21 November 2000; available on http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JQRF]

ICRC appeal to all involved in violence in the Near East

Geneva (ICRC) - The International Committee of the Red Cross (ICRC) is extremely concerned about the consequences in humanitarian terms of the persisting violence in the Near East. Since the end of September, the ICRC has repeatedly called upon all those involved in the violence to observe the restraints imposed by international humanitarian law and its underlying principles and, in particular, to ensure respect for civilians, for the wounded, for medical personnel and for those who are no longer taking part in the hostilities. To date, the intense clashes have left more than 200 people dead and thousands wounded. The ICRC is particularly worried about the large number of casualties among unarmed civilians and even children during clashes and the high proportion of wounds caused by live ammunition and rubber or plastic-coated bullets.

In the context of the Palestinian uprising against Israel as the Occupying Power, the ICRC stresses the fact that the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War remains fully applicable and relevant.

The ICRC once more reminds all those taking an active part in the violence that whenever force is used the choice of means and methods is not unlimited. It reiterates its appeal to all those involved in the violence or in a position to influence the situation to respect and to ensure respect for international humanitarian law and its underlying principles in all circumstances. Terrorist acts are absolutely and unconditionally prohibited, as are reprisals against the civilian population, indiscriminate attacks and attacks directed against the civilian population.

To avoid endangering the civilian population, those bearing weapons and all those who take part in violence must distinguish themselves from civilians. Armed

and security forces must spare and protect all civilians who are not or are no longer taking part in the clashes, in particular children, women and the elderly. The use of weapons of war against unarmed civilians cannot be authorized.

The wounded and sick must be collected and cared for regardless of the party to which they belong. Ambulances and members of the medical services must be respected and protected. They must be allowed to circulate unharmed so that they can discharge their humanitarian duties. All those who take part in the confrontations must respect the medical services, whether deployed by the armed forces, civilian facilities, the Palestine Red Crescent Society or the *Magen David Adom* in Israel.

To date, dozens of Palestine Red Crescent ambulances and many of its staff have come under fire while conducting their medical activities in the occupied territories. Ambulances belonging to the *Magen David Adom* have also been attacked. The ICRC once again calls on all those involved in the violence to respect medical personnel, hospitals and other medical establishments, and also ambulances, other medical transports and supplies.

Any misuse of the emblems protecting the medical services is a violation of international humanitarian law and puts the personnel working under those emblems at risk. The ICRC calls on all persons involved in violence to refrain from misuse of the protective emblems and calls on all the authorities concerned to prevent or repress such practices.

All persons arrested must be respected and protected against any form of violence. The detaining authority must authorize the ICRC to have access to such persons, wherever they may be, so that its delegates may ascertain their well-being and forward news to their families.

The ICRC is increasingly concerned by the consequences in humanitarian terms of the presence of Israeli settlements in the occupied territories, which is contrary to the Fourth Geneva Convention, and by the effects of curfews and the sealing-off of certain areas by the Israeli Defense Forces. As an Occupying Power, Israel may restrict the freedom of movement of the resident population, but only when and in so far as military necessity so dictates. Restrictions on movement by means of curfews or the sealing-off of areas may in no circumstances amount to collective penalties, nor should they severely hinder the daily life of the civilian population or have dire economic consequences. Moreover, the Occupying Power has the duty to ensure an adequate level of health care, including free access to hospitals and medical services, and may not obstruct the circulation of food supplies. All institutions devoted to the care and education of children must be allowed to function normally. Religious customs must be respected, which implies access to places of worship to the fullest extent possible.

Lastly, the ICRC calls upon the authorities concerned and all those involved in the violence to facilitate the work of the volunteers of the Palestine Red Crescent Society, the *Magen David Adom* in Israel, its own delegates and those of the International Federation. Despite tremendous difficulties, these volunteers and delegates have worked tirelessly to bring assistance to the victims of the clashes, often at great risk to their own lives.

C. ICRC Declaration of 5 December 2001

[**Source:** Official Statement of the International Committee of the Red Cross, made at the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, available on http://www.icrc.org/eng]

Statement by the International Committee of the Red Cross, Geneva, 5 December 2001

1. Pursuant to the relevant provisions of international humanitarian law and to the mandate conferred on it by the States party to the 1949 Geneva Conventions, the International Committee of the Red Cross (ICRC) established a permanent presence in Israel, the neighbouring Arab countries and the occupied territories in 1967 with a view to carrying out its humanitarian tasks in the region and to working for the faithful application of international humanitarian law.

2. In accordance with a number of resolutions adopted by the United Nations General Assembly and Security Council and by the International Conference of the Red Cross and Red Crescent, which reflect the view of the international community, the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem. This Convention, ratified by Israel in 1951, remains fully applicable and relevant in the current context of violence. As an Occupying Power, Israel is also bound by other customary rules relating to occupation, expressed in the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907.

3. In general terms, the Fourth Geneva Convention protects the civilian population of occupied territories against abuses on the part of an Occupying Power, in particular by ensuring that it is not discriminated against, that it is protected against all forms of violence, and that despite occupation and war it is allowed to live as normal a life as possible, in accordance with its own laws, culture and traditions. While humanitarian law confers certain rights on the Occupying Power, it also imposes limits on the scope of its powers. Being only a temporary administrator of occupied territory, the Occupying Power must not interfere with its original economic and social structures, organization, legal system or demography. It must ensure the protection, security and welfare of the population living under occupation. This also implies allowing the normal development of the territory, if the occupation lasts for a prolonged period of time.

4. More precisely, the Fourth Geneva Convention sets out rules aimed at safeguarding the dignity and physical integrity of persons living under occupation, including detainees. It prohibits all forms of physical and mental ill-treatment and coercion, collective punishment, and reprisals against protected persons or property. It also prohibits the transfer of parts of the Occupying Power's civilian population into the occupied territory, forcible transfer or deportation of protected persons from the occupied territory, and destruction of real or personal property, except when such destruction is rendered absolutely necessary by military operations.

5. In the course of its activities in the territories occupied by Israel, the ICRC has repeatedly noted breaches of various provisions of international humanitarian

law, such as the transfer by Israel of parts of its population into the occupied territories, the destruction of houses, failure to respect medical activities, and detention of protected persons outside the occupied territories. Certain practices which contravene the Fourth Geneva Convention have been incorporated into laws and administrative guidelines and have been sanctioned by the highest judicial authorities. While acknowledging the facilities it has been granted for the conduct of its humanitarian tasks, the ICRC has regularly drawn the attention of the Israeli authorities to the suffering and the heavy burden borne by the Palestinian population owing to the occupation policy and, in line with its standard practice, has increasingly expressed its concern through bilateral and multilateral representations and in public appeals. In particular, the ICRC has expressed growing concern about the consequences in humanitarian terms of the establishment of Israeli settlements in the occupied territories, in violation of the Fourth Geneva Convention. The settlement policy has often meant the destruction of Palestinian homes, the confiscation of land and water resources and the parcelling out of the territories. Measures taken to extend the settlements and to protect the settlers, entailing the destruction of houses, land requisitions, the sealing-off of areas, roadblocks and the imposition of long curfews, have also seriously hindered the daily life of the Palestinian population. However, the fact that settlements have been established in violation of the provisions of the Fourth Geneva Convention does not mean that civilians residing in those settlements can be the object of attack. They are protected by humanitarian law as civilians as long as they do not take an active part in fighting.

6. The ICRC has also drawn the attention of the Israeli authorities to the effects of prolonged curfews and the sealing-off of certain areas by the Israel Defense Forces. The resulting restrictions on movements have disastrous consequences for the entire Palestinian population. They hamper the activities of emergency medical services as well as access to health care, workplaces, schools and places of worship, and have a devastating effect on the economy. They also prevent, for months on end, Palestinian families from visiting relatives detained in Israel. The concern caused by these practices has grown considerably during the past 14 months as measures taken to contain the upsurge of violence have led to a further deterioration in the living conditions of the population under occupation.

7. The ICRC has reminded all those taking part in the violence that whenever armed force is used the choice of means and methods employed is not unlimited. Today, in view of the sharp increase in armed confrontations, the ICRC has to stress that Palestinian armed groups operating within or outside the occupied territories are also bound by the principles of international humanitarian law. Apart from the Fourth Geneva Convention, which relates to the protection of the civilian population, there are other universally accepted rules and principles of international humanitarian law that deal with the conduct of military operations. They stipulate in particular that only military objectives may be attacked. Thus indiscriminate attacks, such as bomb attacks by Palestinian individuals or armed groups against Israeli civilians, and acts intended to spread terror among the civilian population are absolutely and unconditionally prohibited. The same applies to targeted attacks on and the killing of Palestinian individuals by the Israeli authorities while those individuals

are not directly taking part in the hostilities or immediately endangering human life. Reprisals against civilians and their property are also prohibited. When a military objective is targeted, all feasible precautions must be taken to minimize civilian casualties and damage to civilian property. To avoid endangering the civilian population, those bearing weapons and those taking part in armed violence must distinguish themselves from civilians.

8. Demonstrations against the occupying forces by the civilian population under occupation or stand-offs between them are not acts of war. They should therefore not be dealt with by military methods and means. When faced with the civilian population, Israeli forces must exercise restraint: any use of force must be proportionate, all necessary precautions must be taken to avoid casualties, and the lethal use of firearms must be strictly limited to what is unavoidable as an immediate measure to protect life.

9. Access to emergency medical services for all those in need is also of paramount importance in the current situation. Such access must not be unduly delayed or denied. Ambulances and medical personnel must be allowed to move about unharmed and must not be prevented from discharging their medical duties. All those taking part in the violence must respect and assist the medical services, whether deployed by the armed forces, civilian organizations, the Palestine Red Crescent Society, the Magen David Adom, the ICRC, the International Federation of Red Cross and Red Crescent Societies or other humanitarian organizations.

10. Article 1 common to the four Geneva Conventions stipulates that the "High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances". This conference is to be viewed within that context. The ICRC has always welcomed all individual and joint efforts made by States party to the Geneva Conventions to fulfil this obligation and ensure respect for international humanitarian law. These efforts are all the more vital as violations of humanitarian law are far too common around the globe.

11. The means used to meet these legal and political responsibilities are naturally a matter to be decided upon by States. Whatever the means chosen, however, the ICRC wishes to emphasize that any action States may decide to take at international level must be aimed at achieving practical results and at ensuring application of and compliance with international humanitarian law, in the interests of the protected population.

12. Beyond all legal considerations and in view of the current humanitarian situation, the ICRC again calls upon all parties concerned to make every possible effort to spare civilian lives and preserve a measure of humanity.

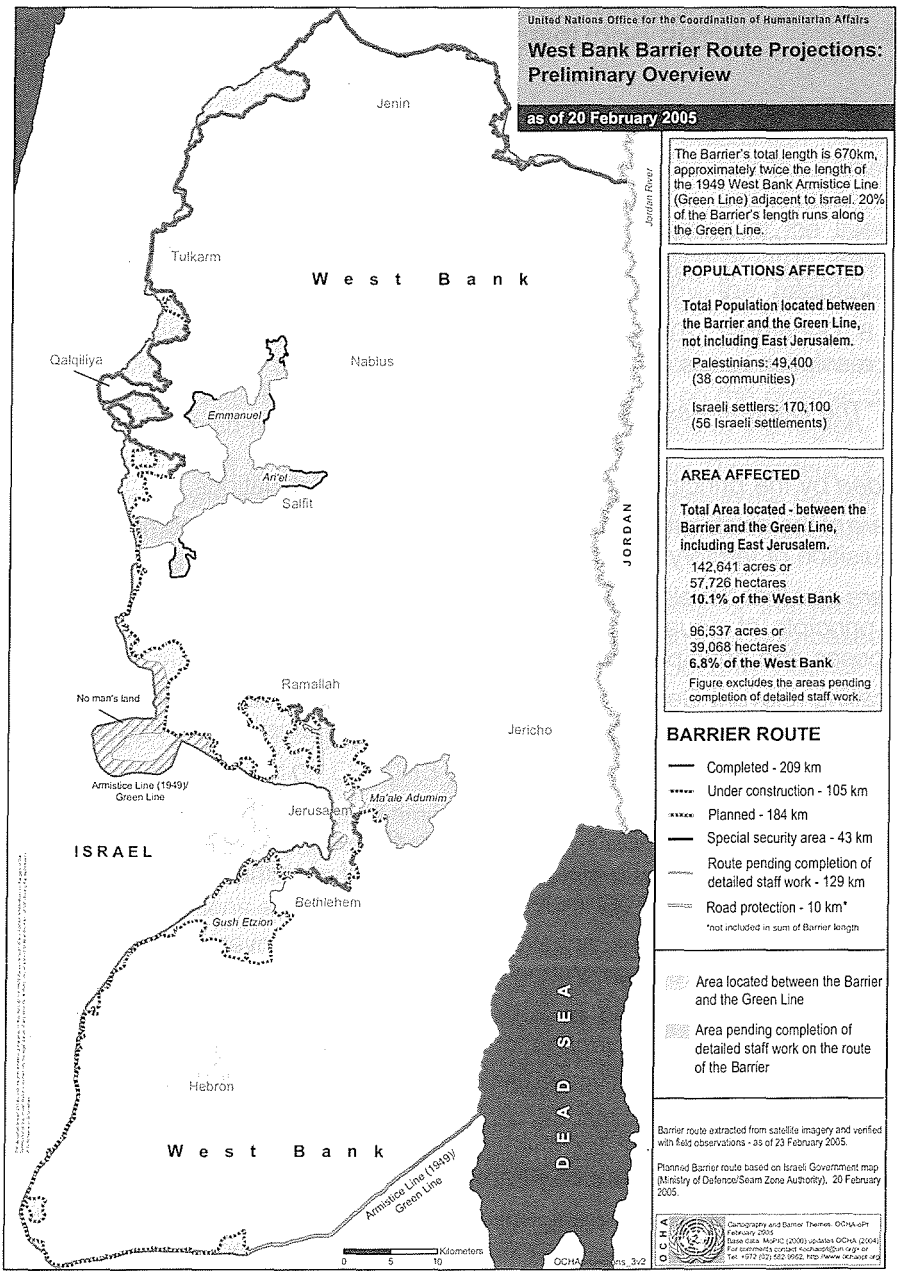
13. For its part, the ICRC will continue to do its utmost to assist and protect all victims in accordance with its mandate and with the principles of neutrality, impartiality and independence which govern its humanitarian work. It counts on the full support of the parties concerned in promoting compliance with the humanitarian rules and facilitating humanitarian activities, which may also help pave the way towards the establishment of peace between all peoples and nations in the region.

14. The steady deterioration of the humanitarian situation over the last few months and, in particular, the tragic events of the past few days have highlighted the need to break the spiral of violence and restore respect for international humanitarian law.

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory

THE CASE

[N.B.: This map was created by the UN Office for the Coordination of Humanitarian Affairs (OCHA) in February 2005; see online: http://domino.un.org/unispal.nsf.]



A. ICJ, Legal Consequences of the Construction of a Wall

[**Source:** Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 9 July 2004, http://www.icj-cij.org.]

INTERNATIONAL COURT OF JUSTICE, 9 JULY 2004, LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

[...]

ADVISORY OPINION

[...]

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. [...] The resolution reads as follows:

"*The General Assembly,*

[...]

Guided by the principles of the Charter of the United Nations,

Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,

Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,

[...]

Reaffirming the applicability of the Fourth Geneva Convention [...] as well as Additional Protocol I to the Geneva Conventions [...] to the Occupied Palestinian Territory, including East Jerusalem,

Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907 [...],

Welcoming the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

Recalling in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are

illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

Recalling relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

Gravely concerned also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

Welcoming the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 [E/CN.4/2004/6], in particular the section regarding the wall,

Affirming the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

Having received with appreciation the report of the Secretary-General, submitted in accordance with resolution ES-10/13 [A/ES-10/248],

Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

[...]

67. As explained in paragraph 82 below, the "wall" in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel ("fence") or by the Secretary-General ("barrier"), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built "in the Occupied Palestinian Territory, including in and around East Jerusalem". As also explained below (see paragraphs 78-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

[...]

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which "*Recommends* to the United Kingdom ... and to all other Members of the United Nations the adoption and implementation ... of the Plan of Partition" of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. [...] [G]eneral armistice agreements were concluded in 1949 between Israel and the neighbouring States [...]. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the "Green Line" owing to the colour used for it on maps; hereinafter the "Green Line"). [...] It was agreed in Article VI, [...] that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto". [...]

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the "Withdrawal of Israel armed forces from territories occupied in the recent conflict", and "Termination of all claims or states of belligerency".

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions "the principle that acquisition of territory by military conquest is inadmissible", condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

> "all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status".

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the "complete and united" capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void". It further decided "not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem".

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States "with reference to the boundary definition under the Mandate as is shown in Annex I (a) ... without prejudice to the status of any territories that came under Israeli military government control in 1967" (Article 3, paragraphs 1 and 2). [...]

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907"), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and

Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

[...]

80. The report of the Secretary-General states that "The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank ..." (Para. 4.) According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a "security fence", 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a "continuous fence" in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that "fence" for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank [...]. [...]

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

[...]

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu'man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities. [...]

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:
(1) a fence with electronic sensors;
(2) a ditch (up to 4 metres deep);
(3) a two-lane asphalt patrol road;
(4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
(5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. "Depth barriers" may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned,

another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a "Closed Area". Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

[...]

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared "to revise the general laws and customs of war" existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the "rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war" [...]. The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns "Military authority over the territory of the hostile State", is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled "Summary Legal Position of the Government of Israel", it is stated that Israel does not agree that the Fourth Geneva Convention "is applicable to the occupied Palestinian Territory", citing "the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt" and inferring that it is "not a territory of a High Contracting Party as required by the Convention".

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it "[was] not as a depositary in a position to decide whether" "the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede" *inter alia* to the Fourth Geneva Convention "can be considered as an instrument of accession".

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

[the Court reproduces the text of common Article 2 to the Conventions]

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that: "the Military Court ... must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail."

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the

Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 ... leaves the meaning ambiguous or obscure; or ... leads to a result which is manifestly obscure or unreasonable." [...]

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention's *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, "ICRC") in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict "whether [it] is or is not recognized as a state of war by the parties" and "in cases of occupation of territories in the absence of any state of war" (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-*

26 April 1947, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the "applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be "recognized and respected at all times" by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. [...]

99. The Security Council, for its part, [...] [i]n resolution 446 (1979) of 22 March 1979, [...] affirmed "*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". [...]

On 20 December 1990, the Security Council, in resolution 681 (1990), urged "the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention ... to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention". It further called upon "the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof".

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

"The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 ... and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949."

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories

102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

"4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

[...]

105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil and Political Rights. In those proceedings certain States had argued that "the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict" (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

[The Court reproduces para. 25 of the Nuclear Weapons Advisory Opinion - *see* **Case No. 46**, p. 896.]

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, [...]."

This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero* v. *Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons

residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes*, A/2929, Part II, Chap. V, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question "whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction" for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that "the Covenant and similar instruments did not apply directly to the current situation in the occupied territories" (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed "to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein" (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position, to the effect that "the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza...", the Committee reached the following conclusion:

> "in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law" (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. [...].

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided "statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories". The Committee noted that, according to Israel, "the Palestinian population within the same jurisdictional areas were

excluded from both the report and the protection of the Covenant" (E/C.12/1/Add. 27, para. 8). [...] its concern in this regard [...]. [...] In view of these observations, the Committee reiterated its concern about Israel's position and reaffirmed "its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control" (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the ... Convention to each child within their jurisdiction ... ". That Convention is therefore applicable within the Occupied Palestinian Territory.

114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

115. In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. [...] In this connection, it was in particular emphasized that "The route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli settlements" illegally established on the Occupied Palestinian Territory. [...]

116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29) [...] emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement". [...]

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). [...]

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in issue. [...]

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the "Closed Area" (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and:

> "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories" (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories" as a "flagrant violation" of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. [...] In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

123. The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with "means of injuring the enemy, sieges, and bombardments". Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 *(g)* of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to "take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country". Article 46 adds that private property must be "respected" and that it cannot "be confiscated". Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

[Here the Court reproduces the text of Article 6]

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention.

[Here the Court reproduces the text of the aforementioned Articles]

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

"Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

[...]

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

Mention must also be made of Article 12, paragraph 1, which provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account

must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. [...] In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, "Each party will provide freedom of access to places of religious and historical significance."

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, "Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m." (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled "Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine", E/CN.4/2004/6, 8 September 2003, para. 9).

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian

People and Other Arabs of the Occupied Territories "an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank's most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus grows and hothouses upon which tens of thousands of Palestinians rely for their survival" (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region" and adds that "Many fruit and olive trees had been destroyed in the course of building the barrier." (E/CN.4/2004/6, 8 September 2003, para. 9.) The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall "cuts off Palestinians from their agricultural lands, wells and means of subsistence" (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, "The Right to Food", Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggravated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services." (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that "By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources)." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that "With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which "the security of the population or imperative military reasons so demand". This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception "where such destruction is rendered absolutely necessary by military operations".

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the International Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

> "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result" (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be "solely for the purpose of promoting the general welfare in a democratic society".

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)". More specifically, Israel's Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter"; the Security Council resolutions referred to, he continued, "have clearly recognized the right of States to use force in self-defence against terrorist attacks", and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; [...]). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

[...]

147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation [...]

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms: "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in

kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Factory at Chorzòw, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

[...]

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'...", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention [...] provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention [...] are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

[...]

163. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one

Decides to comply with the request for an advisory opinion

[...]

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

[...]

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

[...]

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

[...]

D. By thirteen votes to two

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention [...] have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

[...]

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

[...]

SEPARATE OPINION OF JUDGE KOOIJMANS

[...]

I. INTRODUCTORY REMARKS

1. I have voted in favour of all paragraphs of the operative part of the Advisory Opinion with one exception, viz. subparagraph (3) (D) dealing with the legal consequences for States.

   I had a number of reasons for casting that negative vote which I will only briefly indicate at this stage, since I will come back to them when commenting on the various parts of the Opinion.

   My motives can be summarized as follows:

[...]

And, third, I find the Court's conclusions as laid down in subparagraph (3) (D) of the *dispositif* rather weak; apart from the Court's finding that States are under an obligation "not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]" (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body's findings should have a direct bearing on the addressee's behaviour; neither the first nor the last part of operative subparagraph (3) (D) meets this requirement.

[...]

9. [...] If it is correct that the Government of Israel claims that the Fourth Geneva Convention is not applicable *de jure* in the West Bank since that territory had not previously to the 1967 war been under Jordanian sovereignty, that argument already fails since a territory, which by one of the parties to an armed conflict is claimed as its own and is under its control, is - once occupied by the other party - by definition occupied territory of a *High Contracting Party* in the sense of the Fourth Geneva Convention (emphasis added). And both Israel and Jordan were parties to the Convention.

[...]

V. MERITS

[...]

34. *Proportionality* - The Court finds that the conditions set out in the qualifying clauses in the applicable humanitarian law and human rights conventions have not been met and that the measures taken by Israel cannot be justified by military exigencies or by requirements of national security or public order (paras. 135-137). I agree with that finding but in my opinion the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. And in my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.

35. *Self-defence* - Israel based the construction of the wall on its inherent right of self-defence as contained in Article 51 of the Charter. In this respect it relied on Security Council resolutions 1368 (2001) and 1373 (2001), adopted after the terrorist attacks of 11 September 2001 against targets located in the United States.

The Court starts its response to this argument by stating that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State (para. 139). Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point. Resolutions 1368 and 1373 recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51

since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.

36. The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self-defence can be found in the second part of paragraph 139. The right of self-defence as contained in the Charter is a rule of international law and thus relates to *international* phenomena. Resolutions 1368 and 1373 refer to acts of international terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel.

IV. LEGAL CONSEQUENCES

[...]

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. That Article reads:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. (Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.)
>
> 2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."

[...]

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states "What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches." And paragraph 2 refers to "co-operation ... in the framework of a competent international organization, in particular the United Nations". Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court's finding in operative sub-paragraph (3) (E) and not in subparagraph (3) (D).

43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which - virtually without exception - take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial of the right of self-determination", the annexation of Manchuria by Japan and of Kuwait by Iraq, South-Africa's claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (res. ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.

45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 56, para. 125).

46. Finally, I have difficulty in accepting the Court's finding that the States parties to the Fourth Geneva Convention are under an obligation to ensure compliance by Israel with humanitarian law as embodied in that Convention (para. 159, operative subparagraph (3) (D), last part).

In this respect the Court bases itself on common Article 1 of the Geneva Convention which reads: "The High Contracting Parties undertake to respect and *to ensure respect* for the present Convention in all circumstances." (Emphasis added.)

47. The Court does not say on what ground it concludes that this Article imposes obligations on third States not party to a conflict. The *travaux préparatoires* do not support that conclusion. According to Professor Kalshoven, who investigated thoroughly the genesis and further development of common Article 1, it was mainly intended to ensure respect of the conventions by the population as a whole and as such was closely linked to common Article 3 dealing with internal conflicts (F. Kalshoven, "The Undertaking to Respect

and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit" in *Yearbook of International Humanitarian Law*, Vol. 2 (1999), p. 3-61). His conclusion from the *travaux préparatoires* is:

> "I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of government delegates that one might ever wish to read into the phrase 'to ensure respect' any undertaking by a contracting State other than an obligation to ensure respect for the Conventions by its people 'in all circumstances'." (*Ibid.*, p. 28.)

48. Now it is true that already from an early moment the ICRC in its (non-authoritative) commentaries on the 1949 Convention has taken the position that common Article 1 contains an obligation for all States parties to ensure respect by other States parties. It is equally true that the Diplomatic Conference which adopted the 1977 Additional Protocols incorporated common Article 1 in the First Protocol. But at no moment did the Conference deal with its presumed implications for third States.

49. Hardly less helpful is the Court's reference to common Article 1 in the *Nicaragua* case. The Court, without interpreting its terms, observed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". The Court continued that "The United States [was] thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua" to act in violation of common Article 3 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986,* p. 114, para. 220).

But this duty of abstention is completely different from a positive duty to ensure compliance with the law.

50. Although I certainly am not in favour of a restricted interpretation of common Article 1, such as may have been envisaged in 1949, I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic demarches.

[...]

SEPARATE OPINION OF JUDGE ELARABY

[...]

III. THE LAW OF BELLIGERENT OCCUPATION

[...]

3.1. [...] The Israeli occupation has lasted for almost four decades. Occupation, regardless of its duration, gives rise to a myriad of human, legal and political problems. In dealing with prolonged belligerent occupation,

international law seeks to "perform a holding operation pending the termination of the conflict". No one underestimates the inherent difficulties that arise during situations of prolonged occupation. A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation.

Professor Christopher Greenwood provided a correct legal analysis which I share. He wrote:

"Nevertheless, there is no indication that international law permits an occupying power to disregard provisions of the Regulations or the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is willing to trust the occupant with *carte blanche*."

[...]

The fact that occupation is met by armed resistance cannot be used as a pretext to disregard fundamental human rights in the occupied territory. Throughout the annals of history, occupation has always been met with armed resistance. Violence breeds violence. This vicious circle weighs heavily on every action and every reaction by the occupier and the occupied alike.

[...]

I wholeheartedly subscribe to the view [...] that the breaches by both sides of the fundamental rules of humanitarian law reside in "the illegality of the Israeli occupation regime itself". Occupation, as an illegal and temporary situation, is at the heart of the whole problem. The only viable prescription to end the grave violations of international humanitarian law is to end occupation.

[...]

3.2. [...] Military necessities and military exigencies could arguably be advanced as justification for building the wall had Israel proven that it could perceive no other alternative for safeguarding its security. This, as the Court notes, Israel failed to demonstrate. A distinction must be drawn between building the wall as a security measure, as Israel contends, and accepting that the principle of military necessity could be invoked to justify the unwarranted destruction and demolition that accompanied the construction process. Military necessity, if applicable, extends to the former and not the latter. The magnitude of the damage and injury inflicted upon the civilian inhabitants in the course of building the wall and its associated régime is clearly prohibited under international humanitarian law. The destruction of homes, the demolition of the infrastructure, and the despoilment of land, orchards and olive groves that has accompanied the construction of the wall cannot be justified under any pretext whatsoever. Over 100,000 civilian non-combatants have been rendered homeless and hapless.

[...]

SEPARATE OPINION OF JUDGE HIGGINS

[...]

14. [...] So far as the request of the Assembly envisages an opinion on humanitarian law, however, the obligations thereby imposed are (save for their own qualifying provisions) absolute. That is the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight "with one hand behind their back" and act in accordance with international law. While that factor diminishes relevance of context so far as the obligations of humanitarian law are concerned, it remains true, nonetheless, that context is important for other aspects of international law that the Court chooses to address. Yet the formulation of the question precludes consideration of that context.

[...]

18. I regret that I do not think this has been achieved in the present Opinion. It is true that in paragraph 162 the Court recalls that "Illegal actions and unilateral decisions have been taken on all sides" and that it emphasizes that "both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law". But in my view much, much more was required to avoid the huge imbalance that necessarily flows from being invited to look at only "part of a greater whole", and then to take that circumstance "carefully into account". The call upon both parties to act in accordance with international humanitarian law should have been placed within the *dispositif*. The failure to do so stands in marked contrast with the path that the Court chose to follow in operative clause F of the dispositif of the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 266). Further, the Court should have spelled out what is required of both parties in this "greater whole". [...]

19. I think the Court should also have taken the opportunity to say, in the clearest terms, what regrettably today apparently needs constant reaffirmation even among international lawyers, namely, that the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupier but equally for those seeking to liberate themselves from occupation.

[...]

23. The General Assembly has in resolution ES-10/13 determined that the wall contravenes humanitarian law, without specifying which provisions and why. Palestine has informed the Court that it regards Articles 33, 53, 55 and 64 of the Fourth Geneva Convention and Article 52 of the Hague Regulations as violated. Other participants invoked Articles 23 (g), 46, 50 and 52 of the Hague Regulations, and Articles 27, 47, 50, 55, 56 and 59 of the Fourth Convention. For the Special Rapporteur, the wall constitutes a violation of Articles 23 (g) and 46 of the Hague Regulations and Articles 47, 49, 50, 53 and 55 of the Fourth Geneva Convention. It might have been expected that

an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court's disposal, as to *which* of these propositions is correct. Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law.

24. It would also, as a matter of balance, have shown not only which provisions Israel has violated, but also which it has not. But the Court, once it has decided which of these provisions are in fact applicable, thereafter refers only to those which Israel has violated. Further, the structure of the Opinion, in which humanitarian law and human rights law are not dealt with separately, makes it in my view extremely difficult to see what exactly has been decided by the Court. Notwithstanding the very general language of subparagraph (3) (A) of the *dispositif*, it should not escape attention that the Court has in the event found violations only of Article 49 of the Fourth Geneva Convention (para. 120), and of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention (para. 132). I agree with these findings.

25. After its somewhat light treatment of international humanitarian law, the Court turns to human rights law. I agree with the Court's finding about the continued relevance of human rights law in the occupied territories. I also concur in the findings made at paragraph 134 as regards Article 12 of the International Covenant on Civil and Political Rights.

26. At the same time, it has to be noted that there are established treaty bodies whose function it is to examine in detail the conduct of States parties to each of the Covenants. Indeed, the Court's response as regards the International Covenant on Civil and Political Rights notes both the pertinent jurisprudence of the Human Rights Committee and also the concluding observations of the Committee on Israel's duties in the occupied territories.

27. So far as the International Covenant on Economic, Social and Cultural Rights is concerned, the situation is even stranger, given the programmatic requirements for the fulfilment of this category of rights. The Court has been able to do no more than observe, in a single phrase, that the wall and its associated régime "impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights . . ." (para. 134). For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose. It could hardly be an answer that the General Assembly is not setting any more general precedent, because while many, many States are not in compliance with their obligations under the two Covenants, the Court is being asked to look only at the conduct of Israel in this regard.

[...]

33. I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter *thus* recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment, I.C.J. Reports 1986, p. 14).* It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251).

34. I also find unpersuasive the Court's contention that, as the uses of force emanate from occupied territory, it is not an armed attack "by one State against another". I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory - a territory which it has found not to have been annexed and is certainly "other than" Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.

35. In the event, however, these reservations have not caused me to vote against subparagraph (3) (A) of the *dispositif*, for two reasons. First, I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood. Second, even if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution on attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.

[...]

37. I have voted in favour of subparagraph (3) (D) of the *dispositif* but, unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes* (cf. paras. 154-159 of this Opinion). The Court's celebrated dictum in

Barcelona Traction, Light and Power Company, Limited, Second Phase, (Judgment, I.C.J. Reports 1970, p. 32, para. 33) is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion, at paragraph 155. That dictum was directed to a very specific issue of jurisdictional *locus standi.* As the International Law Commission has correctly put it in the Commentaries to the draft Articles on the Responsibility of States for Internationally Wrongful Acts (A/56/10 at p. 278), there are certain rights in which, by reason of their importance "all states have a legal interest in their protection". It has nothing to do with imposing substantive obligations on third parties to a case.

38. That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of "*erga omnes*". [...]

39. Finally, the invocation (para. 157) of "the *erga omnes*" nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" while apparently viewed by the Court as something to do with "the *erga omnes* principle", is simply a provision in an almost universally ratified multilateral Convention. The Final Record of the diplomatic conference of Geneva of 1949 offers no useful explanation of that provision; the commentary thereto interprets the phrase "*ensure respect*" as going beyond legislative and other action within a State's own territory. It observes that

> "in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally." (*The Geneva Conventions of 12 August 1949: Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war* (Pictet ed.) p. 16.)

It will be noted that the Court has, in subparagraph (3) (D) of the *dispositif*, carefully indicated that any such action should be in conformity with the Charter and international law.

[...]

DECLARATION OF JUDGE BUERGENTHAL

[...]

3. It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all

segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law (see para. 10 below). But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.

4. This is true with regard to the Court's sweeping conclusion that the wall as a whole, to the extent that it is constructed on the Occupied Palestinian Territory, violates international humanitarian law and international human rights law. [...]

7. [...] [A]ll we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it "is not convinced" but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.

8. It is true that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies. Thus, Article 46 of the Hague Rules provides that private property must be respected and may not be confiscated. In the Summary of the legal position of the Government of Israel, Annex I to the report of the United Nations Secretary-General, A/ES-10/248, p. 8, the Secretary-General reports Israel's position on this subject in part as follows: "The Government of Israel argues: there is no change in ownership of the land; compensation is available for use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status." The Court fails to address these arguments. While these Israeli submissions are not necessarily determinative of the matter, they should have been dealt with by the Court and related to Israel's further claim that the wall is a temporary structure, which the Court takes note of as an "assurance given by Israel" (para. 121).

9. Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. It provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law. Moreover, given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.

[...]

B. HCJ, Beit Sourik Village Council v. The Government of Israel [*et al.*]

[**Source:** HCJ, Beit Sourik Village Council v. The Government of Israel [et al., HCJ 2056/04; available on http://www.court.gov.il/]]

BEIT SOURIK VILLAGE COUNCIL
v.
THE GOVERNMENT OF ISRAEL [ET AL.],
HCJ 2056/04

[...]

The Supreme Court Sitting as the High Court of Justice

[...]

Judgment

President A. Barak

The Commander of the IDF Forces in Judea and Samaria issued orders to take possession of plots of land in the area of Judea and Samaria. The purpose of the seizure was to erect a separation fence on the land. The question before us is whether the orders and the fence are legal.

Background

1. Since 1967, Israel has been holding the areas of Judea and Samaria [hereinafter - the area] in belligerent occupation. In 1993 Israel began a political process with the PLO, and signed a number of agreements transferring control over parts of the area to the Palestinian Authority. Israel and the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000. From respondents' affidavit in answer to order nisi we learned that, a short time after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights

of violence. In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area and in Israel. They are directed against citizens and soldiers, men and women, elderly and infants, regular citizens and public figures. Terror attacks are carried out everywhere [...] Terror organizations use gunfire attacks, suicide attacks, mortar fire, Katyusha rocket fire, and car bombs. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8200 attacks were carried out in the area. The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6000 were injured, some with serious wounds that have left them severely handicapped. The armed conflict has left many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us.

[...]

7. The "Seamline" obstacle is composed of several components. In its center stands a "smart" fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50-70 meters. Due to constraints, a narrower obstacle, which includes only the components supporting the electronic fence, will be constructed in specific areas. In certain cases the obstacle can reach a width of 100 meters, due to topographical conditions. In the area relevant to this petition, the width of the obstacle will not exceed 35 meters, except in places where a wider obstacle is necessary for topographical reasons. In the area relevant to this petition, the fence is not being replaced by a concrete wall. Efforts are being made to minimize the width of the area of which possession will be taken *de facto*. [...] Hereinafter, we will refer to the entire obstacle on the "Seamline" as "the separation fence."

The Seizure Proceedings

8. Parts of the separation fence are being erected on land which is not privately owned. Other parts are being erected on private land. In such circumstances - and in light of the security necessities - an order of seizure is issued by the Commander of the IDF Forces in the area of Judea and Samaria (respondent 2). Pursuant to standard procedure, every land owner whose land is seized will receive compensation for the use of his land. After the order of seizure is signed, it is brought to the attention of the public, and the proper liaison body of the Palestinian Authority is contacted. An announcement is relayed to the residents, and each interested party is invited to participate in a survey of the area affected by the order of seizure, in order to present the

planned location of the fence. A few days after the order is issued, a survey is taken of the area, with the participation of the landowners, in order to point out the land which is about to be seized. After the survey, a one week leave is granted to the landowners, so that they may submit an appeal to the military commander. The substance of the appeals is examined. Where it is possible, an attempt is made to reach understandings with the landowners. If the appeal is denied, leave of one additional week is given to the landowner, so that he may petition the High Court of Justice.

The Petition

9. The petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A'anan, Beit Likia, Beit Ajaza and Beit Daku. [...] Petitioners are the landowners and the village councils affected by the orders of seizure. They argue that the orders of seizure are illegal. As such, they should be voided or the location of the separation fence should be changed. The injury to petitioners, they argue, is severe and unbearable. Over 42,000 dunams of their lands are affected. The obstacle itself passes over 4,850 dunams, and will separate between petitioners and more than 37,000 dunams, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible. Petitioners' ability to go from place to place will depend on a bureaucratic permit regime which is labyrinthine, complex, and burdensome. Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. Moreover, the separation fence injures not only landowners to whom the orders of seizure apply; the lives of 35,000 village residents will be disrupted. The separation fence will harm the villages' ability to develop and expand. The access roads to the urban centers of Ramallah and Bir Naballa will be blocked off. Access to medical and other services in East Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centers, and of students to universities, will be impaired. Petitioners argue that these injuries cannot be justified.

10. [...] First, petitioners claim that respondent lacks the authority to issue the orders of seizure. Were the route of the separation fence to pass along Israel's border, they would have no complaint. However, this is not the case. The route of the separation fence, as per the orders of seizure, passes through areas of Judea and Samaria. According to their argument, these orders alter the borders of the West Bank with no express legal authority. It is claimed that the separation fence annexes areas to Israel in violation of international law. The separation fence serves the needs of the occupying power and not the needs of the occupied area. The objective of the fence is to prevent the infiltration of terrorists into Israel; as such, the fence is not

intended to serve the interests of the local population in the occupied area, or the needs of the occupying power in the occupied area. Moreover, military necessity does not require construction of the separation fence along the planned route. The security arguments guiding respondents disguise the real objective: the annexation of areas to Israel. As such, there is no legal basis for the construction of the fence, and the orders of seizure which were intended to make it possible are illegal. Second, petitioners argue that the procedure for the determination of the route of the separation fence was illegal. [...]

11. Third, the separation fence violates many fundamental rights of the local inhabitants, illegally and without authority. Their right to property is violated by the very taking of possession of the lands and by the prevention of access to their lands. In addition, their freedom of movement is impeded. Their livelihoods are hurt and their freedom of occupation is restricted. Beyond the difficulties in working the land, the fence will make the trade of farm produce difficult. The fence detracts from the educational opportunities of village children, and throws local family and community life into disarray. Freedom of religion is violated, as access to holy places is prevented. Nature and landscape features are defaced. Petitioners argue that these violations are disproportionate and are not justified under the circumstances. The separation fence route reflects collective punishment, prohibited by international law. Thus, respondent neglects the obligation, set upon his shoulders by international law, to make normal and proper life possible for the inhabitants of Judea and Samaria. The security considerations guiding him cannot, they claim, justify such severe injury to the local inhabitants. This injury does not fulfill the requirements of proportionality. According to their argument, despite the language of the orders of seizure, it is clear that the fence is not of a temporary character, and the critical wound it inflicts upon the local population far outweighs its benefits. [...]

The Normative Framework

23. The general point of departure of all parties - which is also our point of departure - is that Israel holds the area in belligerent occupation (*occupatio bellica*). [...] In the areas relevant to this petition, military administration, headed by the military commander, continues to apply. [...] The authority of the military commander flows from the provisions of public international law regarding belligerent occupation. These rules are established principally in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter - the Hague Regulations]. These regulations reflect customary international law. The military commander's authority is also anchored in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. [hereinafter - the Fourth Geneva Convention]. The question of the application of the Fourth Geneva Convention has come up more than once in this Court. [...] The question is not before us now, since the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review. [...]

24. Together with the provisions of international law, "the principles of the Israeli administrative law regarding the use of governing authority" apply to the military commander. [...] Indeed, "[e]very Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law." [...]

27. [...] [T]he military commander of territory held in belligerent occupation must balance between the needs of the army on one hand, and the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for an additional system of considerations, whether they be political considerations, the annexation of territory, or the establishment of the permanent borders of the state. This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the area has gone on for many years. This fact affects the scope of the military commander's authority. [...] The passage of time, however, cannot extend the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation.

[...]

30. Petitioners, by pointing to the route of the fence, attempt to prove that the construction of the fence is not motivated by security considerations, but by political ones. They argue that if the fence was primarily motivated by security considerations, it would be constructed on the "Green Line [...]. We cannot accept this argument. The opposite is the case: it is the security perspective - and not the political one - which must examine the route on its security merits alone, without regard for the location of the Green Line. [...]

31. [...] We have no reason to assume that the objective is political rather than security-based. Indeed, petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based. Similarly, petitioners did not carry their burden, and did not persuade us that the considerations of the Commander of the IDF Forces in the area, in choosing the route of the separation fence, are not military considerations, and that he has not acted to fulfill them in good faith, according to his best military understanding.

32. Petitioner[s'] second argument is that the construction of the fence in the area is based, in a large part, on the seizure of land privately owned by local inhabitants, that this seizure is illegal, and that therefore the military commander's authority has no to construct the obstacle. We cannot accept this argument. We found no defect in the process of issuing the orders of seizure, or in the process of granting the opportunity to appeal them. Regarding the central question raised before us, our opinion is that the military commander is authorized - by the international law applicable to an area under belligerent occupation - to take possession of land, if this is

necessary for the needs of the army. *See* articles 23(g) and 52 of the Hague Convention; article 53 of the Fourth Geneva Convention. He must, of course, provide compensation for his use of the land. [...] Indeed, on the basis of the provisions of the Hague Convention and the Geneva Convention, this Court has recognized the legality of land and house seizure for various military needs, including the construction of military facilities [...], the paving of detour roads [...], the building of fences around outposts [...], the temporary housing of soldiers [...], the ensuring of unimpaired traffic on the roads of the area [...], the construction of civilian administration offices [...], the seizing of buildings for the deployment of a military force [...]. Of course, regarding all these acts, the military commander must consider the needs of the local population. Assuming that this condition is met, there is no doubt that the military commander is authorized to take possession of land in areas under his control. The construction of the separation fence falls within this framework. The infringement of property rights is insufficient, in and of itself, to take away the authority to build it. It is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs. To the extent that construction of the fence is a military necessity, it is permitted, therefore, by international law. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers. The building of the obstacle, to the extent it is done out of military necessity, is within the authority of the military commander. Of course, the route of the separation fence must take the needs of the local population into account. That issue, however, concerns the route of the fence and not the authority to erect it. [...] This question is the legality of the location and route of the separation fence. [...]

The Route of the Separation Fence

33. The focus of this petition is the legality of the route chosen for construction of the separation fence. This question stands on its own, and it requires a straightforward, real answer. It is not sufficient that the fence be motivated by security considerations, as opposed to political considerations. The military commander is not at liberty to pursue, in the area held by him in belligerent occupation, every activity which is primarily motivated by security considerations. The discretion of the military commander is restricted by the normative system in which he acts, and which is the source of his authority. Indeed, the military commander is not the sovereign in the occupied territory. [...] He must act within the law which establishes his authority in a situation of belligerent occupation. What is the content of this law?

34. The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens. However, it imposes conditions on the use of this authority. This authority must be properly balanced against the rights, needs, and interests of the local population [...]

Proportionality

36. The problem of balancing between security and liberty is not specific to the discretion of a military commander of an area under belligerent occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, including reasonableness and good faith. [...] One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality. According to it, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction is proportionate. This approach crosses through all branches of law. [...]

The Meaning of Proportionality and its Elements

40. According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it. [...] As such, both in international law, which deals with different national systems - from both the common law family (such as Canada) and the continental family (such as Germany) - as well as in domestic Israeli law, three subtests grant specific content to the principle of proportionality. [...]

41. The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the "appropriate means" or "rational means" test. According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the "least injurious means" test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the "proportionate means" test (or proportionality "in the narrow sense.") The test of proportionality "in the narrow sense" is commonly applied with "absolute values," by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a "relative manner." According to this approach, the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act - by employing alternate means, for example - ensures a substantial reduction in the injury caused by the administrative act.

42. [...] Not infrequently, there are a number of ways that the requirement of proportionality can be satisfied. In these situations a "zone of proportionality" must be recognized (similar to a "zone of reasonableness.") Any means chosen by the administrative body that is within the zone of proportionality is proportionate. [...]

43. This principle of proportionality also applies to the exercise of authority by the military commander in an area under belligerent occupation. [...]

The Proportionality of the Route of the Separation Fence

44. The principle of proportionality applies to our examination of the legality of the separation fence. This approach is accepted by respondents. [...] The proportionality of the separation fence must be decided by the three following questions, which reflect the three subtests of proportionality. First, does the route pass the "appropriate means" test (or the "rational means" test)? The question is whether there is a rational connection between the route of the fence and the goal of the construction of the separation fence. Second, does it pass the test of the "least injurious" means? The question is whether, among the various routes which would achieve the objective of the separation fence, is the chosen one the least injurious. Third, does it pass the test of proportionality in the narrow sense? The question is whether the separation fence route, as set out by the military commander, injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence. According to the "relative" examination of this test, the separation fence will be found disproportionate if an alternate route for the fence is suggested that has a smaller security advantage than the route chosen by respondent, but which will cause significantly less damage than that original route.

The Scope of Judicial Review

45. Before we examine the proportionality of the route of the separation fence, it is appropriate that we define the character of our examination. Our point of departure is the assumption, which petitioners did not manage to negate, that the government decision to construct the separation fence is motivated by security, and not a political, considerations. As such, we work under the assumption - which the petitioners also did not succeed in negating - that the considerations of the military commander based the route of the fence on military considerations that, to the best of his knowledge, are capable of realizing this security objective. In addition, we assume - and this issue was not even disputed in the case before us - that the military commander is of the opinion that the injury to local inhabitants is proportionate. On the basis of this factual foundation, there are two questions before us. The first question is whether the route of the separation fence, as determined by the military commander, is wellfounded from a military standpoint. Is there another route for the separation fence which better achieves the security objective? This constitutes a central component of proportionality. If the chosen route is not well-founded from the military standpoint, then there is

no rational connection between the objective which the fence is intended to achieve and the chosen route (the first subtest); if there is a route which better achieves the objective, we must examine whether this alternative route inflicts a lesser injury (the second subtest). The second question is whether the route of the fence is proportionate. Both these questions are important for the examination of proportionality. However, they also raise separate problems regarding the scope of judicial review. [...]

47. [...] Therefore, in our examination of the contrasting military considerations in this case, we give special weight to the fact that the commander of the area is responsible for security. Having employed this approach, we are of the opinion - the details of which we shall explain below - that petitioners have not carried their burden, and have not convinced us that we should prefer the professional expert opinion of members of the Council for Peace and Security over the security stance of the commander of the area. We are dealing with two military approaches. Each of them has military advantages and disadvantages. In this state of affairs, we must place the expert opinion of the military commander at the foundation of our decision.

The Proportionality of the Route of the Separation Fence

48. [...] The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court.

From the General to the Specific

49. The key question before us is [...]: is the injury caused to local inhabitants by the separation fence proportionate, or is it is possible to satisfy the central security considerations while establishing a fence route whose injury to the local inhabitants is lesser and, as such, proportionate? The separation fence which is the subject of this petition is approximately forty kilometers long. Its proportionality varies according to local conditions. We shall examine its proportionality according to the various orders that were issued for the construction of different parts of the fence. We shall examine the legality of the orders along the route of the fence from west to east (See the appendix to this decision for a map of the region.) This route starts east of the town of Maccabim and the Beit Sira village. It continues south to the town of Mevo Choron, and from there continues east to Jerusalem. The route of the fence continues to wind, and it divides between Israeli towns and Palestinian villages adjacent to it. It climbs Jebel Muktam in order to ensure Israeli control of it. As such, it passes the villages of Beit Likia, Beit Anan, and Chirbet Abu ALahm. After that, it advances east, separating Ma'aleh HaChamisha and Har Adar from the villages of Katane, El Kabiba, and Bidu. The fence

continues and circles the village of Beit Sourik, climbing northward until it reaches route 443, which is a major traffic route connecting Jerusalem to the center of the country. In its final part, it separates the villages Bidu, Beit Ajaza, and Beit Daku from Har Shmuel, New Giv'on, and Giv'at Ze'ev.

[...]

Order Tav/104/03; Order Tav/103/03; Order Tav/84/03 (The Western Part of the Order)

51. These orders apply to more than ten kilometers of the fence route. This segment of the route surrounds the high mountain range of Jebel Muktam. This ridge topographically controls its immediate and general surroundings. It towers over route 443 which passes north of it, connecting Jerusalem to Modi'in. The route of the obstacle passes from southwest of the village of Beit Likia, southwest of the village of Beit Anan, and west of the village of Chirbet Abu A-Lahm. Respondent explains that the objective of this route is to keep the mountain area under Israeli control. This will ensure an advantage for the armed forces, who will topographically control the area of the fence, and it will decrease the capability of others to attack those traveling on route 443.

52. Petitioners painted a severe picture of how the fence route will damage the villages along it. [...]

53. Respondents dispute this presentation of the facts. [...]

56. From a military standpoint, there is a dispute between experts regarding the route that will realize the security objective. As we have noted, this places a heavy burden on petitioners, who ask that we prefer the opinion of the experts of the Council for Peace and Security [among them former Israeli generals] over the approach of the military commander. The petitioners have not carried this burden. We cannot - as those who are not experts in military affairs - determine whether military considerations justify laying the separation fence north of Jebel Muktam (as per the stance of the military commander) or whether there is no need for the separation fence to include it (as per the stance of petitioners' and the Council for Peace and Security). Thus, we cannot take any position regarding whether the considerations of the military commander, who wishes to hold topographically controlling hills and thus prevent "flat-trajectory" fire, are correct, militarily speaking, or not. In this state of affairs, there is no justification for our interference in the route of the separation fence from a military perspective.

57. Is the injury to the local inhabitants by the separation fence in this segment, according to the route determined by respondent, proportionate? Our answer to this question necessitates examination of the route's proportionality, using the three subtests. The first subtest examines whether there is a rational connection between the objective of the separation fence and its established route. Our answer is that such a rational connection exists. [...] By our very ruling that the route of the fence passes the test of military

rationality, we have also held that it realizes the military objective of the separation fence.

58. The second subtest examines whether it is possible to attain the security objectives of the separation fence in a way that causes less injury to the local inhabitants. [...] The position of the military commander is that the route of the separation fence, as proposed by members of the Council for Peace and Security, grants less security than his proposed route. By our very determination that we shall not intervene in that position, we have also determined that there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants. In this state of affairs, our conclusion is that the second subtest of proportionality, regarding the issue before us, is satisfied.

59. The third subtest examines whether the injury caused to the local inhabitants by the construction of the separation fence stands in proper proportion to the security benefit from the security fence in its chosen route. This is the proportionate means test (or proportionality "in the narrow sense"). [...] According to this subtest, a decision of an administrative authority must reach a reasonable balance between communal needs and the damage done to the individual. The objective of the examination is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other. This judgment is made against the background of the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants, and which preserves "family honour and rights" (Regulation 46 of the Hague Regulations). All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention. The question before us is: does the severity of the injury to local inhabitants, by the construction of the separation fence along the route determined by the military commander, stand in reasonable (proper) proportion to the security benefit from the construction of the fence along that route?

60. Our answer is that there relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence - which separates the local inhabitants from their agricultural lands - injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law. Here are the facts: more than 13,000 farmers (falahin) are cut off from thousands of dunams of their land and from tens of thousands of trees which are their livelihood, and which are located on the other side of the separation fence. No attempt was made to seek out and provide them with substitute land, despite our oft[en] repeated proposals on that matter. The separation is not

hermetic: the military commander announced that two gates will be constructed, from each of the two villages, to its lands, with a system of licensing. This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe.

61. These injuries are not proportionate. They can be substantially decreased by an alternate route, either the route presented by the experts of the Council for Peace and Security, or another route set out by the military commander. Such an alternate route exists. It is not a figment of the imagination. It was presented before us. It is based on military control of Jebel Muktam, without "pulling" the separation fence to that mountain. Indeed, one must not forget that, even after the construction of the separation fence, the military commander will continue to control the area east of it. In the opinion of the military commander - which we assume to be correct, as the basis of our review - he will provide less security in that area. However, the security advantage reaped from the route as determined by the military commander, in comparison to the proposed route, does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route. Indeed, the real question in the "relative" examination of the third proportionality subtest is not the choice between constructing a separation fence which brings security but injures the local inhabitants, or not constructing a separation fence, and not injuring the local inhabitants. The real question is whether the security benefit reaped by the acceptance of the military commander's position (that the separation fence should surround Jebel Muktam) is proportionate to the additional injury resulting from his position (with the fence separating local inhabitants from their lands). Our answer to this question is that the military commander's choice of the route of the separation fence is disproportionate. The gap between the security provided by the military commander's approach and the security provided by the alternate route is minute, as compared to the large difference between a fence that separates the local inhabitants from their lands, and a fence which does not separate the two (or which creates a separation which is smaller and possible to live with). Indeed, we accept that security needs are likely to necessitate an injury to the lands of the local inhabitants and to their ability to use them. International humanitarian law on one hand, however, and the basic principles of Israeli administrative law on the other, require making every possible effort to ensure that injury will be

proportionate. Where construction of the separation fence demands that inhabitants be separated from their lands, access to these lands must be ensured, in order to minimize the damage to the extent possible.

62. We have reached the conclusion that the route of the separation fence, which separates the villages of Beit Likia and Beit Anan from the lands which provide the villagers with their livelihood, is not proportionate. This determination affects order Tav/103/03, which applies directly to the territory of the mountain itself, and leads to its annulment. This determination also affects order Tav/104/03 which applies to the route west of it, which turns in towards the village of Beit Likia, in order to reach the mountain. The same goes for the western part of order Tav/84/03, which descends from the mountain in a southeasterly direction. [...]

The Eastern Tip of Order no. Tav/107/03 and Order no. Tav/108/03

68. This order applies to the five and a half kilometer long segment of the route of the obstacle which passes west and southeast of the villages of Beit Sourik (population: 3500) and Bidu (population: 7500). A study of this part of the route, as published in the original order, reveals that the injury to these villages is great. From petitioners' data - which was not negated by respondents - it appears that 500 dunams of the lands of the village of Beit Sourik will be directly damaged by the positioning of the obstacle. 6000 additional dunams will remain beyond it (5000 dunams of which are cultivated land), including three greenhouses. Ten thousand trees will be uprooted and the inhabitants of the villages will be cut off from 25,000 thousand olive trees, 25,000 fruit trees and 5400 fig trees, as will as from many other agricultural crops. These numbers do not capture the severity of the damage. We must take into consideration the total consequences of the obstacle for the way of life in this area. The original route as determined in the order leaves the village of Beit Sourik bordered tightly by the obstacle on its west, south, and east sides. This is a veritable chokehold, which will severely stifle daily life. The fate of the village of Bidu is not much better. The obstacle surrounds the village from the east and the south, and impinges upon lands west of it. From a study of the map attached by the respondents (to their response of March 10,2004) it appears that, on this segment of the route, one seasonal gate will be established south of the village of Beit Sourik. In addition, a checkpoint will be positioned on the road leading eastward from Bidu.

69. In addition to the parties' arguments before us, a number of residents of the town of Mevasseret Zion, south of the village of Beit Sourik, asked to present their position. They pointed out the good neighborly relations between Israelis and Palestinians in the area and expressed concern that the route of the fence, which separates the Palestinian inhabitants from their lands, will put those relations to an end. They argue that the Palestinians' access to their lands will be subject to a series of hindrances and violations of their dignity, and that this access will even be prevented completely. On the other hand, Mr. Efraim Halevi asked to present his position, which represents the

opinion of other residents of the town of Mevasseret Tzion. He argues that moving the route of the fence southward, such that it approaches Mevasseret Tzion, will endanger its residents.

70. As with the previous orders, here too we take the route of the separation fence determined by the military commander as the basis of our examination. We do so, since we grant great weight to the stance of the official who is responsible for security. The question which arises before us is: is the damage caused to the local inhabitants by this part of the separation fence route proportionate? Here too, the first two subtests of the principle of proportionality are satisfied. Our doubt relates to the satisfaction of the third subtest. On this issue, the fact is that the damage from the segment of the route before us is most severe. The military commander himself is aware of that. During the hearing of the petition, a number of changes in the route were made in order to ease the situation of the local inhabitants. He mentioned that these changes provide an inferior solution to security problems, but will allow the injury to the local inhabitants to be reduced, and will allow a reasonable level of security. However, even after these changes, the injury is still very severe. The rights of the local inhabitants are violated. Their way of life is completely undermined. The obligations of the military commander, pursuant to the humanitarian law enshrined in the Hague Regulations and the Fourth Geneva Convention, are not being satisfied.

71. The Council for Peace and Security proposed an alternate route, whose injury to the agricultural lands is much smaller. It is proposed that the separation fence be distanced both from the east of the village of Beit Sourik and from its west. Thus, the damage to the agricultural lands will be substantially reduced. We are convinced that the security advantage achieved by the route, as determined by the military commander, in comparison with the alternate route, is in no way proportionate to the additional injury to the lives of the local inhabitants caused by this order. There is no escaping the conclusion that, for reasons of proportionality, this order before us must be annulled. The military commander must consider the issue again. [...] This is the military commander's affair, subject to the condition that the location of the route free the village of Beit Sourik (and to a lesser extent, the village of Bidu) from the current chokehold and allow the inhabitants of the villages access to the majority of their agricultural lands.

[...]

Overview of the Proportionality of the Injury Caused by the Orders

82. Having completed the examination of the proportionality of each order separately, it is appropriate that we lift our gaze and look out over the proportionality of the entire route of the part of the separation fence which is the subject of this petition. The length of the part of the separation fence to which these orders apply is approximately forty kilometers. It causes injury to the lives of 35,000 local inhabitants. 4000 dunams of their lands are taken up by the route of the fence itself, and thousands of olive trees growing

along the route itself are uprooted. The fence separates the eight villages in which the local inhabitants live from more than 30,000 dunams of their lands. The great majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees and other agricultural crops. The licensing regime which the military commander wishes to establish cannot prevent or substantially decrease the extent of the severe injury to the local farmers. Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, which are likely to prevent the passage of vehicles and which will naturally cause long lines and many hours of waiting, will be performed at the gates. These do not go hand in hand with the farmer's ability to work his land. There will inevitably be areas where the security fence will have to separate the local inhabitants from their lands. In these areas, the commander should allow passage which will reduce, to the extent possible, the injury to the farmers.

83. During the hearings, we asked respondent whether it would be possible to compensate petitioners by offering them other lands in exchange for the lands that were taken to build the fence and the lands that they will be separated from. We did not receive a satisfactory answer. This petition concerns farmers that make their living from the land. Taking petitioners' lands obligates the respondent, under the circumstances, to attempt to find other lands in exchange for the lands taken from the petitioners. Monetary compensation may only be offered if there are no substitute lands.

84. The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the links between the local inhabitants and the urban centers (Bir Nabbala and Ramallah). This link is difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence.

85. The task of the military commander is not easy. He must delicately balance between security needs and the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

Epilogue

86. Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and

destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. [...] Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for. The result is that we reject the petition against order no. Tav/105/03. We accept the petition against orders Tav/104/03, Tav/103/03, Tav/84/03 (western part), Tav/107/03, Tav/108/03, Tav/109/03, and Tav/110/03 (to the extent that it applies to the lands of Beit Daku), meaning that these orders are nullified, since their injury to the local inhabitants is disproportionate.

Respondents will pay 20,000 NIS in petitioners' costs.

Vice President E. Mazza

I concur.

Justice M. Cheshin

I concur.

Held, as stated in the opinion of President A. Barak.

June 30, 2004

C. Palestinians 'Made Millions' Selling Cheap Cement for Barrier they Bitterly Oppose

[**Source:** http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/07/25/wmid25.xml]

By Inigo Gilmore in Jerusalem
(Filed: 25/07/2004)

Palestinian businessmen have made millions of pounds supplying cement for Israel's "security barrier" in the full knowledge of Yasser Arafat, the Palestinian leader and one of the wall's most vocal critics.

A damning report by Palestinian legislators, which has been seen by the Telegraph, concludes that Mr Arafat did nothing to stop the deals although he publicly condemned the structure as a "crime against humanity".

The report claims that the cement was sold with the knowledge of senior officials at the Palestinian ministry of national economy, and close advisers to Mr Arafat. It concludes that officials were bribed to issue import licences for the cement to importers and businessmen working for Israelis.

[...]

According to the report, on November 9 last year a letter was sent to Mr Arafat by the Palestinian Authority comptroller, revealing that open-ended import licences for the cement had been signed by Maher al-Masri, the economy minister.

The Palestinian Authority comptroller asserted in the letter that the cement was destined for the wall. The letter was allegedly received and seen by Mr Arafat on the same day that he urged people to demonstrate on the first international "Day against the Wall". According to Mr Khreishe, Mr Arafat took no action to stop further imports, which continued for another five months.

[...]

DISCUSSION

1. a. Are the Hague Regulations and Convention IV applicable to the Palestinian territories? According to the International Court of Justice (ICJ)? According to the Israeli High Court of Justice (HCJ)?
   b. Is para. 1 or para. 2 of Article 2 of Convention IV decisive for the conclusion of the ICJ on the applicability of the Convention?
   c. How can the General Assembly resolution reaffirm the applicability of Protocol I while Israel is not a party to that treaty? Does the ICJ apply Protocol I? Would Protocol I have made any difference to the conclusions of the ICJ?
   d. In which sense is the unilateral undertaking by the declaration of 7 June 1982 to respect Convention IV valid? Does it make Palestine a State Party to the Convention? Has this undertaking any impact on the outcome of the case before the HCJ?
2. Are all provisions of Convention IV still applicable in the Palestinian territories or only those referred to in Article 6 (3)? Have all military operations in the territories ceased?
3. a. Does the construction of the wall/fence amount to an annexation? According to the ICJ? According to the HCJ? Would such an annexation be contrary to IHL? What does the ICJ say about this?
   b. Would the HCJ have found the wall/fence illegal if its route had been influenced by anything other than security considerations? May an occupying power take into account the security of its own population on its territory? That of inhabitants of settlements? On what basis does the HCJ come to the conclusion that no political or Zionist considerations influenced the route of the wall? Is the fact that it does not follow the "green line" evidence for the opposite?
4. a. Does the ICJ explain why the wall/fence violates Arts. 47, 49, 52, 53 and 59 of Convention IV? Can you explain this for each of these provisions? Do you agree with Judge Higgins' criticism (*Cf.* paras. 23 and 24 of her opinion.)?
   b. Explain why the destruction and requisition of private property contravene the requirements of Arts. 46 and 52 of the Hague Regulations and of Art. 53 of

Convention IV. Is this conclusion correct even if the facts are those described by the HCJ in para. 8 of its decision? Do you agree with Judge Buergenthal's criticism (*Cf.* para. 8 of his opinion.)?

c. Which of the provisions mentioned by the ICJ are subject to derogations in case of military exigencies? Are military exigencies and military operations equivalent? Why is the destruction of private property necessary to build the wall not permitted under Art. 53 of Convention IV?

d. May an occupying power seize land for the needs of its army? For security reasons?

e. Why are Israeli settlements in the Palestinian territories prohibited? Does every establishment of Israelis in the Palestinian territories violate IHL? Is the fact that the wall/fence includes Israeli settlements decisive for the conclusion that it contravenes IHL? For the ICJ? For Judge Buergenthal? For you? Does the HCJ deal with the prohibition of settlements? Why not? Isn't it a humanitarian rule of Convention IV?

5. a. Do you agree with the HCJ's definition of proportionality? With the application of that definition to the facts?

b. Does the HCJ consider that a route for the wall/fence less injurious for Palestinians exists? Does it therefore consider that the route is disproportionate? Would the HCJ consider the route disproportionate if the security interests and the injury to Palestinians were the same, but no alternative route existed?

c. Does the HCJ consider that if a measure violating IHL is proportionate, it is admissible?

d. Does the ICJ refer at all to the question of proportionality? In the context of IHL or of International Human Rights Law?

6. a. Is International Human Rights Law applicable in armed conflicts? If yes, how do you determine whether that law or IHL prevails in case of contradiction?

b. Does International Human Rights Law apply in an occupied territory? Is the argument the same for the International Covenant on Civil and Political Rights, for the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child? According to the ICJ? In your opinion?

c. Are all provisions of Human Rights treaties fully applicable during an armed conflict? Are derogations due to the exigencies of the situation only admissible as long as they are officially declared?

d. Are the Human Rights mentioned by the ICJ also protected by IHL in occupied territories? Which are not protected by the latter? Are there any contradictions between those Human Rights and IHL?

e. Does IHL foresee freedom of movement in an occupied territory? Is such freedom compatible with IHL?

f. Does International Human Rights Law lead the ICJ to any conclusion in this case which it would not have reached under IHL?

g. Does the HCJ apply International Human Rights Law?

7. Can the right to self-defence or a state of necessity justify violations of IHL? Of International Human Rights Law? According to the ICJ? The HCJ? In your opinion?

8. What are the legal consequences of the illegality of the wall/fence for Israel? According to the ICJ? According to the HCJ?

9. Does the illicit wall/fence create obligations for the Palestinian Authority? Did it violate those obligations by selling cement for the construction of the wall/fence? Have the individuals involved breached IHL?

10. a. Which are the legal consequences of the illegality of the wall/fence for third States?

b. Have all rules of IHL an *erga omnes* character? What is the impact of such an *erga omnes* character?

c. Does Article 1 common mean that third States must ensure the respect of IHL by Israel? Does Article 1 common simply confirm the *erga omnes* character of IHL rules or has it also an additional meaning? Do you agree with the criticism by Judge Koojimans and Professor Kalshoven of this interpretationof that Article?

d. In practice, what does the obligation for third States not to recognise the illegal situation resulting from the construction of the wall/fence mean? What about their obligation not to render aid or assistance in maintaining the situation created by such construction? What are the reasons for such obligations?

e. What measures must third States take to ensure that the wall/fence is not constructed? Are there any limitations to those measures?

f. Do you agree with Judge Koojimans' criticism of operative subparagraph (3) (D) of the ICJ decision?

11. Does Judge Buergenthal consider that the construction of the wall/fence does not violate IHL?

12. Is Judge Higgins right that the ICJ should also have dealt with the greater context, *i.e.* the suicide attacks by Palestinians on Israeli civilians? Do those attacks violate IHL? Could such violations have altered the conclusions of the ICJ? If the ICJ had attributed those attacks to the Palestinian Authority?

13. Do you agree with the HCJ that there is no security without law and that satisfying the provisions of the law is an aspect of national security (para. 86 of the decision)? If yes, explain why.

1. Israeli Practice

Case No. 108, Israel, Applicability of the Convention to Occupied Territories

THE CASE

[**Source:** Shamgar, M. [At that time Attorney General (Israel), later member and President of the Israeli Supreme Court.], "The Observance of International Law in the Administered Territories" in Israeli Yearbook on Human Rights, vol. 1, 1971, pp. 262-77; footnotes omitted.]

I. APPLICATION OF CONVENTIONS

There is certainly a wide awareness of the great difficulty in approaching problems connected with the actual implementation of the rules of warfare without influence by innate prejudices or a deep-seated subjective outlook. The difficulty is actually twofold: the lack of that unanimity and clarity which is a comparatively frequent characteristic of municipal law, and, over and above that, the difficulty posed by political predilection. [...]

Before turning to the question of the observance of rules of international law, due consideration should be given to the difference between the questions connected with the observance of these rules and the prior question of the applicability of a certain set of rules to given circumstances. In other words, *de facto* observance of rules does not necessarily mean their applicability by force of law. [...]

Humanitarian law concerns itself essentially with human beings in distress and victims of war, not States or their special interests. As Max Huber said: "The fate of human beings is independent of the legal character which belligerents wish to give to their struggle." It is, therefore, always important to seek ways and means by which humanitarian relief can be extended to victims of war without waiting for the international law to develop further and without subjecting the fate of the civilians to the political and legal reality. While political rights and the legal interpretation of a given set of factual circumstances are of far-reaching consequence for the fate of nations, and cannot be excluded from consideration, any possible separation between the decision on political issues and the pragmatic application of humanitarian rules should be considered positively. It must be borne in mind that this was also underlying idea of Article 3, common to all four Geneva Conventions.

In my opinion there is no existing rule of international law according to which the Fourth Convention applies in each and every armed conflict whatever the status of the parties. Territory conquered does not always become occupied territory to which the rules of the Fourth Convention apply. It is apparently not so, for example, in cases of cessation of hostilities that lead to termination of war, nor is it so in cases of subjugation, although this question arose only before 1949.

The whole idea of the restriction of military government powers is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign. Any other conception would lead to the conclusion

that France, for example, should have acted in Alsace-Lorraine according to rules 42-56 of the Hague Rules of 1907, until the signing of a peace treaty.

As I mentioned before, I am aware of the theory of subjugation, which has been applied since World War II; if the Fourth Convention applies to every conflict, how do we adapt this theory to the Fourth Convention? In my view, *de lege late*, the automatic applicability of the Fourth Convention to the territories administered by Israel is at least extremely doubtful, to use an understatement, and automatic application would raise complicated juridical and political problems. I shall mention some of them.

Israel never recognized the rights of Egypt and Jordan territories occupied by them till 1967. Judea and Samaria and the Gaza Strip were part of the territory of the British Mandate of Palestine which ended on May 14, 1948. The war which started on that date never led to recognized boundaries. On the contrary, the Armistice agreements of 1948 explicitly stated that the Armistice demarcation line is not to be construed in any sense as a political or territorial boundary and is delineated without prejudice to the rights, claims or position of either party.

From 1948 till 1956 and again from 1956 till 1967 the Gaza Strip was, according to express U.A.R. statements, under Egyptian military occupation, ruled by a U.A.R. Military Governor. The inhabitants of the Gaza Strip were not nationals of the Occupying Power. They even needed a special permit to enter the U.A.R. Military courts were set up, curfew was declared, and administrative detention was carried out according to the orders of the Military Governor. It is worth noting that notwithstanding these facts, the question of the application of the Fourth Convention to this territory was never brought up or considered before 1967.

The history of the legal status of Judea and Samaria is also relevant. On May 13, 1948, a law was enacted in Transjordan according to which the provisions of the Transjordan Defense law apply to any country or place in which Jordan is responsible for the preservation of security and order. On May 18, 1948, General Ibrahim Pecha Hashem was appointed by King Abdullah as Military Governor of all territories which were held by the Transjordan Army. According to Proclamation No. 2 published by General Hashem:

> All the laws and regulations which were in force in Palestine at the end of the Mandate on 15.5.48 shall remain in force in all areas in which the Arab Jordan Army stays or in which it is responsible for the preservation of security and order, except the laws and regulations which are contrary to the Defense Law of Transjordan of 1935 or the Regulations and Orders published under this law.

On September 16, 1950, the Law Regarding Laws and Regulations in Force in the Two Banks of the Hashemite Jordan Kingdom was published and entered into force. This law provided that the laws and regulations in each of the two banks should remain in force until unified laws for the two banks were promulgated with the consent of the national council and with the ratification of the King. The unification of the laws of the East and West banks went on from 1950 to 1967, although by June 5, 1967, some laws still remained different. The annexation by Jordan of the West Bank on April 24, 1950, was recognized only by two countries: Great Britain and Pakistan. [...]

There is no need to fully appraise the relative value and merit of the rights of the parties in this context. It should, however, be mentioned that in the interpretation most favorable to the Kingdom of Jordan her legal standing in the West Bank was at most that of a belligerent occupant following an unlawful invasion. In other words, following an armed invasion in violation of international law, the military forces of Jordan remained stationed in the West Bank and the Kingdom of Jordan then annexed the West Bank, after having agreed in the Armistice Agreement of 1949 that it had no intention of prejudicing the rights, claims, and positions of the parties to the Agreement. It is therefore not surprising to find the following conclusion as to the relative rights in the West Bank in Blum's article "Reflections on the Status of Judea and Samaria":

> [...] [T]he traditional rules of international law governing belligerent occupation are based on a twofold assumption, namely, (a) that it was the legitimate sovereign which was ousted from the territory under occupation; and (b) that the ousting side qualifies as a belligerent occupant with respect to the territory. According to Glahn, "(b)elligerent occupation... as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government of the occupied territory of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognizing and sanctioning the occupant's rights to administrer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign. It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application." [*Israeli Law Review*, 1968, pp. 279]

The same conclusion would apply to the Gaza Strip which was regarded even by the U.A.R. government as territory under military occupation, and that Government never even raised the claim that it had any legal rights to the territory.

The territorial position is thus *sui generis*, and the Israeli Government tried therefore to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly, the Government of Israel distinguished between the legal problem of the applicability of the Fourth Convention to the territories under consideration which, as stated, does not in my opinion apply to these territories, and decided to act *de facto* in accordance with the humanitarian provisions of the Convention. [...]

V. CONCLUSION

[...] The significant achievements of the existing system, in my opinion, are the following: (a) the existence, since the first day of Military Government, of a military legal system based on the rule of law, a system in which even hostile critics abroad have detected no real flaws; (b) the speedy restoration of the normal functioning of the local courts, which exercise their powers without interference; (c) the fact that the right of defense is ensured in both military and civil trials; (d) the avenue for criticism of the army authorities which has been voluntarily provided for by recourse

to the High Court of Justice, in contrast to what has been customary in all other countries during military rule in occupied territory; (e) the existence of Appeals Committees on compensation for damage and on decisions of the Custodian, presided over by lawyers; (f) the fact that the rights of the population are ensured by a long series of legislative acts relating to protection of property, safeguarding of rights to property, social benefit rights, and freedom of worship. [...]

DISCUSSION

1. a. Was there an international armed conflict between Israel, Jordan and Egypt in 1967? Is Convention IV applicable to the conflict? When does its application cease? (*Cf.* Arts. 2 and 6 of Convention IV.)

   b. Are Convention IV's provisions on occupied territories only applicable in case of occupation of a territory of a "High Contracting Party" (*Cf.* Art. 2 (2) of Convention IV.)? Or to all territory coming under control of a party to an international armed conflict? (*Cf.* Art. 2 (1) of Convention IV.) According to Shamgar's interpretation, are the provisions on the "aliens on the territory of a party to the conflict" applicable to the West Bank and Gaza? Or according to this interpretation are neither these provisions nor those on occupied territories applicable? (*Cf.* Arts. 2, 35-46 and 47-78 of Convention IV.)

   c. When is territory considered occupied according to IHL? (*Cf.* Art. 42 of the Hague Regulations.) Is it a question of facts or of the legal status of the territory or both whether a territory is occupied? Is the concept of "occupied territory" the same under Convention IV and under the Hague Regulations?

   d. Why does Shamgar claim that neither the West Bank nor Gaza are occupied territories as defined by IHL, and that therefore Convention IV is not applicable? Does IHL consider the status of the territory before occupation? According to IHL, can a territory only be occupied if it was previously under the control of a legitimate sovereign government, as claimed by Shamgar? Is the application of IHL conditional on the recognition of the sovereignty of the previous government? What would be the practical consequences for the applicability of Convention IV if it depended on whether the previous control of a conquered territory was legitimate or not? During a conflict, who could answer this question? What are the odds of the belligerents agreeing on this and therefore on the applicability of Convention IV?

   e. Does Convention IV concern itself with questions such as "who started the war?" "Who is fighting a just cause?" or, "Who exercises legitimate control?" Is this not a confusion between *ius ad bellum* and *ius in bello?*

   f. Is the aim of IHL to protect the sovereign rights as seems to be suggested by the quotation from Blum's article? Or is its main aim to protect individuals? Who or what is protected by Convention IV? (*Cf.* Art. 4 of Convention IV.)

2. Is Shamgar's interpretation of what constitutes an occupied territory in accordance with the "ordinary meaning to be given to the terms of the treaty"? (*Cf.* Art. 31 (1) of the Vienna Convention on the Law of Treaties; available on http://www.walter.gehr.net)

3. Although Israel assented to "act de facto in accordance with the humanitarian provisions of the Convention", did it say which provisions? Which are the "humanitarian provisions"? Can Convention IV be divided into humanitarian provisions and non-humanitarian provisions? Doesn't IHL by definition consist entirely of humanitarian provisions? Are the provisions invoked against Israel in **Cases No. 110**, p. 1218, **111**, p. 1223 and **114**, p. 1244, hereafter non-humanitarian provisions? For example, are the prohibitions of torture and of deportations non-humanitarian?

Case No. 109, Israel, Military Prosecutor v. Kassem and Others

THE CASE

[**Source:** Lauterpacht, E. (ed.), *International Law Reports*, Cambridge, Grotius Publications Limited, vol. 42, 1971, pp. 470-483.]

MILITARY PROSECUTOR v. OMAR MAHMUD KASSEM AND OTHERS

Israel, Military Court sitting in Ramallah
April 13, 1969

The following is the judgement of the Court:

[...] [T]he first of the accused pleaded that he was a prisoner of war, and similar pleas were made by the remaining defendants.

[...] [T]he defendants were asked by the Court whether they were prepared to testify so that it could be ascertained whether the conditions entitled them to be regarded as prisoners of war were fulfilled [...].

The second defendant [...] was prepared to testify on oath. [...] [H]e claimed that he belonged to the 'Organization of the Popular Front for the Liberation of Palestine' and when captured was wearing military dress and had in his possession a military pass issued to him on behalf of the Popular Front, bearing "the letters J.T.F. [Popular Front for the Liberation of Palestine], my name and my serial number." [...]

[...]

[W]e hold that we are competent to examine and consider whether the defendants are entitled to prisoner-of-war status, and if we so decide, we shall then cease to deal with the charge. [...]

[W]e shall now inquire into the kinds of combatants to whom the status of prisoners of war is accorded upon capture by enemy forces. [...]

[...]

The principles of the subject were finally formulated in the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. Whether we regard this Convention as an agreement between the Contracting Parties or whether we regard it as expressive of the position under customary International Law relating to the treatment of prisoners of war, we proceed on the assumption

that it applies to the State of Israel and its armed forces; Israel in fact acceded to the Convention on 6 July 1951, Jordan did so on 29 May 1951.

Article 4A of this Convention defines all those categories of person who, having fallen into enemy hands, are regarded as prisoners of war within the meaning of the Convention. For the purpose of deciding the status of the defendants before us, we shall consider paragraphs (1), (2), (3) and (6) of Article 4A.

Without a shadow of doubt, the defendants are not, in the words of paragraph (1), 'Members of the armed forces of a Party to the conflict' or 'members of militias or volunteer corps forming part of such armed forces'.

Article 2, which prescribes the scope of its application, states that it applies to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognise by one of them'.

To comprehend the true intent of the Convention, let us quote Leland Harrison, representative of the U.S.A:

> 'The Convention would, therefore, be applicable to all cases of declared or undeclared war between States to the Convention, and to certain armed conflicts within the territory of a State party to the Convention' (Final Report, IIB, p. 12).

This makes it clear that the Convention applies to relations between States and not between a State and bodies which are not States and do not represent States. It is therefore the Kingdom of Jordan that is a party to the armed conflict that exists between us and not the Organization that calls itself the Front for the Liberation of Palestine, which is neither a State nor a Government and does not bear allegiance to the regime which existed in the West Bank before the occupation and which exists now within the borders of the Kingdom of Jordan. In so saying, we have in fact excluded the said Organization from the application of the provisions of paragraph (3) of Article 4. [...]

Paragraph (6) of Article 4 is also not pertinent, since the defendants are not inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units.

We can be brief. The Organization to which the defendants belong does not answer even the most elementary criteria of a *levée en masse*. We have not to do with the population of an area which an enemy is approaching or invading. In October 1969 we were not approaching an area whose population was not yet under our effective control and we were certainly not invading new areas, and there cannot be the least doubt that, in the period from 5 June 1967 to October 1968, that 'population' had time to 'form itself' into regular armed units.

Another category of persons mentioned in the Convention are irregular forces, i.e., militia and volunteer forces not forming part of the regular national army, but set up for the duration of the war or only for a particular assignment and including resistance movements belonging to a party to the armed conflict, which operate within or outside their own country, even if it is occupied. To be recognised as lawful combatants, such irregulars must, however, fulfil the following four

conditions: (a) they must be under the command of a person responsible for his subordinates; (b) they must wear a fixed distinctive badge recognizable at a distance, (c) they must carry arms openly; (d) they must conduct their operations in accordance with the laws and customs of war.

Let us now examine whether these provisions of Article 4A, paragraph (2), are applicable to the defendants and their Organization.

First, it must be said that, to be entitled to treatment as a prisoner of war, a member of an underground organization on capture by enemy forces must clearly fulfil all the four above mentioned conditions and that the absence of any of them is sufficient to attach to him the character of a combatant not entitled to be regarded as a prisoner of war. [...]

For some reason, however, the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely, the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of prisoners of war upon capture.

It is natural that, in international armed conflicts, the Government which previously possessed an occupied area should encourage and take under its wing the irregular forces which continue fighting within the borders of the country, give them protection and material assistance, and that therefore a 'command relationship' should exist between such Government and the fighting forces, with the result that a continuing responsibility exists of the Government and the commanders of its army for those who fight in its name and on its behalf.

[...] If International Law indeed renders the conduct of war subject to binding rules, then infringements of these rules are offences, the most serious of which are war crimes. It is the implementation of the rules of war that confers both rights and duties, and consequently an opposite party must exist to bear responsibility for the acts of its forces, regular and irregular. We agree that the Convention applies to military forces (in the wide sense of the term) which, as regards responsibility under International Law, belong to a State engaged in armed conflict with another State, but it excludes those forces - even regular armed units - which do not yield to the authority of the State and its organs of government. The Convention does not apply to these at all. They are to be regarded as combatants not protected by the International Law dealing with prisoners of war, and the occupying Power may consider them as criminals for all purposes.

The importance of the allegiance of irregular troops to a central Government made it necessary during the Second World War for States and Governments-in-exile to issue declarations as to the relationship between them and popular resistance forces (see, e.g., the Dutch Royal Emergency Decree of September 1944). In fact, the matter of the allegiance of irregular combatants first arose in connection with the Geneva Convention. The Hague Convention of 18 October 1907 did not mention such allegiance, perhaps because of the unimportance of the matter, little use being made of combat units known as irregular forces, guerrillas, etc., at the beginning of the century. In view, however, of the experience of two World Wars, the nations of the world found it necessary to add

the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.

In the present case, the picture is otherwise. No governments with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The organization itself, so far as we know, is not prepared to take orders from the Jordan Government, witness the fact that it is illegal in Jordan and has been repeatedly harassed by the Jordan authorities. The measures that Jordan has adopted against it have included the use of arms. This type of underground activity is unknown in the international community, and for this reason, as has been pointed out, we have found no direct reference in the relevant available literature to irregular forces being treated as illegal by the authorities to whom by the nature of things they should be subject. If these authorities look upon a body such as the Popular Front for the Liberation of Palestine as an illegal organization, why must we have to regard it as a body to which international rules relating to lawful bodies are applicable?

Despite all, let us nevertheless be extremely liberal and endeavour to proceed on the assumption that each member, even of such an illegal body, is entitled upon capture to be treated as a prisoner of war, if that body fulfils the four basic conditions mentioned in the first article of the rules concerning the laws and customs of war on land, which form an annex to the Hague Convention of 18 October 1907. [...]

Not every combatant is entitled to the treatment which, by a succession of increasingly humane conventions, have ameliorated the position of wounded members of armed forces. Civilians who do not comply with the rules governing *"levée en masse"* and have taken an active part in fighting are in the same position as spies. Similarly, combatants who are members of the armed forces, but do not comply with the minimum qualifications of belligerents or are proved to have broken other rules of warfare, are war criminals and as such are liable to any treatment and punishment that is compatible with the claim of a captor State to be civilised.

By the introduction of additional distinctions between lawful and unlawful combatants, and combined application of the test of combatant and non-combatant character and of civilian and military status, it becomes possible to give far-reaching protection to the overwhelming majority of the civilian population of occupied territories and captured members of the armed forces.

Within narrower limits even those categories of prisoners who are excluded from such privileged treatment enjoy the benefits of the standard of civilisation. At least they are entitled to have the decisive facts relating to their character as non-privileged prisoners established in... judicial proceedings. Moreover, any punishment inflicted on them must keep within the bounds of the standard of civilisation.

From all the foregoing, it is not difficult to answer the submission of counsel for the defence that a handful of persons operating alone and themselves fulfilling the conditions of Article 4A (2) of the Convention may also be accorded the status of prisoners of war. Our answer does not follow the line of reasoning of learned counsel.

[...] [I]t may be said that a person or body of persons not fulfilling the conditions of Article 4 A(2) of the Convention can never be regarded as lawful combatants even if they proclaim their readiness to fight in accordance with its terms. He who adorns himself with peacock's feathers does not thereby become a peacock.

What is the legal status of these unlawful combatants under international law? The reply may be found in von Glahn, [The Occupation of Ennemy Territories, p. 52].

If an armed band operates against the forces of an occupant in disregard of the accepted laws of war ... then common sense and logic should counsel the retention of its illegal status. If an armed band operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory, then no combatant or prisoner of war rights can be or should be claimed by its members. [...]

If we now consider the facts we have found on the evidence of the witness for the prosecution, Moshe, as above, we see that the body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of customary International Law accepted by civilized nations.

The attack upon civilian objectives and the murder of civilians in Mahne Yehuda Market, Jerusalem, the Night of the Grenades in Jerusalem, the placing of grenades and destructive charges in Tel Aviv Central Bus Station, etc., were all wanton acts of terrorism aimed at men, women and children who were certainly no lawful military objectives. [...] Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.

The presence of civilian clothes among the effects of the defendants is, in the absence of any reasonable explanation, indicative of their intent to switch from the role of unprotected combatants to that of common criminals. Acts involving the murder of innocent people, such as the attack on the aircraft at Athens and Zurich airports, are abundant testimony of this.

International Law is not designed to protect and grant rights to saboteurs and criminals. The defendants have no right except to stand trial in court and to be tried in accordance with the law and with the facts established by the evidence, in proceedings consonant with the requirements of ethics and International Law.

We therefore reject the plea of the defendants as to their right to be treated as prisoner of war and hold that we are competent to hear the case in accordance with the charge-sheet. [...]

[Report: Law and Courts in the Israel held Areas (Jerusalem, 1970), p. 17.]

DISCUSSION

1. a. Does an international armed conflict exist, which makes IHL applicable? If so between which States? When does Convention III apply? Who is a belligerent party? Does the Court contend that Convention III does not apply in this case? For which reasons? (*Cf.* Art. 2 common to the Conventions.)

   b. Is the Court's decision based upon the same argumentation used to establish the inapplicability of Convention IV to the West Bank and Gaza Strip? (*See*

Case No. 108, Israel, Applicability of the Convention to Occupied Territories. p. 1208.) Is Convention III applicable before Israeli courts but not Convention IV? When the decision states that the Popular Front for the Liberation of Palestine "operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory" does it consider, contrary to **Case No. 108**, Israel, Applicability of the Convention to Occupied Territories. p. 1208, that Jordan is the legitimate sovereign, or would it deny POW status to Jordanian soldiers?

c. Under the Court's reasoning, does Convention III protect Palestinians residing in the Occupied Territory who rise up against occupation? Would it have applied to Palestinians fighting in the same territory prior to occupation? What would be your answer to those questions under IHL?

d. Is an individual who fights for a State not recognized by the Detaining Power entitled to POW status under Convention III? What if it is simply the government which is not recognized by the Detaining Power? Has the State or the government to recognize that the individual is fighting for them or is it sufficient that the individual, in fact, fights for them? Are your answers different under Protocol I? Or is it sufficient to belong to a party to the conflict? Does the defendant not fight for a Palestinian State? Does the PFLP represent that State? (*Cf.* Arts. 2 and 4 of Convention III and Arts. 1 and 43 of Protocol I.)

e. Does such an interpretation of Art. 2 of Convention III explain why Protocol I includes Art. 1 (4)? Could this Court's decision have been rendered if Protocol I had applied? Would the result have been different? Which part of the Court's reasoning would have been different? Which additional factors would the Court have had to consider? Would the Conventions have been automatically inapplicable because the Popular Front for the Liberation of Palestine was not a State Party? (*Cf.* Arts. 1 (4) and 96 (3) of Protocol I.)

2. According to IHL who is considered a combatant? Of what relevance is that determination to this case? In addition to Art. 4 (A) of Convention III, does Art. 1 of the Hague Regulations not provide a definition?

3. a. Is the Court right in stating that to benefit from POW Status, someone has to belong to a party to the conflict? Or is it sufficient to comply with the requirements listed under Art. 4 (A) (2) (a)-(d)? Would the answer be different if Protocol I had been applicable?

   b. Are the requirements listed under Art. 4 (A) (2) (a)-(d) cumulative? Do they have to be fulfilled by the whole group or only by the members claiming POW status? Is it sufficient if the group only aims at fulfilling the requirements?

4. If the accused had been granted POW status, would the Court have had to cease dealing with charges of "murder of civilians [...] placing of grenades in Tel Aviv Central Bus Station [...] wanton acts of terrorism"? If Protocol I had applied would the accused have been immune from prosecution for such acts? Or would IHL rather have prescribed such prosecution? (*Cf.* Arts. 4 and 85 of Convention III and Arts. 43, 44, 51 and 85 (3) (a) of Protocol I.)

Case No. 110, Israel, Ayub v. Minister of Defence

THE CASE

[**Source:** reproduced as summarized and partly translated by Domb, F. in *Israel Yearbook on Human Rights,* 1979, pp. 337-342; footnotes omitted.]

II. H.C. 606/78,
AYUB, *ET AL.* v. MINISTER OF DEFENCE, *ET AL.*
(THE BETH EL CASE); H.C. 610/78,
MATAWA, *ET AL.*
v.
MINISTER OF DEFENCE, *ET AL.*
(THE BEKAOT CASE)
33(2) *Piskei Din* 113.

In this case, the Supreme Court of Israel, sitting as the High Court of Justice, was asked to rule on the legality of establishing Jewish civilian settlements on private Arab lands previously requisitioned by the Israeli Military Government for military and security needs. Both Arab petitioners are the owners of lands in Al-Bireh and Tubas respectively, which are in Judea and Samaria, in the West Bank Region (that has been under Israeli Military Administration since the Six Day War of 1967). The lands had been requisitioned in 1970 and 1975 pursuant to Orders issued by the Military Commander of the Region. The Orders stated that the Military Commander of the Region deemed the requisition to be necessary for military and security purposes. At the initiative of the Israeli civilian Government, and not the Military Commander, Jewish settlements were established on the requisitioned lands in 1978, whereupon the Arab land-owners petitioned the High Court of Justice for an injunction against the Requisition Orders and for the return of their lands. Two grounds were cited:

(a) the requisition was not necessary for genuine military or security purpose and does not, in fact, serve any such purpose;

(b) alternatively, even if justified for military needs, the requisition of the lands still constitutes a violation of rules of international law which the petitioners are entitled to rely upon in this Court.

With regard to the connection between these two grounds the Court at the outset proceeded to stress that these are two separate grounds which must not be confused. An act of a military government in an occupied territory might be justified from a military, security viewpoint and yet it would not be impossible for it to be defective from the point of view of international law. Not everything that furthers security needs is permissible under international law.

The High Court bench [...] analysed both grounds separately and, finally, unanimously rejected the petition. The leading judgment was delivered by Witkon J. [...].

At the commencement, Witkon J. adds a preliminary remark clarifying [that] the Court's [...] decision will be based solely on the

> rights of the parties before us, according to the current situation prevailing between Israel and the Arab States. This is a situation of belligerency and the status of the respondents with respect to the occupied territory is that of an Occupying Power.

The first argument raised by the petitioners - whereby the requisitioning was not justified by genuine military or security needs - was rejected by Witkon J. for the following reasons:

1. No distinction can be drawn, as suggested by the petitioners, between strict military needs justifying Requisition Orders and general security needs, which are allegedly beyond the scope of requisition powers. In the Court's opinion, "the military aspect and the security aspect are one and the same" because

   > the prevailing situation is one of belligerency, and the responsibility for maintaining order and security in the occupied territory is imposed upon the Occupying Power. It also must forestall the dangers arising out of such territory to the occupied territory itself and to the Occupying Power. These days warfare takes the form of acts of sabotage, and even those who regard such acts (which injure innocent citizens) as a form of a guerrilla war, will admit that the Occupying Power is authorized and even obliged to take all steps necessary for their prevention.

   Therefore, the acts of the Military Commander are justified as serving either strict military needs or needs of general security or, obviously, both of them.

2. The Occupying State may take preventive measures against terrorist activities and acts of sabotage even in areas where they do not actually occur. This is in line with the Court's opinion in the *Hilu Case* to which Witkon J. refers. In that case, land owned by Bedouin tribes in the Rafiah Salient (in Northern Sinai) was requisitioned and Jewish settlements were established upon it. The Bedouin's application for an injunction against the Requisition Orders was dismissed by the Court. The arguments of the respondent that the steps taken were necessary due to the terrorist activities and acts of sabotage which in fact took place in the area were unanimously upheld by the Court. Although in the present case no terrorist activity has actually taken place in the area in question, Witkon J. refused to differentiate between the two cases maintaining that prevention was the best cure for any ailment, it being preferable to detect and thwart terrorist activity prior to its perpetration. Since one of the affidavits submitted by the respondents unequivocally indicates that the requisitioned lands are situated in sensitive strategic areas "it is difficult to expect that an Occupying Power would leave the control of such areas to elements which are likely to be hostile."

3. As long as a state of belligerency exists, Jewish settlements in occupied territories serve actual and real security needs. Witkon J. sustains the opinion he expressed in the *Hilu Case* that the fact that requisitioned lands are intended for Jewish settlements does not deprive such requisitioning of its security character. In his view

> it is indisputable that in occupied areas the existence of settlements - albeit "civilian" - of citizens of the Occupying Power contributes greatly to the security in that area and assists the army in fulfilling its task. One need not be a military and defence expert to understand that terrorist elements operate with greater ease in an area solely inhabited by a population that is indifferent or sympathizes with the enemy, than in an area in which one also finds people likely to observe the latter and report any suspicious movement to the authorities. Terrorists will not be granted a hideout, assistance or supplies by such people.

Since the affidavits of the respondent confirm that the Jewish settlers are subject to the control of the army and remain there only with the permission and the authority of the army, Witkon J. still adheres to his view expressed in the *Hilu Case* that "as long as a state of belligerency exists, Jewish settlement in occupied territories serves genuine security needs."

Consequently, the Court held that the requisitions in question and the establishment of civilian settlements thereon actually serve military and security needs and are therefore in accord with Israeli internal-municipal law.

In support of their alternative argument - challenging the legality of the requisitions from the standpoint of international law - the petitioners relied on provisions of both the 1907 Hague Convention (No. IV) respecting the Laws and Customs of War on Land and the 1949 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. Turning to this argument, Witkon J. first considers and rules on the preliminary question as to whether the petitioners, as protected persons, may themselves claim their rights under these Conventions in a municipal (internal) court of the Occupying State or, whether, only the contracting States to those Conventions are entitled to claim the rights of the protected persons and that, of course, only on the international level.

In the words of the Court, the answer to this question depends on whether the invoked provisions of international law have become part of the internal-municipal law of the State whose court is asked to enforce it. A provision of an international Convention is part of the internal law - and, hence, enforceable in internal courts - if it forms part of customary international law, as distinct from conventional international law which binds only the contracting States *inter se*.

With regard to provisions of the 1907 Hague Convention and the 1949 Fourth Geneva Convention, Witkon J. refers to three judgments of the Supreme Court in which both these Conventions were held to be part of conventional international law on which individuals may not rely in an Israeli internal court. However, following these judgments, Professor Yoram Dinstein published an article stressing that a difference does exist between the two Conventions and that while the 1949 Fourth Geneva Convention has remained part of conventional international law, the 1907 Hague Regulations, which in any case only express the law as it had been accepted by all enlightened States, are considered as customary international law.

In light of this article, and after considering the views of Schwarzenberger and von Glahn, Witkon J. became convinced that the 1907 Hague Convention is generally regarded as customary international law, whereas provisions of the

1949 Fourth Geneva Convention remain conventional in their nature. Consequently the petitioners may rely in this Court on the 1907 Hague Convention - which thus forms part of Israeli internal law - but not on provisions of the 1949 Fourth Geneva Convention. Since their contention as to the illegality of the settlements was totally based on Article 49 of the 1949 Fourth Geneva Convention, the Court lacks the competence to deal with it.

It therefore remained for the Court to decide only whether the requisition of the petitioners' lands violates, *inter alia*, Articles 23 and 46 of the Hague Regulations prohibiting confiscation of private property. It was proven to the Court that the lands in question were seized only to be used and that rental was offered to the petitioners, who retained their ownership of the lands. This kind of seizure - namely, requisition - is lawful under Article 52 of the Hague Regulations on which von Glahn comments that:

> Under normal circumstances an occupant may not appropriate or seize on a permanent basis any immovable private property, but on the other hand a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity...

The Court also adopts von Glahn's view regarding the question of how to deal with land which the occupant army does not really need for its own purposes but which must not be left in the possession of the owners lest it serve the interests of the enemy. According to the passage quoted by the Court "common sense would appear to dictate the need for preventive measures by the occupant against such use of private property by its owners." [...]

DISCUSSION

1. a. When may private property be requisitioned in occupied territory according to IHL? By whom? When may private property be confiscated? By whom? Which additional limitations does IHL place both on requisition and confiscation? (*Cf.* Arts. 23 (g), 46, 52 and 55 of the Hague Regulations and Art. 49 of Convention IV.)

   b. Is the opinion of the Court on the extent to which requisitions by an occupying power are admissible compatible with that of the US Military Tribunal at Nuremberg in **Case No. 78**, US v. Alfried Krupp *et al.* p. 1030? Which decision is correct?

2. Was the land in this case requisitioned for a military or security purpose? Does establishment of a settlement at the initiative of the Israeli civilian government, and not the Military Commander, serve a military or security purpose? Suppose that the needs of the army of occupation or military necessity justify the temporary seizure of private land, does that permit the occupying power to settle its own civilians on that land? (*Cf.* Art. 49 (6) of Convention IV.)

3. Because an occupation is deemed temporary, does the establishment of permanent settlements violate IHL? Except for security needs, when may the occupying power make permanent changes in the occupied territory? Would IHL

permit the construction of such settlements if they benefited the local Palestinian population? (*Cf.* Arts. 43, 46, 52 and 55 of the Hague Regulations.)

4. Regardless of whether the land requisition served a military purpose, do such settlements directly violate the IHL provision prohibiting the transfer of the occupying power's population into occupied territory? (*Cf.* Art. 49 (6) of Convention IV.) Which purpose lies behind this IHL provision? Is this purpose humanitarian? Would a voluntary settlement by Israelis, not done or assisted by the government of the occupying power, be permissible? Could military necessity or security reasons justify a violation of the prohibition of the transfer of the Occupying Power's population into occupied territory?

5. a. Why does the Court declare that it lacks the competence to deal with Convention IV? Why is the conventional or customary status of Convention IV relevant to its applicability in this case, particularly since Israel is a State Party? Are conventional rules less binding than customary ones?

   b. May a State decide that international treaties become part of its law only if there is legislation of application? Has the State an obligation to adopt such legislation? Does IHL oblige States Parties to allow the Conventions to be invoked before its courts? May Israel invoke its constitutional system, the absence of legislation of application, or a decision of its Supreme Court to escape international responsibility for violations of Convention IV?

   c. Are the Hague Regulations applicable in this case? As conventional or customary law?

   d. Does the Court explain how (presumably all) provisions of the Hague Regulations are customary and (presumably all) provisions of the Fourth Geneva Convention not? Which could be the justification for such a distinction? How could Professor Dinstein justify that all provisions of Convention IV are purely conventional? Are some customary law? Is Art. 49 of Convention IV customary law? How could one assess whether Art. 49 (6) of Convention IV is customary or purely conventional taking into account that, in 1978 less than 10 out of more than 150 States were not bound conventionally to respect that provision? Should one assess only the practice of those non-Parties? Should one only assess whether Art. 49 (6) was customary in 1949? Did customary law not develop between 1949 and 1979? Why should Art. 49 (6) of Convention IV not belong to customary law?

Case No. 111, Israel, House Demolitions in the Occupied Palestinian Territory

THE CASE

[N.B.: In 2004 Israel officially decided to no longer resort to punitive house destructions as they do not have a deterrent effect.]

A. Sakhwil *et al.* Commander of the Judea and Samaria Region

[**Source:** *Israeli Yearbook on Human Rights*, vol. 10, 1980, p. 345; footnotes omitted.]

H.C. 434/79, SAKHWIL *ET AL.*
v.
COMMANDER OF THE JUDEA AND SAMARIA REGION

[...]

[...]

This petition was filed with the High Court of Justice by two Arab women from [...] the West Bank Region. The women asked the Court to issue an injunction preventing the respondent from sealing off or demolishing or expropriating the houses in which they and their families resided.

[...]

In respect to the house of the second petitioner, the respondent had indeed ordered the sealing off of one on its rooms - that which belonged to her son. The woman's counsel [...] argued before the High Court that the order to seal off a room was invalid because it was discriminatory, arbitrary and in violation of the 1949 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. The Court considered the fact that the son was convicted by the Military Court of Ramallah of membership in an unlawful organisation, of providing shelter to a person who had committed an offence in violation of security legislation, and of possessing explosives. It was proven to the Court that the son had knowingly used his room which the respondent had ordered sealed as a shelter for a member of the Al-Fatah organisation (one who had actually engaged in sabotage activity in Jerusalem) and as a hiding place for a sack of explosives. Taking cognisance of the purpose for which the room had served, the Court found the argument on the illegality of the respondent's order to be groundless. The Court stated that the room could be lawfully sealed pursuant to Regulation 119(1) of the Defence (Emergency) Regulations, 1945, which "constitute Jordanian legislation that has remained in force since the period of the British Mandate, and which is consequently still in force in the Judea and Samaria Region". As to the content of Regulation 119 permitting destruction of private property in certain circumstances, the Court observed that "Regulation 119 applies to an unusual punitive action, whose main purpose is to deter the performance of similar acts".

Finally, the Court also rejected the counsel's allegation relating to the observance of the Geneva Convention. It found it unnecessary to look into the question of

whether the respondent was bound to comply with the provisions of the Geneva Convention, for "even if it were so, there is no contradiction between the provisions of that Convention ... and the use of the authority vested in the respondent by legislation which was in force at the time when the Judea and Samaria Region was under Jordanian rule and which has remained in force in Judea and Samaria to this day". Consequently this petition was rejected by the High Court, and the sealing off of a room by the respondent was upheld.

B. The Israeli Information Centre for Human Rights in the Occupied Territories, "Demolition for Alleged Military Purposes"

[**Source:** The Israeli Information Centre for Human Rights in the Occupied Territories, "Demolition for Alleged Military Purposes" online: http://www.btselem.org/]

International humanitarian law

Even following the transfer of parts of the West Bank and the Gaza Strip to the Palestinian Authority as part of the Oslo Accords, Israel remains the occupier of the Occupied Territories. As the occupier, it must comply with the duties of an occupying state, and act in accordance with the laws of occupation.

Hostilities are taking place in the Occupied Territories, but these events do not justify Israel's avoidance of its duties as the occupier, as if the occupation had ended. [...]

The occupying state must also protect the civilian population's property. Article 46 of the Hague Regulations provides that private property must be respected and that it cannot be confiscated. Article 53 of the Fourth Geneva Convention provides that the destruction of property by the occupying state is forbidden, "except where such destruction is rendered absolutely necessary by military operations." Because the occupier has special obligations toward the civilian population, it bears an extremely heavy burden of proof that the injury was necessary. Article 147 of the Convention provides that, "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Convention.

Israeli officials use article 23(g) of the Hague Regulations, of 1907, to justify the demolition of houses and destruction of agricultural land. This article states that it is forbidden "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war." Israeli officials argue that protecting security forces and settlers from Palestinian gunfire, and combating the digging of tunnels intended for smuggling weapons, are pressing military necessities that justify the demolition of property pursuant to article 23(g).

There is no significant difference between article 23(g) of the Hague Regulations, on which Israel relies, and Article 53 of the Fourth Geneva Convention, and the articles complement each other. The reason that Israel referred to the Hague Regulations is twofold: it seeks to emphasize that an armed conflict is currently being waged in the Occupied Territories, and that the Fourth Geneva Convention does not apply in the Occupied Territories, an argument it has made continuously since 1967, contrary to the position of the international community.

Even in the case of military necessity, which can provide an exception to the sweeping prohibition on destruction of property, the occupier must comply with the other provisions of international humanitarian law. Indeed, jurists and international tribunals have firmly rejected the argument that military necessity prevails over every other consideration and nullifies application of these other provisions. Every act must comply with international humanitarian law, and the parties are not free to choose the ways and means to wage combat.

To ensure that the exception set forth in article 23(g) of the Hague Regulations and Article 53 of the Fourth Geneva Convention is not broadly construed, international humanitarian law provides, inter alia, that it is forbidden to damage property as a preventive means where the danger has not yet been realized. It further provides that destruction of property is forbidden unless alternative, less injurious, means are not available to achieve the objective. In addition, it is expressly forbidden to destroy property with the intent to deter, terrify, or take revenge against the civilian population. Injury to property intended to cause permanent or prolonged damage is also forbidden.

Even though the claim that some cases of destruction entailed military necessity cannot be outright rejected, there is strong reason to believe that many cases involved considerations that were extraneous to the narrow definition of military necessity. However, we shall not examine the question of whether military necessity indeed existed in the Gaza Strip to justify the exception to the prohibition on damaging private property. For even if military necessity exists, Israel's policy flagrantly violates other rules of international humanitarian law, the violation of which are sufficient to make the policy illegal.

In the past, too, Israel relied extensively on a broad construction of the "military necessity" exception. Israel claimed "pressing military necessity" to justify the house demolitions committed pursuant to Regulation 119 of the Emergency Defense Regulations. Israel made its claim even though it had declared that the demolitions were intended to punish persons suspected of attacks against Israel and to deter other Palestinians from performing similar acts. The prohibition on destruction of property set forth in international humanitarian law is intended precisely to prevent using such reasons to justify damage to property.

Principle of proportionality

[...] [The] principle [of proportionality] also applies to Israel's policy discussed in this document. According to the commentary published by the ICRC on article 53 of the Fourth Geneva Convention, destruction of property is illegal if the occupier does not "try to keep a sense of proportion in comparing the military advantages to be gained with the damage done." This prohibition applies even in a situation of military necessity.

Examination of the circumstances in which Israel implemented its policy - the extreme magnitude of the house demolitions, the uprooting of trees, the destruction of agricultural fields, and the manner in which Israel chose to implement its policy - clearly and unequivocally indicate that these contentions are baseless. The injury to the civilian population was excessive in proportion to

the military advantage that Israel ostensibly sought to achieve by implementing this policy.

One of the primary requirements of proportionality states that actions that will injure civilians may be taken only after alternative acts, whose resultant injury would be less, are considered and then rejected because they will not achieve the necessary military advantage. Israel ignores this rule and uses means whose injury to civilians is extremely severe. Furthermore, Israel declares that destruction of the agricultural land and demolition of houses constitute a future policy. Declaring these acts a policy indicates the lack of an intention to consider alternatives before carrying out the acts of destruction.

The IDF forces destroyed entire residential neighborhoods, claiming that, under some of the houses, tunnels had been dug through which weapons were being smuggled. In other cases, the army destroyed dozens of houses on the grounds that Palestinians were firing from the area at IDF soldiers. The demolition of houses based on this claim cannot be deemed to meet the conditions required by the principle of proportionality.

Israel destroyed crops and agricultural land, and uprooted fruit trees on the grounds that from these fields Palestinians fired at soldiers and settlers. In some of the cases, the IDF forces destroyed tomato and squash fields, in which people could not hide. The army's actions caused long-term, and in some instances irreversible, damage to the land, and affected the income of thousands of people for many years to come. Destruction of this kind certainly cannot be considered to be in accordance with the principle of proportionality. [...]

The argument that Israel breached the principle of proportionality when it implemented its policy in the Gaza Strip is supported by the comments made by Brigadier General Dov Zadka, head of the Civil Administration. In his response to a question from a reporter from B'Mahaneh [the IDF magazine] whether Israel did not overdo the demolitions that it carried out in the Occupied Territories, Zadka stated:

> In Gaza - very much so. I think they did several things that were excessive. After the events in Aley Sinai and Dugit, they executed an extremely massive clearance in what they called "the northern sector." They uprooted hundreds of dunam of strawberries and orchards and greenhouses, and I think that wasn't right... In Judea and Samaria, too, there are places that we haven't acted properly. Sometimes I approve a specific scope of clearing, but when I go to the field I find a degree of hyper-activity by the troops... Did we overdo it in certain places? To tell the truth - yes. For sure. You approve the removal of thirty trees, and the next day you see that they removed sixty trees. The soldier or the company commander on the site got carried away. There have been such cases, and we must not ignore them.

C. Israel Ministry of Foreign Affairs, "The Demolition of Palestinian Structures Used for Terrorism - Legal Background"

[**Source:** Israel Ministry of Foreign Affairs, "The Demolition of Palestinian Structures Used for Terrorism - Legal Background", 18 May 2004, online: http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups]

For nearly four years, Israelis have been the victims of a relentless and ongoing campaign by Palestinian terrorists to spread death and destruction, condemning our region to ongoing turmoil, killing more than 900 Israelis and injuring more than 6000.

In light of this unprecedented lethal threat, Israeli security forces have sought to find new effective and lawful counter-measures that would minimize the occurrence of such terrorist attacks in general, and suicide terrorism in particular, and to discourage potential suicide bombers.

Palestinian terrorists employ the most abhorrent and inhuman methods, including suicide terrorism in order to target Israeli civilians and soldiers, contrary to any notion of morality, and in grave breach of the international laws of armed conflict. Palestinian terrorists operate from within densely populated areas, abusing the protection granted by international law to the civilian population.

Faced with the failure of the Palestinian leadership to comply with its obligations to fight terrorism, stop incitement and prevent the smuggling of weapons, Israel has been compelled to combat the threat to the lives of Israelis, exercising its right to self defense while upholding its obligations under international law. One such security measure is the demolition of structures that pose a real security risk to Israeli forces.

Terrorists often operate from within homes and civilian structures. When terrorists fire from within these buildings or activate roadside charges from orchards and fields, military necessity dictates the demolition of these locations. Under International Law, these locations are considered legitimate targets. Therefore, in the midst of combat, when dictated by operational necessity, Israeli security forces may lawfully destroy structures used by terrorists.

A further instance necessitating the demolition of buildings is the use made by terrorist groups of civilian buildings in order to conceal openings of tunnels used to smuggle arms, explosives and terrorists from Egypt into the Gaza Strip. Similarly, buildings in the West Bank and Gaza Strip are used for the manufacturing and concealment of rockets, mortars, weapons and explosive devices to be used against Israel. The demolition of these structures is often the only way to combat this threat.

Another means employed by Israel against terrorists is the demolition of homes of those who have carried out suicide attacks or other grave attacks, or those who are responsible for sending suicide bombers on their deadly missions. Israel has few available and effective means in its war against terrorism. This measure is employed to provide effective deterrence of the perpetrators and their dispatchers, not as a punitive measure. This practice has been reviewed and upheld by the High Court of Justice.

Israel's security forces adhere to the rules of International Humanitarian Law and are subject to the scrutiny of Israel's High Court of Justice in hundreds of petitions made annually by Palestinians and human rights organizations.

Israeli measures are not a form of "collective punishment" as some have claimed, as if the intention were to cause deliberate hardship to the population at large. While the security measures taken in self-defense and necessitated by terrorist threats do unfortunately cause hardships to sectors of the Palestinian population, this is categorically not their intent. Wherever possible, even in the midst of military operations, Israel's security forces go to great lengths to minimize the effects of security measures on the civilian population not involved in terrorism.

In this context, Israel adopts measures in order to ensure that only terrorists and the structures they use are targeted. Furthermore, though permissible under the laws of armed conflict, Israel refrains whenever possible from attacking terrorist targets from the air or with artillery, in order to minimize collateral damage, a policy which entails risking the lives of Israeli soldiers. The death of 13 soldiers in ground operations in the Gaza Strip in early May 2004 is an example of the heavy price Israel pays for its commitment to minimize Palestinian civilian casualties.

While there is no question that the Palestinian population is suffering from the ongoing conflict, that suffering is a direct result of Palestinian terrorism aimed at innocent Israelis, and the need for Israel to protect its citizens from these abhorrent attacks.

[...]

D. Amnesty International, "House Demolition: Palestinian Civilians in Rafah Refugee Camp"

[**Source:** Amnesty International, "House Demolition: Palestinian civilians in Rafah refugee camp", 18 May 2004, online: http://web.amnesty.org/library/print/ENGMDE150532004]

18 May 2004

ISRAEL/OCCUPIED TERRITORIES

Palestinian civilians in Rafah refugee camp

The Israeli army has accelerated its demolition of houses in the Rafah refugee camp in the past few days, making over 1,000 people homeless. The army intends to demolish more houses in the camp. [...]

United Nations Relief and Works Agency (UNRWA) officials estimate that the Israeli army has destroyed more than 80 buildings in the Rafah refugee camp during the past few days, leaving some 1,100 Palestinians homeless. Israeli army officials have announced their intention to demolish more homes, and on 16 May the Israeli Supreme Court rejected a petition, filed by human rights organizations on behalf of Palestinian families living in the refugee camp, to stop the demolitions.

The army say this latest wave of destruction of Palestinian homes is intended to expand the no-go area (referred to as the Philadelphi Route) along the Egyptian border in the southern Gaza Strip. The Israeli authorities contend that the

massive scale of house demolition is necessary to uncover tunnels used by Palestinians to smuggle weapons into the Gaza Strip from Egypt. The demolition plan was reportedly approved on 13 May by Prime Minister Ariel Sharon, Defense Minister Shaul Mofaz and other top officials.

The Rafah refugee camp, in existence since 1948, is very densely populated, with rows of houses separated by narrow alleyways. In late 2000 the Israeli army began the massive destruction of houses in the camp. Until then, houses had stood only a few meters from the border with Egypt: now houses are reduced to rubble for up to 300 meters from the border. The destruction has targeted row after row of houses, contrary to claims by the Israeli authorities that they only destroy houses used by Palestinians to attack Israeli soldiers patrolling the border, and houses used as cover for tunnels.

On 14 May, Israeli army Chief of Staff Moshe Yaalon reportedly said that "There's a process whereby the first row of houses is abandoned and used for digging tunnels for smuggling weapons and cover for shooting We've been forced to destroy houses here in the past and apparently we'll have to destroy more houses in the future." [...]

Amnesty International believes that the massive destruction in Rafah refugee camp and elsewhere in the Gaza Strip cannot be justified on the grounds of "absolute military necessity," as the Israeli authorities claim, and constitutes a form of collective punishment against the tens of thousands of Palestinians who have been affected. Such measures are a violation of international humanitarian law, notably Article 33 of the Fourth Geneva Convention, which states: "No protected person [i.e. those living under foreign occupation] may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation...are prohibited...Reprisals against protected persons and their property are prohibited". [...]

E. *Ha'aretz*, "High Court allows Gaza demolitions: Army's 'operational necessity' takes precedence"

[**Source:** *Ha'aretz*, Tel Aviv, 17 May 2004, Yuval Yoaz and Gideon Alon, "High Court allows Gaza demolitions: Army's 'operational necessity' takes precedence", online: www.haaretz.com]

The High Court of Justice ruled yesterday that Israel has the right to demolish Palestinian homes without granting the residents a right to a court of appeal in the event of "immediate operational necessity" or when it endangers the lives of Israeli soldiers or jeopardizes military operations.

Justices Eliahu Mazza, Dorit Beinisch and Eliezer Rivlin rejected a petition by 13 residents of Rafah, whose homes are targeted for demolition by the Israel Defense Forces. The ruling cancels a temporary order issued by Mazza on Friday night that stopped the IDF from proceeding with plans to raze homes adjacent to the Philadelphi route on the southern border of the Gaza Strip.

The justices accepted the state's position that it is impossible to promise that no additional homes will be demolished. The state is committed to granting legal

recourse to Palestinians whose homes are slated for demolition - except when this entails an immediate military risk. But attorney Enar Helman, representing the state, admitted that the situation on the ground makes this distinction largely irrelevant.

"In 99 percent of the cases in the Rafah area, which is different from the West Bank or elsewhere in the Gaza Strip, the moment we announce our intention of razing a home, the Palestinians immediately set booby-traps there," Helman explains.

"The state declared to us that the demolition of homes by the IDF during the fighting on Friday on the Philadelphi route was not conducted as a means of deterrence but as an urgent military action required to defend the lives of soldiers operating in the field," the justices ruled.

Despite the rejection of the petition, the attorney for the petitioners, Yunis Tamim, voiced hope that the court's decision could ultimately limit the scope of destruction. "We are sure that the army will think very carefully about destroying houses in the future. This is a clear decision that there are certain conditions in which houses can be demolished," he told reporters.

Knesset reaction

Zehava Gal-On, chairwoman of the Meretz faction, said she regretted the High Court's decision. The MK said the court was abandoning thousands of innocent people for what the army defines as security needs. "It was again demonstrated that in Israel, human rights stop at the Green Line border and are not extended to the residents of the occupied territories," Gal-On said.

MK Mohammed Barakeh (Hadash) also attacked the court's decision, claiming that it provided "a stamp of approval for war crimes."

In response to this criticism, Likud MK and coalition chairman Gideon Sa'ar said that he "regrets that the security of the state and IDF soldiers are not valued as highly as the property rights of Rafah residents in the eyes of the critics from the left." He called it a "pathetic attempt to terrorize the court for obvious political reasons."

DISCUSSION

1. Why should an Israeli court apply Jordanian law? (*Cf.* Art. 64 of Convention IV.) By applying Jordanian legislation (Regulation 119 (1) of the Defence (Emergency) Regulations, 1945) does the Court admit the status of Judea and Samaria as occupied territory requiring application of the Geneva Conventions? (*Cf.* Art. 2 (2) common to the Conventions, Art. 6 of Convention IV, Arts. 1 (3) and 3 (b) of Protocol I, Arts. 23 (h) and 43 of the Hague Regulations.)

2. a. "Regulation 119 (1)" permits destruction of private property; is this consistent with the Geneva Conventions? Was such action justified by military necessity? (*Cf.* Art. 53 of the Hague Regulations and Arts. 53 and 147 of Convention IV.)

b. In *Sakhwil*, did the woman or her son own the home? Was the son the only resident of the home? Was the woman convicted of any crime? Are these relevant considerations? (*Cf.* Art. 50 of the Hague Regulations and Art. 33 of Convention IV.) Do the Conventions not provide for the right to a fair trial? Was the woman tried for any crime with a penalty permitting the destruction of her house? (*Cf.* Art. 147 of Convention IV and Art. 85 (4) (e) of Protocol I.)

c. If application of "Regulation 119 (1)" contradicts the above mentioned articles of the Conventions, must the Regulation, if constituting Jordanian law in force prior to occupation, be applied? May it be applied? (*Cf.* Art. 43 of the Hague Regulations and Art. 64 of Convention IV.)

3. Was the Gaza Strip an occupied territory in October 2003? Does the prohibition to destroy houses also apply outside occupied territories? (*Cf.* Arts. 2, 4 and 53 of Convention IV; Art. 52 of Protocol I and Art. 42 of the Hague Regulations.)

4. Does Art. 23 (g) of the Hague Regulations apply to the conduct of hostilities or also to occupied territories? Is B'Tselem correct in writing in Document B. that there is no significant difference between Art. 23 (g) of the Hague Regulations and Art. 53 of Convention IV? Is Art. 23 (g) of the Hague Regulations today replaced by Art. 52 of Protocol I and the corresponding customary international law?

5. Are the destructions described in documents B., C. and D. covered by the law of military occupation, by the law on the conduct of hostilities, or both? In each case, when is the demolition of a house justified? When can a civilian dwelling be a military objective? May a military objective only be destroyed if it is absolutely necessary to do so due to military operations? (*Cf.* Art. 53 of Convention IV and Art. 52 of Protocol I.)

6. Do the circumstances described by the Ministry of Foreign Affairs regarding when the military can demolish homes for reasons of military necessity conform to the rules of IHL? Discuss each of the categories. When are the homes "legitimate targets"? (*Cf.* Arts. 53 of Convention IV and 52 of Protocol I.)

7. Do the measures the Israeli forces take to ensure only "terrorists" and their structures are targeted comply with their obligations under IHL? Is it permitted under IHL to attack civilian homes from the air? Even within an occupied territory? If those homes are being used by insurgents?

8. Is protecting Israeli soldiers a legitimate factor for determining what constitutes military necessity?

Case No. 112, Israel, Al Nawar v. Minister of Defence

THE CASE

[**Source:** Domb, F., "Judgments of the Supreme Court of Israel" in *Israel Yearbook on Human Rights,* vol. 16, 1986, pp. 321-328; footnotes omitted.]

H.C. (High Court) 574/82
AL NAWAR v. MINISTER OF DEFENCE, *ET AL.*

[...]

This is a leading judgment - delivered by Shamgar J.P. - on the question of the treatment of enemy property situated either on the battlefield or on territory subject to military occupation.

The petition was filed by a Lebanese citizen, complaining that during the "Peace for Galilee" operation, in 1982, the IDF (Israel Defence Forces) had illegally seized the equipment machines and stock of an enterprise manufacturing plastic products, situated near the village of Damur in South Lebanon. While the IDF Commander in Lebanon (the third respondent) contended that the enterprise belonged to the PLO and had been seized as enemy property, the petitioner claimed that he had purchased the enterprise in June 1982, prior to its seizure, so that it was his private property.

On the basis of the evidence submitted to the High Court, Shamgar J.P. made the following findings:

a) The enterprise formed part of "Tzamd" enterprises, which constitute part of the economic infrastructure of the PLO.

b) The enterprise was situated together with an ammunition depot and a military shoe factory in a building occupied and controlled by PLO forces.

c) The IDF came upon the enterprise in July 1982; thereupon, it placed guards on the site for the purpose of declaring it seized.

d) The petitioner signed the purchase contract for the enterprise in August 1982, after its seizure by the IDF; thus, at the time of the alleged purchase, the enterprise's owner had no right of disposition with respect to the property.

Given these facts, the central legal issue raised in the petition was the authority of the respondents to seize an enterprise owned by the PLO.

The first question analyzed by Shamgar J.P. concerned the law that applied at the time of seizure to the region where the enterprise was situated (hereinafter: the Region) and to the movables seized thereon. On this question Shamgar J.P. ruled that

> during the relevant period of June-September 1982, the international rules of war on land, as formulated in the third Section of the Hague Regulations annexed to the 1907 Hague Convention (No. IV) respecting the Laws and

> Customs of War on Land, and the 1949 Fourth Geneva Convention, applied to the Region where the enterprise was situated.

In reaching this conclusion, Shamgar J.P. relied principally on his judgment delivered in H.C. 593/82 (Tzemel Adv. Case), where he pointed out that the Hague Regulations and the Fourth Geneva Convention are applicable when (according to Article 42 of the Hague Regulations) a territory is "actually placed under the authority of the hostile army", thereby acquiring the status of an "occupied territory". Whether a given area is "actually placed under the authority of the hostile army" is a question of fact to be resolved along the lines of the two-part test proposed in the *British Manual of Military Law* (edited by H. Lauterpacht, 1958), according to which a belligerent occupation occurs when two conditions are fulfilled:

> First, that the legitimate government should, by the act of the invader, be rendered incapable of publicly exercising its authority within the occupied territory ; second, that the invader should be in a position to substitute his own authority for that of the legitimate government.

Applying this test, Shamgar J.P. rejected the petitioner's allegation that there was no actual military occupation by Israel in Lebanon because of the temporary and non-durable nature of the IDF presence there.

Relying on Dinstein's treatise *Laws of War*, Shamgar J.P. observed that the "Peace for Galilee" operation was not directed against the State of Lebanon. However, during the "Peace for Galilee" operation, the IDF had undisputedly controlled a part of Lebanon's territory.

Given this, there is no need to determine the question whether a state of war between Israel and Lebanon existed in June 1982, because as stated in Dinstein's treatise, even if it did not exist

> as concerns operations between opposing armed forces, the fundamental laws of war (mainly on warfare)... shall apply.

Consequently, Shamgar J.P. held that during the "Peace for Galilee" operation, the activity of the IDF in Lebanon was initially subject to the international law of warfare and subsequently to the international law applicable to occupied territory. Shamgar J.P. therefore turned to an examination of the international law pertaining to enemy property on the battlefield (or in a combat zone) and in occupied territory.

a) *Enemy Property on the Battlefield* (or Combat Zone)

The starting point of this topic, as formulated by Shamgar J.P., is that under contemporary international law, the powers of a military force with respect to enemy property falling into its hands during or following combat are defined and restricted.

The main principle of international law in respect of enemy property was codified in Article 23 (g) of the Hague Regulations, which provides that

it is especially forbidden:

(g) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Further rules on this topic - as elucidated by Shamgar J.P. - may be summarized as follows:

(a) All movable State property captured on the battlefield may be appropriated by the capturing belligerent State as booty of war. This is in accordance with Dinstein's approach that all movable State property captured in a combat zone, such as arms and ammunition, depots of merchandise, machines, instruments and even cash, automatically become the property of the belligerent into whose hands it has fallen.

(b) Further, all private property actually used for hostile purposes (or which may be useful for hostile purposes) found on the battlefield or in a combat zone may be appropriated by a belligerent State as booty of war.

(c) As explained by Schwarzenberger, Article 23(g) of the Hague Regulations, while prohibiting the destruction or seizure of enemy property, does not accord protection to property used for hostile purposes. Such property enjoys protection from arbitrary destruction, but it is still subject to the enemy's right of appropriation as booty.

(d) Article 46(2) of the Hague Regulations, providing that private property cannot be confiscated applies only to private property within the ordinary meaning of the term "private" and does not extend to property "actually in use by the hostile army".

(e) State property includes not only property actually owned by the enemy State, but also property controlled or administered by it, and even the property of companies, institutions or bodies in which the State has a substantial interest or over which it exercises substantial control. This broad definition of State property was adopted in the *Governmental Property Order* (Judea and Samaria) (No. 59), 1967.

(f) The distinction between State (governmental) property and private ordinary property should be based on the functional test applied in the 1921 Arbitral Award in the *Cession of Vessels and Tugs for Navigation on the Danube Case,* which determines the nature of the property in question according to its actual use. [...]

b) *Enemy Property in an Occupied Territory*

Regarding State movable property, Article 53 (first paragraph) of the Hague Regulations provides:

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

This comprehensive list of seizable movables, together with the sweeping reference to property which may be used for military operations, leads to the conclusion that - as pointed out by Dinstein - with the exception of movables not expressly enumerated in the Article and entirely beyond military use (like books and paintings), most of the governmental movables in an occupied territory may be lawfully seized.

Consequently, there is no practical difference between the status of movable governmental property captured on the battlefield and that seized in occupied territory: both constitute booty of war, so that the occupant acquires title to the property and may sell it in order to use the income for military purposes. Further, according to Article 53 (first paragraph), there is no duty of restoration or compensation for seizure of governmental property.

Regarding private property in occupied territory, Article 53 (second paragraph) provides that

> Except in cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and, in general, *all kinds of war material may be seized, even if they belong to private individuals,* but they must be restored at the conclusion of peace, and indemnities must be paid for them. (Emphases added)

It follows that all private property in actual hostile use, even if not enumerated in this provision, may be seized. Consequently, the status of private property used for military purposes is identical to that of governmental property: both may be seized by the occupant.

* * *

[...]

Applying the above-surveyed law to the facts as stated in the beginning of the judgment, Shamgar J.P. concluded that because the enterprise belonged to the PLO, the seizure in question was a lawful seizure effected on the battlefield and/or in occupied territory of movable enemy property which had been in actual hostile use and which was also useful for military purposes: [...].

Shamgar J.P. also discussed the petitioner's contention that the international laws of war regarding enemy property are intended to apply to the property of a belligerent State and not to that of an organization, whose property should be regarded as purely private. Responding to this contention, Shamgar J.P. noted the modern tendency to extend the application of the international law of war beyond declared wars between States so as to include all armed conflicts, even those of a non-international character. Even independent of this tendency, however, the legal principles applying to this contention are as follows:

> When a State acts in self-defence against terrorist organizations performing acts of murder and sabotage against its citizens, it is entitled to take towards such organizations and their property the same steps that it is entitled-according to the laws of war-to take against a hostile State army and its property. A comprehensive organization engaged in terrorist and military activity cannot expect to enjoy the immunities and protections granted by the laws of war to the

> property of civilians, who do not form part of enemy forces ... Therefore the laws of war placed on an equal footing governmental property and private property in hostile or military enemy use; both constitute booty of war (*Cession of Vessels and Tugs for Navigation on the Danube).* The law governing enemy State property and private property in hostile or military use applies also-with due modifications-to the property of a terrorist organization. [...]

The ultimate operative conclusion reached by Shamgar J.P. was that

> Given the particular political and military circumstances that existed in Lebanon, the IDF was authorized by the laws of war to act towards the property of the PLO economic arm as if it were a property of a belligerent enemy State, or a private property serving the enemy-namely, it could be treated either as booty of war on a battlefield, or seized as enemy State property in an occupied territory according to Regulation 53 (first paragraph).

Thus the High Court, sitting as a bench of five judges, unanimously dismissed the petition.

DISCUSSION

1. Why did the Court rule that the Hague Regulations and Convention IV applied? and that the region concerned acquired the status of occupied territory? What makes this case distinct from those cases concerning the West Bank and Gaza Strip? Is it truly an issue concerning the status of the territory prior to conflict? Even though the Court here agrees with Dinstein's treatise that "as concerns operations of opposing armed forces, the fundamental laws of war ... shall apply"? Does the Court believe that a state of war must be declared between States for the territory in its control to be considered occupied? (*See* **Case No. 108**, Israel, Applicability of the Convention to Occupied Territories. p. 1208, **Case No. 110**, Israel, Ayub v. Minister of Defence. p. 1218 and **Case No. 114**, Israel, Cases Concerning Deportation Orders. p. 1244.)

2. Even if the Hague Regulations and Convention IV apply here, does the Court have competence to try this case as Israel has not adopted legislation of application concerning Convention IV? Why does the Court not discuss its competence to try this case? If the Court has competence to try this case is that because both the Hague Regulations and Convention IV are customary law? Why is the conventional or customary status of these Conventions relevant to their applicability in this case? (*See* **Case No. 110**, Israel, Ayub v. Minister of Defence. p. 1218.)

3. a. According to IHL when may private property be requisitioned in occupied territory? By whom? When may private property be confiscated? By whom? Which additional limitations does IHL place both on requisition and confiscation? (*Cf.* Arts. 23 (g), 46, 52 and 55 of the Hague Regulations and Art. 55 (2) of Convention IV.) Do IHL provisions correspond to the rules elucidated by Shamgar J.P. (concerning property captured on the battlefield), which this Court considers applicable in occupied territory?

b. Was the property in this case requisitioned for a military or security purpose? Or because it was not private property? Are these different questions? Of what significance are the answers to these questions?

c. Do you agree that the PLO should be considered as a State for the purposes of classifying private property as State property? If the PLO was not considered a State, could the IDF have seized the property?

Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security

[N.B.: As from June 2002, the detainees were no longer held in "administrative detention", but as "unlawful combatants". End June 2002, the ICRC was able to hold its first visit to Mr. Dirani since his arrest and the first visit in two years to Mr. Obeid. Both detainees have since been released and repatriated.]

THE CASE

[**Source:** High Court of Justice Cheikh Abdal Karim Obeid and Mustafa Dib Mar'I Dirani v. The Ministry of Security, H.C.J. 794/98, 23 August 2001; unofficial translation.]

In the Supreme Court in its capacity as the High Court of Justice

H.C.J. 794/98

Before:
The Honorable President A. Barak
The Honorable Vice President Sh. Levin
The Honorable Justice T. Or
The Honorable Justice M. Heshin
The Honorable Justice Y. Englard

The Applicants: 1. Sheik Abdal Karim Obeid
Mustafa Dib Mar'i Dirani
v.
The Respondents: 1. The Minister of Security
Batya Arad
Tami Arad
Chen Arad
David Arad

Hearing

Date of the hearing: January 11, 2001, 16th of Tevet - 5761 [...]

Judgment

President A. Barak

1. The Applicants are held in administrative detention: Applicant No. 1 (Obeid) since 1989, Applicant No. 2 (Dirani) since 1994. The legality of their administrative detention has been examined in the Courts. It was held that

the administrative detention of the Petitioners was lawful, and that their release, at this time, poses a danger of causing a real damage to the security of the State and the well being of the inhabitants. The danger posed by the Applicants is learned both from the nature of their acts prior to their detention and from their senior status in the organizations to which they belong (Administrative Detention Appeal 5652/00) *Obeid and others v. The Minister of Security* (as yet unpublished). While in administrative detention, the Applicants requested to be permitted to meet with Red Cross representatives. The request was denied. The Petition before us was submitted against that decision and an order nisi was granted. While the Application was still pending, the Respondent notified that he decided to allow meetings between Applicant No. 1 (Obeid) and Red Cross representatives. Based on this notification, Obeid's Application was struck off [the record]. We continued to hear Dirani's application, while first waiting for a ruling to be handed down (in Administrative Detention Appeal 5652/00) concerning the legality of the administrative detention. After it was ruled that the administrative detention was valid, we continued to hear his claims concerning meetings with the Red Cross representatives. At their request, we added the Arad family [N.B: Ron Arad is an Israeli soldier who has disappeared. Israel considers that the organizations which the detainees belonged to hold Arad, held him or disposed of his body if he is dead or at least have information on his fate.] as additional Respondents (2-5). While Dirani's Application was pending, it was again decided to prevent the Red Cross visits to Obeid. At his request, we again added Obeid as an Applicant in the application.

2. Counsel for the Applicants bases his application on international law as well as our own internal law. As for the first source, he claims for the application of Article 143 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War. He also maintains that this provision has a customary force, therefore constituting part of Israel's internal law. It has also been argued that under our internal law (Regulation 11, State of Emergency Powers Regulations (Detention) (Administrative Detention - Detention Conditions))-1981 (hereinafter: "the Regulations"), the requested visits have to be allowed.

3. Mr. Nitzan claims for Respondent No. 1, and counsel for Respondents 2-5 joins in these claims, that the provisions of the Fourth Geneva Convention in general, and the provision of Article 143 of this Convention in particular, are of mere conventional force and, therefore, do not constitute part of the law of the State. In addition, he claims that even if this provision applies in the case before us, then, by virtue of the provision of the first sentence of Article 5 of the Convention, it is possible to deny "such rights and privileges under the present Convention" as would "be prejudicial to the security of such State", and that such is the case before us. As regards Article 11 of the Regulations, it was argued before us that the decision to prevent the meeting of the Applicants and the Red Cross personnel is reasonable. At the basis of this decision lies the position of Respondent No.1, according to which the holding of visits of the Red Cross to the Applicants might harm the security

of the State. In this regard we heard, with the consent of the Applicant's Counsel and in their absence, information concerning the security considerations which form the basis for Respondent No. 1's position.

4. Concerning the reasonableness of the decision to prevent a meeting between the Applicants and Red Cross personnel, there has been a change in the position of the Attorney General. At first we were told that while the Chief of Staff is of the opinion that the Applicants should not be allowed meetings with Red Cross personnel, whereas the position of the Attorney General differed. The Attorney General was of the opinion that, taking into consideration all of the circumstances of the matter, and especially the period of time that has elapsed since the Applicants were first detained, it was right and proper to enable a meeting of Red Cross representatives with them. The Attorney General emphasized that "the passing of time is a substantial consideration. Another consideration is that at the end of the day, Israel, in its behavior, is not like those who hold Ron Arad captive. Israel will do its best to obtain his liberation and to achieve this it will continue to demand the right to hold in administrative detention people whose detention can help in this. However, in these very circumstances, it is appropriate to allow the meeting with Red Cross representatives." Summarizing his position, the Attorney General noted that the reasonable approach would be to preserve the framework of the administrative detention and to enable the Applicants to meet with Red Cross representatives. "This manner of proceeding would be reasonable given, on one hand, the weight that must be given to the humanitarian aspect, and on the other hand. to the real possibility that today, with the passing of time, the prevention of a meeting with Red Cross representatives [will not] aid in the matter of Ron Arad in any way."

5. While the Application before us was pending, three IDF soldiers (Staff Sargeant Binyamin Avraham, Staff Sargeant Omar Sawayid and Sargeant Adi Avitan) were abducted by the Hizbullah (on October 7, 2000). At about the same time Colonel (Reserve) Elhanan Tannenbaum was also abducted. The Hizbullah organization refuses to provide Israel with any information whatsoever about the abductees, their welfare and their health. It also refuses to allow Red Cross representatives to visit them. Against this backdrop, the Attorney General reached the conclusion that for the time being, it would not be reasonable to allow the Red Cross to conduct visits to the Applicants. The Attorney General emphasized before us (in a Supplementary Notification dated January 4, 2001) that "these developments constitute a substantial change of circumstances as regards the relief sought by the application, since it is obvious that the State of Israel has a supreme interest - and a supreme obligation - to make every effort to obtain information on the welfare and health of the abductees. Therefore, for the time being, it would not be reasonable to allow the Red Cross to hold visits to the Applicants." In this, he joined his position to that of the Chief of Staff. In this context it was emphasized that the Applicants are not cut off from the outside world. They have been seen by the public. They have been photographed by the media. All of these clarified to the world that they are

healthy and well. They regularly meet with their attorney. They turn to the courts in their concerns. Under these circumstances, the importance of allowing the Red Cross visits to the Applicants is much decreased, as opposed to the situation where all these steps are not permitted to people held in detention.

6. We heard interesting and comprehensive legal claims during the hearings in which we deliberated on this application in its various stages. We wish to leave most of these claims for future determination. Our position is founded on the perception that, at the end of the day, the real question before us is the reasonableness of the decision to not to allow the Applicants to meet the Red Cross representatives. This is certainly the case if the rules of international law do not apply in our case, and the ruling [of the Court] must be taken based on the exercise of the discretion of the security authorities according to Article 11(a)(2) of the Regulations, which states:

> "a) a detainee is permitted to see visitors in a place determined by the commander for a period of half an hour as set forth below:
>
> (1) one visit of members of the family once in two weeks [...];
>
> (2) for a visitor of another degree of family relation or any other visitor who does not fall under Article 12 [dealing with visits by an attorney] - with special permission that the commander may grant at his discretion."

Even if the rules of international law apply in this matter, the exercise of security considerations (according to Article 5 of the Fourth Geneva Convention) must be made within the range of reasonableness. Hence, the key question is whether or not the decision not to allow the Applicants to meet with Red Cross representatives is reasonable.

7. In determining the reasonableness of this decision, two opposing considerations must be balanced: the first, the humanitarian consideration connected with the visits of Red Cross personnel to the applicants. The other, which is the security consideration, on which we have received information, and which concerns information on the navigator Ron Arad, and our four captives, we are not free to divulge the detailed contents of. Here also, we can leave for future determination [the question of] the proper balance between these opposing considerations during the time when the position of Respondent No. 1 was that the visits should continue to be prevented (in 1998), or when there has been a change in the Attorney General's position (at the beginning of 2001). What we have to determine is what the proper balance is now, after three years have elapsed from the time of the first decision, and after more than half a year has elapsed since the Attorney General changed his position. Moreover, it is appropriate to take into account the general context of a very prolonged administrative detention. To this question, our answer is that now, there is no longer any possibility to justify the prevention of the meeting of the Applicants with Red Cross representatives. With the passing of the years and months, the humanitarian consideration becomes weightier and weightier. On the other hand, the passing of time lessens the weight of the security consideration. In

this matter we have asked the representatives of the army who appeared before us and we thoroughly examined the considerations. We were convinced that in the proper balance between the humanitarian considerations and the security considerations, the humanitarian considerations prevail.

8. One may ask: are the Applicants entitled to have humanitarian considerations weighed in their matter? They are members of terror organizations. Humanity is beyond them and harming innocent people is the bread of their subsistence. Are the Applicants worthy of having humanitarian considerations made on their behalf, when Israeli soldiers and civilians are held by the organizations to which the Applicants belong, and these organizations do not weigh humanitarian considerations at all, and refuse to provide any information on our men whom they hold captive? Our answer to these questions is this: The State of Israel is a State of law; the State of Israel is a democracy that respects human rights, and gives serious weight to humanitarian considerations. We weigh these considerations, for compassion and humanity are ingrained in our character as a Jewish and democratic State; we weigh these considerations, for a person's dignity is precious in our eyes, even if he is one of our enemies (compare with High Court of Justice Case 320/80 *Kawasama v. The Minister of Defense*, P.D. 35(3) 113, 132). We are aware that such an approach seemingly gives an "advantage" to the terror organizations that are without any humanity. But this is a transient "advantage". Our moral approach, the humanity in our position, the rule of law that guides us - these are all important components of our security and our strength. At the end of the day, this is our own advantage. Things that were said elsewhere are appropriate here too:

"We are well aware that this judgment does not make it easier to deal with this reality. That is the fate of democracy, that not all means are legitimate to it, and not all methods employed by its enemies are open to it. Often democracy fights with one of its hands tied behind its back. Despite this, the hand of democracy prevails, since observing the rule of law and recognizing the liberties of the individual are an important component in democracy's perception of its security. At the end of day, these values strengthen democracy's spirit and strength *and enable it to overcome its difficulties." (High Court of Justice 5100/94, Public Committee Against Torture in Israel v. The State of Israel*, P.D. 53(4) 817, 845).

9. It was not easy for us to reach our decision. We are aware of the efforts made on behalf of Ron Arad and our abducted soldiers and civilians. We are convinced that our decision cannot harm these efforts. It is this conviction that enables us, in the overall balance, to determine that the humanitarian considerations prevail. We are aware that many - who did not see the security information that was presented to us - may think otherwise. [...]

The result is that we allow the Application, in the sense that Respondent No. 1 has to make the acceptable arrangements to enable a visit of Red Cross representatives to the Applicants.

The President [...]

Justice Y. Englard

[...] The two Applicants [...] have been held in administrative detention in Israel for many years. Applicant No. 1 has been in detention since 1989, that is for twelve years; Applicant No. 2 since 1994. The question before us is whether to allow the Red Cross to visit them.

The heart revolts against the inhuman and cynical behavior of the terror organizations that cause additional pain and sorrow to the families of the abductees who know nothing on the fate of their loved ones. Our hearts are also with the Arad family, from whom the fate of their son has been hidden by the terror organization and the governments who stand behind them. This behavior is not only inhuman and inconsistent with the behavior of civilized people, but it also stands in explicit contradiction to international conventions, and it is doubtful whether the international organizations and enlightened countries do enough to rectify this intolerable situation.

All of this lies in the background of the decisions by the security authorities, who try in every way to bring about a solution to the humanitarian and political problem of the abduction of civilians and soldiers by terror organizations and holding them in captivity, and who act in a manner contrary to all humanitarian rules. The honest belief of the State of Israel's authorities is that the prevention of visits to the Applicants could help in the struggle for the basic rights of the abductees. If not for the hope that the pressure of the prevention of these visits might bring about a similar response on the part of terror organizations, the security entities would not have even considered taking this step against the Applicants.

As my colleague President Barak set forth in detail, Red Cross visits are a clear humanitarian matter, to which the State of Israel considers itself bound subject, of course, to urgent and vital security needs. I would like to add a number of remarks from the viewpoint of Judaism, as they are expressed in the Halachic tradition. It is ruled as Halacha in the Code of Jewish Law (Shulhan Aruch , Yoreh Dea, Samech' Resh-Nun -Bet,) that "there is no greater Mitzva than the redemption of prisoners" and that

> "anyone who ignores the redemption of prisoners, transgresses [the rule] you shall not harden your heart (Deuteronomy 15, 7) or close your hand (Deuteronomy 15, 7). [And the rule] you shall not stand aside while your fellow's blood is shed (Leviticus 19, 16). [And the rule] he shall not subjugate him through hard labor in your sight (Leviticus 25, 53) [And] negates the rule you shall open your hand to him (Deuteronomy 15, 8). And the Mitzva of let your brother live with you (Leviticus 25, 36). [And the rule] you should love your fellow as yourself (Leviticus 19, 18). [And the rule] deliver them that are drawn into death. (Proverbs 24, 11). And many things of this kind (Code of Jewish Law - Shulhan Aruch, Yoreh Dea, Mark Resh-Nun-Bet, Section B)"

It was also ruled that "any moment of delay in the redemption of the prisoners, where it can be made earlier, it is like the shedding of blood". (*ibid*, Section).

With all of the great importance attached to the Mitzva of the redemption of prisoners, Jewish law sets some exceptions to the manner in which prisoners shall be released. This means that, in choosing the manner in which the prisoner shall be released, we must weigh wider considerations, such as the influence of the act of release on future prisoners who will fall into the hands of evil men. In our time, we also see ourselves as obligated to the maintenance of humanitarian values as a form of restoration of the world order in the wide sense of the word. There is no need to elaborate on this. In the special circumstances of this case, it seems, for the time being, that this consideration compels giving permission to Red Cross visit to the Applicants.

Therefore I join in the conclusion of my colleague, President A. Barak. [...]

DISCUSSION

1. a. Is the internment of the Applicants lawful under IHL? Can the acts imputed to the Applicants justify their administrative internment without trial, or only their criminal prosecution? (*See* Arts. 42, 43 and 78 of Convention IV.)

   b. Since the Applicants were arrested in southern Lebanon, is it acceptable to intern them in Israel? After Israel withdrew from southern Lebanon, could it continue to hold the Applicants? (*See* Art. 49 (1) of Convention IV.)

2. a. Why was the family of Ron Arad involved in this trial?

   b. Do the families of Ron Arad, the three Israeli soldiers captured on 7 October 2000 and Colonel Tannenbaum have the right to know the fate of their loved ones? Does the ICRC have the right to visit these persons? Can a violation of these rights justify the detention of the Applicants? Can it justify the refusal to allow the ICRC to visit the Applicants? Can it justify the denial of the right of the Applicants' families to know the Applicants fate through the ICRC? Is the demand for reciprocity an acceptable way of obtaining compliance with IHL? Does it contribute towards compliance? Can reciprocity take the form of reprisals? Would such reprisals be acceptable? (*See* Arts. 70, 71, 122, 123 and 126 of Convention III; Arts. 25, 33 (3), 106, 107, 136, 137, 140 and 143 of Convention IV; Arts. 32 and 33 of Protocol I; Art. 60 (5) of the Vienna Convention on the Law of Treaties, cited above, Chapter 13. IX. 2. c) dd) but no reciprocity, p. 301.)

   c. Would it be acceptable to detain the Applicants for as long as they provide no information on the fate of Ron Arad (and other missing persons) for the families concerned? For as long as the organizations to which the Applicants belong do not provide such information? Does Israel have "the right to hold in administrative detention people whose detention can help in" the release of Ron Arad? Did the judges violate IHL when they decided that this was the case? Did they commit a grave breach of Convention IV? (*See* Arts. 34, 42, 78 and 147 of Convention IV.)

   d. How do you view the ban on ICRC visits to the Applicants and the claim that such a ban furthers the cause of Ron Arad?

3. a. Does IHL confer on the Applicants the right to be visited by the ICRC? Does it confer on the ICRC the right to visit the Applicants? (*See* Art. 143 (5) of Convention IV.)

   b. What is the real issue to be decided by the Court: whether the ban on visits is reasonable, or whether the right to visits is guaranteed by international law?

4. Why is it important to know whether Art. 143 of Convention IV is customary, given that Israel and Lebanon are both party to this Convention? Can Israel - which belongs to the dualist tradition in terms of the relationship between international treaties and domestic law - argue that because it has not adopted national legislation to transform and implement Convention IV it is under no obligation to comply with it?

5. a. Can security reasons justify depriving a protected person of the rights laid down in Convention IV? Does the first sentence of Art. 5 of Convention IV apply to the Applicants arrested in southern Lebanon? Can Art. 5 (2) of Convention IV be invoked to ban ICRC visits to protected persons?

   b. What security reasons could justify a ban on ICRC visits? Can these reasons be invoked in the case in point?

6. What is the "humanitarian aspect" of ICRC visits to the Applicants? What rights are more easily exercised because of ICRC visits?

7. What are the advantages and disadvantages of showing, as does Judge Englard, that the requirements of IHL correspond to those of the Code of Jewish Law?

Case No. 114, Israel, Cases Concerning Deportation Orders

THE CASE

[**Source:** *ILM,* vol. 29 (1), 1990, pp. 139-181; footnotes omitted.]

ISRAEL: SUPREME COURT JUDGMENT IN CASES CONCERNING DEPORTATION ORDERS

[April 10, 1988]

[...]

The Supreme Court Sitting As the High Court of Justice

H.C. 785/87

H.C. 845/87

H.C. 27/88

[...]

Judgment

Shamgar P.

1. These three petitions, which we have heard together, concern deportation orders under Regulation 112 of the *Defence (Emergency) Regulations,* 1945 [...].

On March 13, 1988 we decided to dismiss the petitions [...]. The following are the reasons for the Judgment.

2. [W]e shall first examine the general contentions which essentially negate the existence of a legal basis for the issue of a deportation order to a resident of the above-mentioned territories. For if the conclusion will be that under the relevant law the issue of a deportation order is forbidden, then obviously there will be no need to examine whether a substantive justification exists for the issue of the specific order, through the application of this question to the factual data pertaining to each of the petitioners. [...]

3. (a) The petitioners raised, as a central reason for their petitions, the argument that Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the Fourth Geneva Convention) forbids the deportation of any of the petitioners from Judea, Samaria or the Gaza Strip, as the case may be. According to the argument, an absolute prohibition exists, with regard to a resident of one of the territories occupied by the I.D.F. [Israel Defence Force], against the application of Article 112 of the Defence (Emergency) Regulations, 1945 or of any other legal provision (if such exists) whose subject is deportation. This is due to the provisions of the above-mentioned international convention which, according to the contention, should be seen as a rule of public international law, binding upon the State of Israel and the Military Government bodies acting on its behalf and granting those injured the right of access to this Court.

The legal premise underlying this argument has been raised time and again before this Court and has been discussed either directly or partially and indirectly in a number of cases; [...].

[...]

(c) My comments will relate to the following areas:

(1) The accepted approach to interpretation under internal Israeli law;

(2) Principles of interpretation applicable to international conventions;

(3) Interpretation of the above-mentioned Article 49.

(d) The accepted interpretation in our law: [...]

In a nutshell, what has been said until now may be summarized thus: We have referred to the guidelines used in establishing the relation between the literal meaning of the written word and the correct legal interpretation, as far as this applies to our legal system. Interpretation in this sector seeks, as was said, to pave the way to a revelation of the legislative purpose. Setting the purpose in this form is directed to the sources which one may turn to in order to ascertain the purpose. It is customary in this matter to examine more than the text and, *inter alia*, also the legislative history; the legal and substantive context, and the meanings stemming from the structure of the legislation [...].

(e) Interpretation in Public International Law: Now the second question arises, which is: What are the rules of interpretation relevant to our matter that are used in public international law.

Israel has not yet ratified the Vienna Convention of 23 May 1969 on the Law of Treaties, which came into force in 1980 for those who joined it (hereinafter: the Vienna Convention). [available on http://www.walter.-gehr.net]

[...] Nonetheless, there is value, even if only for the sake of comparison, in an examination of the provisions of the Convention regarding interpretation.

On the issue of interpretation, Articles 31 and 32 of the said Convention state:

"31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion [sic] with the conclusion of the treaty; [...]

32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable." [...]

It seems that from the first part of Article 31 (1) one could conclude that the Convention sought to support that school of interpretation which emphasizes the text, as opposed to the alternative school of interpretation, no less accepted, which focuses on the intentions of the draftsmen of the Convention [...]. Yet, the second part of Article 31(1) and Article 32 form the bridge to the other theories of interpretation, also familiar to us from the earlier examination of our municipal law.

That is, the provisions of the Convention leave ample space to enable examination of the purpose which led to its making. It is even possible to reflect upon the preparatory work describing the background to the making of the Convention, as material which can complement the plain understanding of the text, its purpose and scope of application.

[...]

And freely translated [from Professor Mustafa Kamil Yasseen]: The method of interpretation cannot be uniform and identical and it may change in accordance with a series of factors. It is fundamentally dictated by the approach of the interpreter to interpretive methodology, by the substance of the instrument being interpreted, and by the characteristics of the particular field of law (i.e. public international law - m.s.) with which one is dealing. This and more, as far as treaties are concerned, a method of interpretation must see itself as a declarative act and not as a formative one (i.e. not judicial legislation - m.s.). The method must take into account that the treaty is an act stemming from the free will of the treaty makers, and that it is not a one-sided act; that the parties to the treaty are sovereign states, and that it is not a contract between individuals, nor the internal law of the state. Lastly this method must keep in mind the characteriistics [*sic*] of the international legal order, a field in which formalism does not have the upper hand, a field in which states enjoy a great deal of freedom of action, a field in which states are not only parties to a treaty, but also the ones to whom the treaty is directed (i.e. the states must be its executors - m.s.), and a field in which the preference for peaceful means to settle disputes depends upon the free will of states. Therefore, it is not surprising that the method of interpretating [sic] a treaty is different from that applicable to a law or a contract. [...]

(f) [...] Beyond that: When for the purpose of the issue before us we adopt the interpretive approach as expressed in the specific area of law that we are presently discussing, namely public international law, we should recall Professor Yasseen's interpretive guidelines [...] from which emerges, *inter alia*, a stand rejecting the constriction of state authority and rejecting formalism, or an approach which ignores the special qualities of the field of law that we are discussing.

We shall now proceed to the application of the rules of interpretation to the issue before us.

(g) *Article 49 of the Fourth Geneva Convention:* What is the dispute regarding the interpretation of the above-mentioned Article 49.

The relevant portions of the Articles state:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.
>
> ...
>
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

In *H.C. 97/79* (pp. 316-317) cited above, Sussman P. comments regarding the argument that the application of Regulation 112 of the Defence (Emergency) Regulations is contrary to Article 49 of the Fourth Geneva Convention:

"...I have not found substance in the argument that the use of the above-mentioned Regulation 112 stands in contradiction to Article 49 of the Fourth Geneva Convention [...]. It is intended, as Dr. Pictet in his commentary on the Convention (p.10) writes, to protect the civilian from arbitrary action by the occupying army, and the purpose of the above-mentioned Article 49 is to prevent acts such as the atrocities perpetrated by the Germans in World War II, during which millions of civilians were deported from their homes for various purposes, generally to Germany in order to enslave them in forced labour for the enemy, as well as Jews and others who were deported to concentration camps for torture and extermination.

It is clear that the above-mentioned Convention does not detract from the obligation of the Occupying Power to preserve public order in the occupied territory, an obligation imposed by Article 43 of the 1907 Hague Convention, nor does it detract from its right to employ the necessary means to ensure its own security, see Pictet, *Humanitarian Law and the Protection of War Victims*, at p. 115.

...

It has nothing whatsoever in common with the deportations for forced labour, torture and extermination that were carried out in World War II. Moreover, the intention of the respondent is to place the petitioner outside the country and not to transfer him to the country, to remove him because of the danger that he poses to public welfare and not to draw him nearer for the purpose of exploiting his manpower and deriving benefit from him for the State of Israel."

Landau P. again referred to this subject in *H.C 698/80* mentioned above at pp. 626-628. The following are the relevant passages from his remarks:

[...] Ms Langer has more forcefully repeated that same argument. In her opinion, the Court in *H.C. 97/79* ignored the difference between the first and second paragraphs of said Article 49: Whereas the prohibition against evacuating civilian populations generally carried out by displacement within the occupied territory is permitted for purposes of the population's security or for imperative military reasons, as is stated in the second paragraph of the Article, the prohibition against deportation beyond the border is absolute, 'regardless of their motive' as is stated in the latter part of the Article. The book *The Geneva Convention of August 12, 1949, Commentary* (Geneva, ed. by J.S. Pictet, vol. IV, 1958) 279 is cited. Regarding the prohibition against deportations, it states:

'The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2'. [...]

It has been argued before us that one must distinguish between the reason for the prohibitions in Article 49 of the Convention, which was, as was said, founded in the memory of those atrocities, and between that which stems from the unambiguous wording of the prohibition in the first paragraph of the Article, which applies, according to its language, not only to mass deportation, but also to deportation of individuals. As opposed to this, one can say that the deportation of individuals was also carried out

occasionally under the Hitler regime for the realization of the same policy which led to mass deportation, and therefore none of the provisions of Article 49 are in any way applicable to the deportation of persons who endanger public welfare - as this Court has ruled in *H.C. 97/79*. [...]

[...]

But whatever the correct interpretation of the first paragraph of Article 49 of the Convention may be, the Convention, as Article 49 in its entirety, does not in any case form a part of customary international law. Therefore, the deportation orders which were issued do not violate internal Israeli law, nor the law of the Judea and Samaria Region, under which this Court adjudicates . ...

Ms. Langer recalled to us a passage from G. Schwarzenberger's book, *International Law as Applied by International Courts and Tribunals* (London, vol. II, 1968) 165-166, which was cited in the above-mentioned *H.C. 606, 610/78*, at p. 121. The learned writer expresses the belief that the prohibition against the deportation of residents of an occupied territory is but 'an attempt to clarify existing rules of international customary law'. I assume that here too, the reference is to arbitrary deportations of population, akin to the Hitler regime. If the author was also referring to deportation of individuals in order to preserve the security of the occupied territory, then that is the opinion of an individual author, stated in vague terms with no substantiation whatsoever." [...]

(h) *What were the considerations guiding the draftsmen of the Convention:* An examination of *Actes de la Conférence Diplomatique de Genève de 1949*, [...] shows incontrovertibly that in choosing the term "deportations", the participants in the deliberations referred to deportations such as those carried out during World War II. [...]

The Convention draftsmen referred to deportations "as those that took place during the last war" and in the framework of the deliberations sought a text that would reflect the ideas that were expressed in different ways and in different languages. [...]

Article 49, which prohibited deportations was connected therefore with such provisions. As Pictet describes [...]

[i]n his words: When one thinks about the millions of people who were forcibly transferred from place to place during the last conflict (*i.e.* World War II - m.s.), and about their suffering, both physical and moral, one cannot but thankfully bless the text (of the Convention - m.s.) which put an end to these inhuman practices.

Here then deportations, concentration camps and the taking of hostages were linked together and the word "deportations" was used in the context described above. [...]

One is not speaking in this regard, not even by inference, about the removal from the territory of a terrorist, infiltrator or enemy agent, but rather about the protection of the entire civilian population as such from deportation, since the civilian population has more and more frequently become direct victim of war [...].

The conclusion, stemming from all of the above, is that the purpose which the draftsmen of the Convention had in mind was the protection of the civilian population, which had become a principal victim of modern-day wars, and the adoption of rules which would ensure that civilians would not serve as a target for arbitrary acts and inhuman exploitation. What guided the draftsmen of the Convention were the mass deportations for purposes of extermination, mass population transfers for political or ethnic reasons or for forced labour. This is the "legislative purpose" and this is the material context.

It is reasonable to conclude that the reference to mass and individual deportations in the text of the Article was inserted in reaction also to the Nazi methods of operation used in World War II, in which mass transfers were conducted, sometimes on the basis of common ethnic identity, or by rounding up people in Ghettos, in streets or houses, at times on the basis of individual summonses through lists of names. Summons by name was done for the purpose of sending a person to death, to internment in a concentration camp, or for recruitment for slave labour in the factories of the occupier or in agriculture. Moreover, it seems that the summons to slave labour was always on an individual basis.

(i) The gist of the petitioners' argument is that the first paragraph prohibits any transfer of a person from the territory against his will.

The implications of this thesis are that Article 49 does not refer only to deportations, evacuations and transfers of civilian populations, as they were commonly defined in the period of the last war, but also to the removal of any person from the territory under any circumstances, whether after a legitimate judicial proceeding (e.g. an extradition request), or after proving that the residence was unlawful and without permission [...], or for any other legal reason, based upon the internal law of the occupied territory.

According to the said argument, from the commencement of military rule over the territory there is a total freeze on the removal of persons, and whosoever is found in a territory under military rule cannot be removed for any reason whatsoever, as long as the military rule continues. In this matter there would be no difference between one dwelling lawfully or unlawfully in the territory, since Article 49 extends its protection to anyone termed "protected persons", and this expression embraces, according to Article 4 of the Convention, all persons found in the territory, whether or not they are citizens or permanent residents thereof and even if they are there illegally as infiltrators (including armed infiltrators), [...].

The petitioners' submission rests essentially on one portion of the first paragraph of the Article, i.e. on the words "... transfers ... deportations ... regardless of their motive". That is, according to this thesis, the reason or legal basis for the deportation is no longer relevant. Although the petitioners would agree that the background to the wording of Article 49 is that described above, the Article must now be interpreted according to them in its *literal and simple* meaning, thus including any forced removal from the territory.

(j) I do not accept the thesis described for a number of reasons:

It is appropriate to present the implications of this argument in all its aspects. In this respect we should again detail what is liable to happen,

according to the said argument, and what is the proper application of Article 49 in the personal sense and in the material sense. [...]

From the personal aspect, Article 49 refers, as was already mentioned, and as is universally accepted, to all those falling under the category of protected persons. This term is defined in Article 4 of the Convention, which in the relevant passage states:

> "Persons protected by the Convention are those who, at a given moment *and in any manner whatsoever*, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals*."
> (emphasis added - m.s.)

The definition employs a negative test, i.e. for our purposes, anyone who is not an Israeli national and is found in a territory occupied by our forces, is *ipso facto* a protected person. This includes an infiltrator, spy and anyone who entered the territory in any illegal manner. [...]

The acceptance of the argument that the prohibition in Article 49 applies, whatever the motive for its personal application, means that if someone arrives in the territory for a visit of a limited period, or as a result of being shipwrecked on the Gaza coast, or even *as an infiltrator for the purpose of spying or sabotage* (and even if he is not a resident or national of the territory, for that is not a requirement of Article 4), it is prohibited to deport him so long as the territory is under military rule. In other words, the literal, simple and all-inclusive definition of Article 49, when read together with Article 4, leads to the conclusion that the legality of a person's presence in the territory is not relevant, for his physical presence in the territory is sufficient to provide him with absolute immunity from deportation. According to this view, it is prohibited to deport an armed infiltrator who has served his sentence. [...]

[F]rom the thesis offered by the petitioners, it would follow that an infiltrator for sabotage purposes could not be deported before or after serving his sentence. The same would be true, according to this approach, of a person who came for a visit over the open bridges, yet stayed beyond the expiration of his permit. The literal and simple interpretation leads to an illogical conclusion.

(k) [...]

> If, [...] one accepts the proposed interpretation of the petitioners, according to which deportation means any physical removal from the territory, then the above would apply, for instance, to deportation for the purposes of extradition of the protected person, for this too requires removing a person from the territory. Laws, judicial decisions and legal literature use, in the context of extradition, the term deportation to refer to the stage of carrying out the extradition or the rendition. A murderer who escaped to the occupied territory would have a safe haven, which would preclude his transfer to the authorized jurisdiction. [...]

(l) Regarding the issue before us, the petitioners have directed our attention to the remarks of Pictet in *Commentary, supra*, at 368, who

adopts the literal interpretation, according to which all deportations are prohibited no matter what the reason. One should see this interpretive view, which would apply Article 49 to as broad a group of circumstances as possible, in its context and within its limits. The desire for a literal and simple meaning, which may find expression in scholarly opinions in professional literature, does not bind the courts. Not only are there other and contradictory viewpoints [...], but, more essentially, the Court deals with the law as it exists and clarifies the meaning of a law or of a treaty, as appropriate by adopting accepted rules of interpretation [...].

Were we to adopt the rules of interpretation used in our law, we could not accept the thesis proposed by the petitioners. The Court would consider the flaw which the Convention was intended to correct [...]; would examine the material context and the structure of Article 49, which in its other provisions refers clearly and openly to evacuations and transfers of population [...], would attempt to lift the veil from over the legislative purpose in order to adopt it as a standard of interpretation [...]; and would be wary of and refrain from the adoption of a literal interpretation which is, so to speak, simple but in law and in fact so simplistic that it leads the language of the law or the Convention, as appropriate, to a range of applicability that confounds reason [...] *e.g.* the absolute prohibition against the deportation of an infiltrator or spy, since deportations are prohibited, as it were, "regardless of their motive".

Essentially, even reference to the rules of interpretation of international conventions does not help the petitioners' argument: For even the Vienna Convention does not submit to the literal interpretation, but rather sees the words of the convention "in their context and in the light of its object and purpose" (Article 31(1) of the Vienna Convention). The Convention permits us to examine the preparatory work and shies away from an interpretation whose outcome is "manifestly absurd or unreasonable", and this description would apply at once to a prohibition against the deportation of an infiltrator [...].

[...]

(m) By contrast with this answer to the petitioners' contention, the opposite question naturally arises, namely, what then is the alternate interpretation of the words "regardless of their motive".

If we adopt the interpretation by which the term "deportation" refers to the mass and arbitrary deportations whose descriptions are familiar to us, then the words referring to the motive do not change the essence; the reference to some possible motive simply serves to preclude the raising of arguments and excuses linking the mass deportations to, as it were, legitimate motives. In other words, whatever the motive, the basic essence of the prohibited act (deportation), to which the words of Article 49 are directed, does not change. The opposite is true: There is basis for the claim that the reference to "some motive" is also among the lessons of World War II.

The words "regardless of their motive" were intended to encompass all deportations of populations and mass evacuations for the purposes of labour, medical experiments or extermination, which were founded during the war on

a variety of arguments and motives, including some which were but trickery and deceit (such as relocation, necessary work, evacuation for security purposes etc...). Furthermore, the draftsmen of the Convention took into account the existing right of the military government to utilize manpower during wartime (see Regulation 52 of the 1907 Hague Regulations which deals with compulsory services, and Article 51 of the Fourth Geneva Convention which even today permits the forcing of labour on protected persons), but sought to clarify that mass deportation, as it was carried out, is prohibited even when the motive is seemingly legitimate, except in the event of evacuation in accordance with the qualifications set out in paragraph 2 of Article 49. [...]

To summarize, this Court had the authority to choose the interpretation that rests upon the principles explained above over the literal interpretation urged by the petitioners. This Court has done so in *H.C. 97/79* [...]. [...]

4. (a) This Court has indicated in its judgments that the above-mentioned Article 49 is within the realm of conventional international law. In consequence of this determination, the petitioners have now raised a new thesis which holds that this Court's approach [...] is founded in error. This approach holds that the rules of conventional international law (as opposed to customary international law) do not automatically become part of Israeli law, unless they first undergo a legal adoption process by way of primary legislation. [...]

(b) The petitioners submit that not only does customary international law automatically become part of the country's laws (barring any contradictory law), but that there are also parts of conventional international law which are automatically incorporated, without the need for adoption by way of legislation as a substantive part of Israeli municipal law. These are those parts of conventional international law which are within the realm of "law-making treaties". [...]

5. [...]

(b) The legal situation in Israel: Israeli law on the question of the relationship between international law and internal law - that is in order to settle the question of whether a given provision of public international law has become part of Israeli law - distinguishes between conventional law and customary law [...].

[...]

According to the consistent judgments of this Court, customary international law is part of the law of the land, subject to Israeli legislation setting forth a contradictory provision. [...]

Lord Alverstone expressed the [...] idea in the *West Rand* case mentioned above when he said that in order to be considered a part of English law, a rule of international law must:

> "... be proved by satisfactory evidence, which must shew [sic] either that the particular proposition put forward has been recognised or acted upon

by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it."

That is, in fact, a standard similar to the one adopted in the definition appearing in Article 38(1)(b) of the Statute of the International Court, which deals with international custom. [...]

(c) [...]

The clear meaning of these remarks is that the adoption of international treaties - in order to incorporate them as part of internal law and in order to open them to enforcement through the national tribunals - is conditional upon a prior act of the legislator. As we shall see, international treaties may constitute a declaration of the valid customary law - but then their content will be binding by virtue of the said customary status of the rule found therein and not by virtue of its inclusion in the treaty. [...]

(d) [...]

To summarize, according to the law applying in Israel, an international treaty does not become part of Israeli law unless-

(1) Its provisions are adopted by way of legislation and to the extent that they are so adopted, or,

(2) The provisions of the treaty are but a repetition or declaration of existing customary international law, namely, the codification of existing custom. [...]

(e) If we apply what was said above to the issue before us, we must remember that Article 49 has been categorized in our judgments as conventional law which does not express customary international law. [...]

Regarding the fact that Article 49 did not reflect customary law, Landau P. adds at p. 629:

"In fact the occupation forces in the Rhineland in Germany, after World War I, used the sanction of deportation from the occupied territory against officials who broke the laws of the occupation authorities or who endangered the maintenance, security or needs of the occupying army: Fraenkel, *Military Occupation and the Rule of Law*, Oxford University Press, 1944. Under this policy the French deported during the armistice following that war 76 officials and the Belgians - 12, and during the dispute over the Ruhr (1923) no less than 41,808 German officials were deported (*ibid.*, at 130-131). In the face of these facts, it is clear that the prohibition against the deportation of civilians did not constitute a part of the rules of customary international law accepted by civilized states, as if the Geneva Convention simply gave expression to a pre- existing law." [...]

7. [...]

(c) [...]

[C]ountries, which are signatories to the treaty, are obligated to adhere to their said obligations in relations among themselves; however, in the system of relations between the individual and government, one can lean in court only upon rules of customary public international law. This approach formed the basis for Witkon J.'s remarks in *H.C. 390/79* mentioned above, when he said at p. 29:

> "One must view the Geneva Convention as part of conventional international law; and therefore - according to the view accepted in common law countries and by us - an injured party cannot petition the court of a state against which he has grievances to claim his rights. This right of petition is given solely to the states who are parties to such a convention, and even this litigation cannot take place in a state's court, but only in an international forum."

(d) Mr. Rubin questions [...] whether grounds exist to assume that the Hague Regulations were considered at the time of the Convention's signing as merely an international obligation undertaken by the state becoming a party to the Regulations and that *only subsequently* did they turn into binding customary international law and as such a part of the internal law. The answer to this question emerges, in my view, from the words of the International Tribunal in Nuremburg, which stated the following in its judgment:

> "The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention (Hague Convention Concerning the Laws and Customs of War on Land) expressly stated that it was an attempt 'to revise the general laws and customs of war' which it thus recognized to be then existing, but *by 1939 these rules laid down in the Convention were recognized by all civilised nations and were regarded as being declaratory of the laws and customs of war. ..." (I.M.T. Judgment, supra, at 65).*
>
> (emphasis added - m.s.)

In other words, there has been development in terms of the status of the Hague rules as customary law in the period that has elapsed since the signing of the Convention in 1907. [...]

11. Let us now turn to the specific submissions of each of the petitioners:

12. *H.C. 785/87:* (a) The petitioner Abd al Nasser Abd al Aziz Abd al Affo, born in 1956, is a resident of the city of Jenin.

The deportation order [...] reads as follows:

> "By virtue of my authority under Regulation 112 (1) of the Defence (Emergency) Regulations, 1945, and my authority under any law or security legislation, and whereas I believe the matter is necessary to ensure the security of the Region, public welfare and public order, I hereby order that:

Abd al Nasser Abd al Affo Muhamad Abd al Aziz, [...] be deported from the Region.

[He] is a senior operative in the 'National Front' organization, who has been sentenced three times in the past to prison terms for his terrorist activity. He is about to finish a third prison term of five years and three months. During his stay in prison, he assiduously continues his hostile activity in order to further the purposes of the organization." [...]

13. *H.C. 845/87:* (a) Abd al Aziz Abd Alrachman Ude Rafia, born in 1950, is a resident of Gaza.

On November 15, 1987 a deportation order was issued against him which included the following reasons:

"This order is issued since the above serves as a spiritual leader of the Islamic Jihad movement in the Gaza Strip, which supports a violent Islamic revolution on the Iranian model, armed struggle and the liberation of Palestine through Jihad. In the framework of his sermons in the mosques, he calls for action against the Israeli rule by military struggle."

Immediately upon receipt of this order, the petitioner was arrested and jailed in Gaza. The petitioner applied to the Advisory Committee [...].

[...]

The Committee noted in its reasoned and detailed decision the following, *inter alia:*

"The applicant is mentioned as responsible for the Islamic Jihad in the Gaza Strip and perhaps beyond that area. He is depicted as a guide of that organization and as an influential figure among the residents of the area in general and among those who belong to that organization in particular. They look to him constantly and often wait by his doorway to hear his words. He acquired his status through his activities as a lecturer at the university and as a preacher in the mosque, where he delivered extreme religious and nationalist addresses laden with incitement and hatred against Israeli rule. These contained on occasion calls for violent struggle, including encouragement of civil disorder and even extreme acts of violence, such as murder. There is no doubt, therefore, that the applicant constitutes an actual danger to the security of the Region and its inhabitants and to the maintenance of public order; and that the deportation order was given, therefore, within the framework of considerations enumerated in Regulation 108 of the Regulations.

...

The question remains whether in the applicant's case, the most severe step, namely deportation, is in order.

In view of the applicant's "history" and personality, we are convinced that the answer to this question is affirmative.[...]

Even placing him in prison, such as in administrative detention, will not counter his influence. There are grounds for fearing that precisely in such a place he will be even more accessible to the extremists among his followers and that his stay in prison will have a most dangerous

and negative influence on what takes place both within the prison and outside it.

The most efficient and suitable measure in this case is, therefore, to deport the applicant outside the Region and the country.

Even if he were free to go about in a foreign land and no one would constrain him, his harmful influence on the Region would be immeasurably smaller and less perceptible and immediate than would be the case, were he to walk about in our midst." [...]

I, therefore see no grounds for the intervention by this Court in the decision of respondent [...].

14. (a) *H.C. 27/88:* (a) The petitioner J'mal Shaati Hindi is a resident of Jenin and is studying at Al Najah University. On 1 December 87 a deportation order was issued against him [...].

[...]

(d) The petitioner complained about the legal procedure, in the framework of which classified evidence was presented to the Advisory Committee in his absence and in the absence of his counsel. On a similar issue the Court has stated in the above-mentioned *H.C. 513, 514/85 and H.C.M. 256/85* at p. 658:

"The petitioners complained that they were not privy to the secret material that was presented to the Advisory Board, but as this Court has already explained regarding a similar case in *A.D.A. 1/80*, this is the sole reasonable arrangement that strikes a balance between the two interests, which are: On the one hand maintaining an additional review of the considerations and decisions of the Military Commander; and on the other hand preventing damage to State security through disclosure of secret sources of information. It indeed does not provide an opportunity to respond to every factual contention and the Advisory Board (or a court under given circumstances) must take this fact into consideration when it examines the weight or the additional degree of corroboration of the information. However, the legislator could not find a more reasonable and efficient manner to guard against the disclosure of secret information in circumstances where such is vital in order to prevent severe damage to security; [...]."

The Committee examined, on this occasion as well, what would be the maximal information that it could place at the disposal of the petitioner without damaging vital security interests, and one has no cause for complaint against the Committee. We have nothing to add in this matter, because we have not examined the secret material and in any case do not know its details. [...]

Therefore, I would dismiss the petitions and set aside the orders issued on their basis. [...]

Bach J.:

1. I concur in the final conclusion that my esteemed colleague, the President, has reached regarding these petitions; however, on one point of principal importance I must dissent from his opinion.

   The issue concerns the proper interpretation of Article 49 of the Fourth Geneva Convention (hereinafter "The Convention"). [...]

   [...]

5. After examining the question in all its aspects, I tend to accept the position of the petitioners on this matter, and my reasons are as follows:
   a) The language of Article 49 is unequivocal and explicit. The combination of the words "*Individual or mass forcible transfers as well as deportations*" in conjunction with the phrase "*regardless of their motive*", (emphasis added - g.b.), admits in my opinion no room to doubt, that the Article applies not only to mass deportations but to the deportation of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional - "regardless of their motive."
   b) I accept the approach, which found expression in Sussman P.'s judgment in *H.C. 97/79*, namely that the Convention was framed in the wake of the Hitler period in Germany, and in face of the crimes which were perpetrated against the civilian population by the Nazis during World War II. Similarly, I would subscribe to the opinion that one may consider the historical facts accompanying the making of a convention and the purpose for its framing in order to find a suitable interpretation for the articles of the convention. Even the Vienna Convention, upon which Professor Kretzmer relied in this context, does not refute this possibility [Article 31] [...].

      [...] I find no contradiction between this "historical approach" and the possibility of giving a broad interpretation to the Article in question.

      The crimes committed by the German army in occupied territories emphasized the need for concluding a convention that would protect the civilian population and served as a lever (and quasi "trigger") for its framing. But this fact does not in any way refute the thesis that, when they proceeded to draw up that convention, the draftsmen decided to formulate it in a broad fashion and in a manner that would, *inter alia*, totally prevent the deportation of residents from those territories either to the occupying state or to another state.

      The text of the Article, both in terms of its context and against the backdrop of the treaty in its entirety, cannot admit in my opinion the interpretation, that it is directed solely towards preventing actions such as those that were committed by the Nazis for racial, ethnic or national reasons.

      We must not deviate by way of interpretation from the clear and simple meaning of the words of an enactment when the language of the Article is unequivocal and when the linguistic interpretation does not contradict the legislative purpose and does not lead to illogical and absurd conclusions.

c) The second portion of Article 49 supports the aforesaid interpretation. Here the Convention allows the evacuation of a population *within the territory*, i.e. from one place to another in the occupied area, if it is necessary to ensure the security of the population or is vital for military purposes. It teaches us that the draftsmen of the Convention were aware of the need for ensuring security interests, and allowed for this purpose even the evacuation of populations within the occupied territories. The fact that in the first portion this qualification was not introduced, i.e. the deportation of residents beyond the borders for security reasons was not permitted, demands our attention.

d) Additionally, a perusal of other articles of the Convention illustrates an awareness by the draftsmen of the security needs of the occupying state and indirectly supports the aforesaid broad interpretation of Article 49.

This is what the first part of Article 78 states:

> "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."

I accept Professor Kretzmer's contention that Articles 78 and 49 should be read together and that one should infer from them as follows: Where a person poses a foreseeable security danger, one may at most restrict his freedom of movement within the territory and arrest him, but one cannot deport him to another country. [...]

A study of Article 5 of the Convention, which deals specifically with spies and saboteurs, leads to the same conclusion. The second paragraph of Article 5 reads:

> "Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention." [...]

We see that under the Convention, the rights of spies and saboteurs can be denied in various ways, if the matter is deemed necessary for security reasons. Yet despite the alertness of the Convention's draftsmen to the security needs of the occupying power, there is no Article qualifying the sweeping prohibition in Article 49, and there is no allusion to the right to deport such persons to another state.

The above-mentioned Articles of the Geneva Convention supplement the provisions of Regulation 43 of the Hague Regulations, which obligates the occupying power to ensure public order and public welfare in the occupied territories, in the sense that they indicate the measures which may be adopted in order to fulfil this obligation. In any event, nothing in Regulation 43 of the Hague Regulations stands in contradiction to the simple and broad interpretation suggested for Article 49.

e) A clear direction is discernible in the Convention. The freedom of movement of a "protected person" can be limited, and he can even be arrested without trial, if it is necessary in order to protect public security or another vital interest of the occupying state; this is in addition to the possibility of placing him on trial, punishing him and even condemning

him to death. But the "protected person" cannot be deported; for the moment deportation to another country is carried out, the occupying state has no further control over him, and he therefore ceases to be a "protected person".

f) [...]

This interpretation of Article 49 of the Convention has won nearly universal acceptance and I accept it as well. [...]

My esteemed colleague, the President, also relies on the argument that, in light of the sweeping formulation of Article 4 of the Convention which includes a definition of the term "protected persons" under the Convention, a literal interpretation of Article 49 would lead to the conclusion that one could not even deport terrorists who illegally infiltrate into the territory during the occupation, and similarly that it would not be possible to extradite criminals from the territories to other states in accordance with extradition treaties.

The question regarding infiltrators could arise because of a certain difficulty in the interpretation of Article 4 of the Convention, which is not free of ambiguity. Thus when that same Article 4 states that "Persons protected by the Convention are those who *find themselves* in case of a conflict or occupation in the hands of a Party to the conflict or an Occupying Power..." (emphasis added - g.b.) then there is perhaps room to argue that the reference is to people who due to an armed conflict or belligerence between states, have fallen into a situation where against their will they *find themselves* in the hands of one of the parties to the conflict or in the hands of the occupying power; whereas people who subsequently penetrate into that territory with malicious intent are not included in that definition. If and when this problem arises in an actual case, there will be a need to resolve it through an appropriate interpretation of Article 4 of the Convention, but this does not suffice, in my opinion, to raise doubts concerning the interpretation of Article 49. In the matter before us, the aforesaid difficulty is in any case non-existent, since the petitioners are, by all opinions, permanent residents of the territories controlled by the I.D.F.; and if the Convention under discussion applies to those territories, then they are undoubtedly included in the definition of "protected persons".

The same applies to the problem of extraditing criminals. The question of to what extent an extradition treaty between states is feasible, when it concerns people who are located in territories occupied by countries which are parties to the treaty, is thorny and complicated in itself; and whatever may be the answer to this question, one can not draw inferences from this regarding the interpretation of Article 49. In any case, should it be established that it is indeed possible to extradite persons who are residents of occupied territories on the basis of the Extradition Law, 5714-1954 and the treaties that were signed in accordance with it, then regarding the possibility of actually extraditing the persons concerned, I would arrive at the same ultimate conclusion

as I do regarding the petitioners against whom the deportation orders were issued under Regulation 112 of the Defence (Emergency) Regulations, as will be detailed below.

7. Despite the aforesaid I concur with the opinion of my esteemed colleague, the President, that these petitions should be dismissed.[...] I do not see any grounds for deviating from the rule that was established and upheld in an appreciable number of judgments under which Article 49 of the Convention is solely a provision of conventional international law as opposed to a provision of customary international law. Such a provision does not constitute binding law and cannot serve as a basis for petitions to the courts by individuals. [...]

8. I would further add that I see no grounds for our intervention in the decisions of the respondents in this matter for the sake of justice. [...]

   I have not ignored the fact that representative of the state have declared on a number of occasions before this Court, that it is the intention of the Government to honour as policy the humanitarian provisions of the Convention. [...]

   However, each case will be examined in accordance with its circumstances, and in contrast with the interpretation of laws and conventions which at times require strict adherence to the meaning of words and terms, the Court enjoys a flexible and broad discretion when it examines a Government policy declaration in accordance with its content and spirit.

   It should not be overlooked that the Fourth Geneva Convention, with which we are dealing, includes a variety of provisions, the major portion of which are surely humanitarian in substance. But some are of public and administrative content and the Convention also contains articles which can only partially be considered of a humanitarian nature. Article 49 of the Convention is indeed primarily of a humanitarian nature, but it seems that this aspect cannot predominate when it attempts, due to its sweeping formulation, to prevent the deportation of individuals, whose removal was decided upon because of their systematic incitement of other residents to acts of violence and because they constitute a severe danger to public welfare. [...]

9. In the light of the aforesaid and as I also agree with those portions of the President's opinion which deal with the factual aspects of the petitions, I concur in the conclusion reached by my esteemed colleague in his judgment regarding the fate of these petitions.

Rendered today 23 Nissan 5748 (April 10, 1988)

DISCUSSION

1. a. Are all provisions of Convention IV purely conventional? Are some customary law? Is Art. 49 of Convention IV customary law? How is this assessed? How could one assess this taking into account that, in 1985, 164 out of 170 States

were bound conventionally to respect that provision? Should one assess the practice of the 6 States not party to the Convention? Does the Court not rather assess whether Art. 49 was customary in 1949? Or in 1923? Has customary law not developed between 1949 and 1985?

b. Why is the status, whether conventional or customary, of Art. 49 relevant to the Convention's applicability in this case if Israel is a Party to Convention IV?

c. May a State adopt the Israeli system under which international treaties to which Israel is a Party are not automatically part of Israeli law but only become so if there is legislation of application? Has Israel an obligation to adopt such legislation? Does IHL oblige Israel to allow the Conventions to be invoked before its courts? May Israel invoke its constitutional system, the absence of legislation of application, or this decision of its Supreme Court to escape international responsibility for violations of Convention IV? (*Cf.* Arts. 145 and 146 of Convention IV.)

d. Are the Hague Regulations applicable in this case? As conventional or customary law?

e. Is Art. 49 of Convention IV self-executing? Is the answer to this question relevant in this case? Does such a question, however, explain, *e.g.,* the inclusion of Arts. 49/50/129/146 or 48/49/128/145 respectively of the four Conventions concerning national legislation?

2. a. Assuming applicability of the Conventions to Israel, do the deportations violate Art. 49 of Convention IV? To what cases of deportations does the Court consider Art. 49 applicable? Why? Is this understanding consistent with the "ordinary meaning to be given to the terms of the treaty"? (*Cf.* Art. 31 (1) of the Vienna Convention on the Law of Treaties.) Why does the Court determine that the "ordinary meaning" of Art. 49 leads to "manifestly absurd or unreasonable" outcomes, allowing for supplementary means of interpretation? (*Cf.* Art. 32 (b) of the Vienna Convention on the Law of Treaties.)

b. Could you imagine a wording of Art. 49 (1) more clearly prohibiting individual deportations than the actual wording? Is the result of the literal interpretation (that individual deportations are prohibited, regardless of their motive) unreasonable in light of the object and purpose of Convention IV? Does Pictet's and other drafters' recollections of the mass deportations by Nazi Germany mean that they wanted Art. 49 to cover only such deportations? Would such a will be controlling for today's interpretation of the rule?

c. In his separate opinion, how does Bach interpret Art. 49? If the majority adopted Bach's opinion, would the deportations in this case still occur? Why?

3. Regardless of whether Israel is legally bound by the Geneva Conventions, Israel has declared that in general it intends to honour the humanitarian provisions of the Convention. What are these humanitarian provisions? Do articles prohibiting deportation not constitute humanitarian provisions? Or only in certain instances? Are the three petitioners in this case protected persons according to Art. 4? According to the Court for application of the humanitarian provisions of the Conventions?

4. a. Petitioners objected to the evidentiary use of "classified material," as it denied their right to a fair trial, *e.g.,* para. 14 (d) of the majority's opinion.

Notwithstanding a determination concerning utilization of "classified material," would Art. 49 permit deportations following a legitimate judicial proceeding?

b. Is deportation not permissible when repeat offenders (such as the present petitioners) place the public order and safety of the occupied territory at risk and no alternative measures appear available? (*Cf.* Art. 43 of the Hague Regulations and Art. 49 of Convention IV.)

5. May protected persons never be transferred according to Convention IV? Is this Art. 49's distinction between deportation and evacuation? What is this distinction? (*Cf. also* Art. 78 of Convention IV.)

6. Are the deportations condoned by the High Court of Justice grave breaches of IHL? (*Cf.* Art. 147 of Convention IV.)

Case No. 115, Israel, Ajuri v. IDF Commander

THE CASE

[**Source:** Ajuri v. IDF Commander, The Supreme Court sitting as the High Court of Justice, 3 September 2002, HCJ 7019/02; HCJ 7015/02] available on http://www.court.gov.il/]

1. Kipah Mahmad Ahmed Ajuri
HCJ7015/02
2. Abed Alnasser Mustafa Ahmed Asida *et al*

v.

1. IDF Commander in West Bank
2. IDF Commander in Gaza Strip *et al*

1. Amtassar Muhammed Ahmed Ajuri *et al*
HCJ7019/02

v.

1. IDF Commander in Judaea and Samaria
2. IDF Commander in Gaza Strip *et al*

The Supreme Court sitting as the High Court of Justice
[3 September 2002]

Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, T. Strasberg-Cohen, D. Dorner, Y. TPrkel, D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice

Facts: The IDF Commander in Judaea and Samaria made orders requiring three residents of Judaea and Samaria to live, for the next two years, in the Gaza Strip. The orders were approved by the Appeals Board. The three residents of Judaea and Samaria petitioned the High Court of Justice against the orders.

The petitioners argued that the orders were contrary to international law. In particular the petitioners argued that Judaea and Samaria should be regarded as a different belligerent occupation from the one in the Gaza Strip, and therefore the orders amounted to a deportation from one territory to another, which is forbidden under international law (art. 49 of the Fourth Geneva Convention).

The respondents, in reply, argued that the orders complied with international law. The respondents argued that the belligerent occupation of Judaea, Samaria and the Gaza Strip should be considered as one territory, and therefore the orders amounted merely to assigned residence, which is permitted under international law (art. 78 of the Fourth Geneva Convention).

A further question that arose was whether the IDF commander could consider the factor of deterring others when making an order of assigned residence against any person.

Held: Article 78 of the Fourth Geneva Convention empowers an occupying power to assign the place of residence of an individual for imperative reasons of security. Assigned residence is a harsh measure only to be used in extreme cases. However, the current security situation in which hundreds of civilians have been killed by suicide bombers justifies the use of the measure in appropriate cases.

Judaea and Samaria and the Gaza Strip are effectively one territory subject to one belligerent occupation by one occupying power, and they are regarded as one entity by all concerned, as can be seen, *inter alia*, from the Israeli-Palestinian interim agreements. Consequently, ordering a resident of Judaea and Samaria to live in the Gaza Strip amounts to assigned residence permitted under art. 78 of the Fourth Geneva Convention, and not to a deportation forbidden under art. 49 of the Fourth Geneva Convention.

An order of assigned residence can be made against a person only if there is a reasonable possibility that the person himself presents a real danger to the security of the area. If he does not, considerations of deterring others are insufficient for making an order of assigned residence. But if such a danger does exist, the IDF commander is authorized to make an order of assigned residence, and he may consider the deterrent factor in deciding whether actually to make the order or not.

The Appeals Board found that the petitioner in HCJ 7019/02 had sewn explosive belts. The Appeals Board found that the first petitioner in HCJ 7015/02 had acted as a lookout for a terrorist group when they moved explosive charges. In both these cases, the Supreme Court held that the deeds of the petitioners justified assigned residence, and it upheld the orders. However, with regard to the second petitioner in HCJ 7015/02, the Appeals Board found only that he had given his brother, a wanted terrorist, food and clothes, and had driven him in his car and lent him his car, without knowing for what purpose his brother needed to be driven or to borrow his car. The Supreme Court held that the activities of the second petitioner were insufficient to justify the measure of assigned residence, and it set aside the order of assigned residence against him.

HCJ 7019/02 - petition denied.

HCJ 7015/02 - petition of the first petitioner denied; petition of the second petitioner granted. [...]

Judgment

President A. Barak

The military commander of the Israel Defence Forces in Judaea and Samaria made an 'order assigning place of residence'. According to the provisions of the order, the petitioners, who are residents of Judaea and Samaria, were required to live for the next two years in the Gaza Strip. Was the military commander authorized to make the order assigning place of residence? Did the commander exercise his discretion lawfully? These are the main questions that arise in the petitions before us.

Background

1. Since the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents, the elderly, children, men and women. More than six hundred citizens and residents of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. [...] Bereavement and pain over whelm us.

2. Israel's fight is complex. The Palestinians use, *inter alia*, guided human bombs. These suicide bombers reach every place where Israelis are to be found (within the boundaries of the State of Israel and in the Jewish villages in Judaea and Samaria and the Gaza Strip). They sew destruction and spill blood in the cities and towns. Indeed, the forces fighting against Israel are terrorists; they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including in holy sites; they are supported by part of the civilian population, and by their families and relatives. The State of Israel faces a new and difficult reality, as it fights for its security and the security of its citizens. This reality has found its way to this court on several occasions (see HCJ 2936/02 *Doctors for Human Rights v. IDF Commander in West Bank*; HCJ 2117/02 *Doctors for Human Rights v. IDF Commander in West Bank*; HCJ 3451/02 *Almadani v. Minister of Defence*, at p. 36).

3. In its struggle against terrorism, Israel has undertaken - by virtue of its right of self-defence - special military operations (Operation 'Protective Wall' which began in March 2002 and Operation 'Determined Path' which began in June 2002 and has not yet ended). The purpose of the operations was to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks. In these operations, IDF forces entered many areas that were in the past under its control by virtue of belligerent occupation and which were transferred pursuant to agreements to the (full or partial) control of the Palestinian Authority. The army imposed curfews and closures on various areas. Weapons and explosives were rounded up. Suspects were arrested. [...]

4. The special military operations did not provide an adequate response to the immediate need to stop the grave terrorist acts. The Ministerial Committee for National Security sought to adopt several other measures that were intended to prevent further terrorist acts from being perpetrated, and to deter potential attackers from carrying out their acts. [...]

5. One of the measures upon which the Ministerial Committee for National Security decided - all of which within the framework of the Attorney-General's opinion - was assigning the place of residence of family members of suicide bombers or the perpetrators of serious attacks and those sending them from Judaea and Samaria to the Gaza Strip, provided that these family members were themselves involved in the terrorist activity. This measure was adopted because, according to the evaluation of the professionals involved (the army, the General Security Service, the Institute for Intelligence and Special Tasks (the *Mossad*), and the police), these additional measures might make a significant contribution to the struggle against the wave of terror, resulting in the saving of human life. This contribution is two-fold: *first*, it can prevent a family member involved in terrorist activity from perpetrating his scheme (the preventative effect); *second*, it may deter other terrorists - who are instructed to act as human bombs or to carry out other terror attacks - from perpetrating their schemes (the deterrent effect).

The Amending Order assigning place of residence

6. In order to give effect to the new policy, on 1 August 2002 the military commander of the IDF forces in Judaea and Samaria amended the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970 (hereafter - the Original Order). This Order determined provisions, inter alia, with regard to special supervision (s. 86). These allow instructions to be given that a person should be placed under special supervision. According to the provisions of the Original Order, no authority should be exercised thereunder unless the military commander is of the opinion 'that it is imperative for decisive security reasons' (s. 84(a)). An order of special supervision may be appealed before the Appeals Board (s. 86(e)). The Appeals Board is appointed by the local commander. The chairman of the Appeals Board is a judge who is a jurist. The Board's role is to consider the order made under this section and to make recommendations to the military commander. If a person appeals an order and the order is upheld, the Appeals Board will consider his case at least once every six months whether that person submitted a further appeal or not (s. 86(f)). The application of the Original Order was limited to Judaea and Samaria. The amendment that was made extended its application to the Gaza Strip as well (the Security Provisions (Judaea and Samaria) (Amendment no. 84) Order (no. 510), 5762-2002 (hereafter - the Amending Order)). The provisions of the Amending Order (s. 86(b)(1) after the amendment) provide:

'Special supervision and assigning a place of residence'

a. A military commander may direct in an order that a person shall be subject to special supervision.

b. person subject to special supervision under this section shall be subject to all or some of the following restrictions, as the military commander shall direct:

(1) He shall be required to live within the bounds of a certain place in Judaea and Samaria or in the Gaza Strip, as specified by the military commander in the order.'

In the introduction to the Amending Order it is stated that is was made 'in view of the extraordinary security conditions currently prevailing in Judaea and Samaria, [...]. It was also stated in the introduction that the order was made 'after I obtained the consent of the IDF military commander in the Gaza Strip'. Indeed, in conjunction with the Amending Order, the IDF commander in the Gaza Strip issued the Security Provisions (Gaza Strip) (Amendment no. 87) Order (no. 1155), 5762-2002. Section 86(g) of this order provided that:

> 'Someone with regard to whom an order has been made by the military commander in Judaea and Samaria under section 86(b)(1) of the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970, within the framework of which it was provided that he will be required to live in a specific place in the Gaza Strip, shall not be entitled to leave that place as long as the order is in force, unless the military commander in Judaea and Samaria or the military commander in the Gaza Strip so allow.'

Under the Amending Order, orders were made assigning the place of residence of the three petitioners before us. Let us now turn to these orders and the circumstances in which they were made.

The proceedings before the military commander and the Appeals Board

7. On 1 August 2002, the IDF commander in Judaea and Samaria (hereafter - the Respondent) signed orders assigning the place of residence of each of the petitioners. [...] These orders require each of the petitioners to live in the Gaza Strip. The orders state that they will remain valid for a period of two years. The orders further state that they may be appealed to the Appeals Board. Underlying each of the orders are facts - which we will consider below - according to which each of the petitioners was involved in assisting terrorist activity that resulted in human casualties. In the opinion of the Respondent, assigning the place of residence of the petitioners to the Gaza Strip will avert any danger from them and deter others from committing serious acts of terror. The petitioners appealed the orders before the Appeals Board. A separate hearing was held with regard to the case of each of the petitioners, before two Appeals Boards. Each of the Boards held several days of hearings. The Boards decided on 12 August 2002 to recommend to the Respondent that he approve the validity of the orders. The Respondent studied the decision of the Boards and decided on the same day that the orders would remain valid. On 13 August 2002, the petitions before us were submitted against the Respondent's decision.

The proceedings before us *[...]*

9. Counsel for the petitioners argued before us that the Amending Order, the individual orders issued thereunder and the decisions of the Appeals Boards should be set aside, for several reasons. [...] *Third*, the Amending Order was made without authority, because the Respondent was not competent to make an order concerning the Gaza Strip. Finally - and this argument was the focus of the hearing before us - the Amending Order is void because it is contrary to international law. Counsel for the Respondent argued before us that the petitions should be denied. According to him, the Amending Order, and the individual orders made thereunder, are proper and they and the proceeding in which they were made are untainted by any defect. The respondent was competent to make the Amending Order, and the individual orders are lawful, since they are intended to prevent the petitioners from realizing the danger that they present, and they contain a deterrent to others. The orders are proportionate. They are lawfully based on the factual basis that was presented to the commander and the Appeals Boards. According to counsel for the Respondent, the Amending Order and the orders made thereunder conform to international law, since they fall within the scope of article 78 of the Fourth Geneva Convention of 1949 (Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1949; hereafter - the Fourth Geneva Convention). [...]

12. As we have seen, the arguments before us concern various aspects of the decision of the Respondent and the Appeals Board. We should state at the outset that we found no basis to the arguments about procedural defects in the decision of the Respondent or in the decisions of the Appeals Boards. [...] Indeed, the main matters on which the parties concentrated their arguments - and on which we too will focus - concern the following three questions: *first*, was the military commander competent, under the provisions of international law, to make the Amending Order? This question concerns the authority of a military commander under international law to make arrangements with regard to assigning a place of residence. *Second*, if the answer to the first question is yes, what are the conditions required by international law for assigning a place of residence? This question concerns the scope of the military commander's discretion under international law in so far as assigning a place of residence is concerned. *Third*, do the conditions required by international law for making the orders to assign a place of residence exist in the case of the petitioners before us? This question concerns the consideration of the specific case of the petitioners before us in accordance with the laws that govern their case. Let us now turn to consider these questions in their proper order.

The authority of the military commander to assign a place of residence

13. Is the military commander of a territory under belligerent occupation competent to determine that a resident of the territory shall be removed from his place of residence and assigned to another place of residence in that territory? It was argued before us that the military commander does not

have that authority, if only for the reason that this is a forcible transfer and deportation that are prohibited under international law (article 49 of the Fourth Geneva Convention). Our premise is that in order to answer the question of the military commander's authority, it is insufficient to determine merely that the Amending Order (or any other order of the commander of the territory) gives the military commander the authority to assign the place of residence of a resident of the territory. The reason for this is that the authority of the military commander to enact the Amending Order derives from the laws of belligerent occupation. They are the source of his authority, and his power will be determined accordingly. I discussed this in one case, where I said:

> 'From a legal viewpoint the source for the authority and the power of the military commander in a territory subject to belligerent occupation is in the rules of public international law relating to belligerent occupation (*occupatio bellica*), and which constitute a part of the laws of war' (HCJ 393/82 Almashulia v. IDF Commander in Judaea and Samaria, at p. 793).

In this respect, I would like to make the following two remarks: *first*, all the parties before us assumed that in the circumstances currently prevailing in the territory under the control of the IDF, the laws of international law concerning belligerent occupation apply [...]; *second*, the rules of international law that apply in the territory are the customary laws (such as the appendix to the (Fourth) Hague Convention respecting the Laws and Customs of War on Land of 1907, which is commonly regarded as customary law; hereafter - the Fourth Hague Convention). With regard to the Fourth Geneva Convention, counsel for the Respondent reargued before us the position of the State of Israel that this convention - which in his opinion does not reflect customary law - does not apply to Judaea and Samaria. Notwithstanding, Mr Nitzan told us - in accordance with the long-established practice of the Government of Israel (see M. Shamgar, 'The Observance of International Law in the Administered Territories', 1 Isr. Y. H. R. 1971, 262) - that the Government of Israel decided to act in accordance with the humanitarian parts of the Fourth Geneva Convention. In view of this declaration, we do not need to examine the legal arguments concerning this matter, which are not simple, and we may leave these to be decided at a later date. It follows that for the purpose of the petitions before us we are assuming that humanitarian international law - as reflected in the Fourth Geneva Convention (including article 78) and certainly the Fourth Hague Convention - applies in our case. We should add that alongside the rules of international law that apply in our case, the fundamentalprinciples of Israeli administrative law, such as the rules of natural justice, also apply. Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue. [...]

14. The fundamental premise is that the displacement of a person from his place of residence and his forcible assignment to another place seriously harms his dignity, his liberty and his property. A person's home is not merely a roof over his head, but it is also a means for the physical and social location of a person, his private life and his social relationships [...]. Several basic human

rights are harmed as a result of an involuntary displacement of a person from his home and his residence being assigned to another place, even if this assigned residence does not involve him crossing an international border (see F. M. Deng, *Internally Displaced Persons: Compilation and Analysis of Legal Norms*, 1998, 14). These human rights derive in part from the internal law of the various countries, and are in part enshrined in the norms of international law.

15. The rights of a person to his dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. [...]

16. The extent of the restriction on human rights as a result of the forcible assignment of a person's residence from one place to another varies in accordance with the reasons that underlie the assigned residence. [...] In the case before us, we are concerned with the assigned residence of a person from his place of residence to another place in the same territory for security reasons in an area subject to belligerent occupation. The extent of the permitted restriction on human rights is determined, therefore, by the humanitarian laws contained in the laws concerning armed conflict [...]. These laws are mainly enshrined in the Fourth Hague Convention and the Fourth Geneva Convention. We will now turn to these laws.

17. We were referred to various provisions in the Fourth Hague Convention (mainly article 43) and in the Fourth Geneva Convention (mainly articles 49 and 78). In our opinion, the case before us is governed entirely by the provisions of article 78 of the Fourth Geneva Convention: [available on http://www.icrc.org/ihl] [...]

This provision concerns assigned residence. It constitutes a special provision of law (*lex specialis*) to which we must refer and on the basis of which we must determine the legal problems before us. Whatever is prohibited thereunder is forbidden even if a general provision may *prima facie* be interpreted as allowing it, and what is permitted thereunder is allowed even if a general provision may prima facie be interpreted as prohibiting it [...]. Indeed, a study of the Amending Order itself and the individual orders made thereunder shows that the maker of the Order took account of the provisions of article 78 of the Convention, and acted accordingly when he made the Amending Order and the individual orders. The Respondent did not seek, therefore, to make a forcible transfer or to deport any of the residents of the territory. The Respondent acted within the framework of 'assigned residence' (according to the provisions of article 78 of the Fourth Geneva Convention). Therefore we did not see any reason to examine the scope of application of article 49 of the Fourth Geneva Convention, which prohibits a forcible transfer or a deportation. In any event, we see no need to consider the criticism that the petitioners raised with regard to the ruling of this court, as reflected in several decisions, the main one being HCJ 785/87 *Abed El-Apu v. IDF Commander in West Bank*, with

regard to the interpretation of article 49 of the Fourth Geneva Convention. We can leave this matter to be decided at a later date.

18. Article 78 of the Fourth Geneva Convention does not deal with a forcible transfer or deportation. It provides a comprehensive and full arrangement with regard to all aspects of assigned residence and internment of protected persons. This provision integrates with several other provisions in the Fourth Geneva Convention (arts. 41, 42 and 43) that also discuss internment and assigned residence. When the place of residence of a protected person is assigned from one place to another under the provisions of art. 78 of the Fourth Geneva Convention, it is a lawful act of the military commander, and it does not constitute a violation of human rights protected by humanitarian international law. Indeed, art. 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right. This can be seen, *inter alia*, in the provisions of art. 78 of the Fourth Geneva Convention that determines that the measures stipulated therein are the measures that the occupying power (i.e., the military commander) may 'at most' carry out.

The conditions for exercising the authority of the military commander with regard to assigned residence

19. Article 78 of the Fourth Geneva Convention stipulates several (objective and subjective) conditions with which the military commander must comply, if he wishes to assign the place of residence of a person who is protected by the Convention. We do not need, for the purposes of the petitions before us, to consider all of these conditions. Thus, for example, art. 78 of the Fourth Geneva Convention stipulates an objective condition that a regular procedure for exercising the authority must be prescribed; this procedure shall include a right of appeal; decisions regarding assigned residence shall be subject to periodic review, if possible every six months. These provisions were upheld in the case before us, and they are not the subject of our consideration. We should add that under the provisions of art. 78 of the Fourth Geneva Convention, someone whose place of residence was assigned 'shall enjoy the full benefit of article 39 of the present convention'. We have been informed by counsel for the Respondent, in the course of oral argument, that if in the circumstances of the case before us the Respondent is subject to duties imposed under the provisions of art. 39 of the Convention, he will fulfil these duties. Two main arguments were raised before us with regard to the conditions stipulated in art. 78 of the Fourth Geneva Convention. Let us consider these. The *first* argument raised before us is that art. 78 of the Fourth Geneva Convention refers to assigned residence within the territory subject to belligerent occupation. This article does not apply when the assigned residence is in a place outside the territory. The petitioners argue that assigning their residence from Judaea and Samaria to the Gaza Strip is removing them from the territory. Consequently, the precondition for the application of art. 78 of the Fourth

Geneva Convention does not apply. The petitioners further argue that in such circumstances the provisions of art. 49 of the Fourth Geneva Convention apply, according to which the deportation of the petitioners is prohibited. The *second* argument raised before us concerns the factors that the military commander may take into account in exercising his authority under the provisions of art. 78. According to this argument, the military commander may take into account considerations that concern the danger posed by the resident and the prevention of that danger by assigning his place of residence (preventative factors). The military commander may not take into account considerations of deterring others (deterrent factors). Let us consider each of these arguments.

Assigned residence within the territory subject to belligerent occupation

20. It is accepted by all concerned that art. 78 of the Fourth Geneva Convention allows assigned residence, provided that the new place of residence is in the territory subject to belligerent occupation that contains the place of residence from which the person was removed. The provisions of art. 78 of the Fourth Geneva Convention do not apply, therefore, to the transfer of protected persons outside the territory held under belligerent occupation. This is discussed by J. S. Pictet in his commentary to the provisions of art. 78 of the Fourth Geneva Convention:

> 'the protected persons concerned can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself' (J. S. Pictet, *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, at p. 368).

It was argued before us that the Gaza Strip - to which the military commander of Judaea and Samaria wishes to assign the place of residence of the petitioners - is situated outside the territory.

21. This argument is interesting. According to it, Judaea and Samaria were conquered from Jordan that annexed them - contrary to international law - to the Hashemite Kingdom, and ruled them until the Six Day War. By contrast, the Gaza Strip was conquered from Egypt, which held it until the Six Day War without annexing the territory to Egypt. We therefore have two separate areas subject to separate belligerent occupations by two different military commanders in such a way that neither can make an order with regard to the other territory. According to this argument, these two military commanders act admittedly on behalf of one occupying power, but this does not make them into one territory.

22. This argument must be rejected. The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content. Thus, for example, our attention was drawn by counsel for the Respondent to the provisions of clause 11 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, which says:

'The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim agreement.'

This provision is repeated also in clause 31(8) of the agreement, according to which the 'safe passage' mechanisms between the area of Judaea and Samaria and the area of the Gaza Strip were determined. Similarly, although this agreement is not decisive on the issue under discussion, it does indicate that the two areas are considered as one territory held by the State of Israel under belligerent occupation. Moreover, counsel for the Respondent pointed out to us that 'not only does the State of Israel administer the two areas in a coordinated fashion, but the Palestinian side also regards the two areas as one entity, and the leadership of these two areas is a combined one'. Indeed, the purpose underlying the provisions of art. 78 of the Fourth Geneva Convention and which restricts the validity of assigned residence to one territory lies in the societal, linguistic, cultural, social and political unity of the territory, out of a desire to restrict the harm caused by assigning residence to a foreign place. In view of this purpose, the area of Judaea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory. In this territory there are two military commanders who act on behalf of a single occupying power. Consequently, one military commander is competent to assign the place of residence of a protected person outside his area, and the other military commander is competent to agree to receive that protected person into the area under his jurisdiction. The result is, therefore, that the provisions of art. 78 of the Fourth Geneva Convention does apply in our case. Therefore there is no reason to consider the provisions of art. 49 of that Convention.

The considerations of the area commander

23. The main question that arose in this case - and to which most of the arguments were devoted - concerns the scope of the discretion that may be exercised by the occupying power under the provisions of art. 78 of the Fourth Geneva Convention. This discretion must be considered on two levels: *one* level - which we shall consider immediately - concerns the factual considerations that the military commander should take into account in exercising his authority under the provisions of art. 78 of the Fourth Geneva Convention. The *other* level - which we shall consider later - concerns the applicability of the considerations that the military commander must take into account to the circumstances of the cases of each of the petitioners before us.

24. With regard to the first level, it is accepted by all the parties before us - and this is also our opinion - that an essential condition for being able to assign the place of residence of a person under art. 78 of the Fourth Geneva Convention is that the person himself constitutes a danger, and that assigning his place of residence will aid in averting that danger. It follows that the basis for exercising the discretion for assigning residence is the

consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others. Likewise, one may not assign the place of residence of a person who is not innocent and did carry out acts that harmed security, when in the circumstances of the case he no longer presents any danger. Therefore, if someone carried out terrorist acts, and assigning his residence will reduce the danger that he presents, it is possible to assign his place of residence. One may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not present a danger to the area. This is the case even if assigning the place of residence of a family member may deter other terrorists from carrying out acts of terror. This conclusion is required by the outlook of the Fourth Geneva Convention that regards the measures of internment and assigned residence as the most severe and serious measures that an occupying power may adopt against protected residents (see Pictet, *ibid.*, at p. 257). Therefore these measures may be adopted only in extreme and exceptional cases. Pictet rightly says that:

> 'In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately their exceptional character must be preserved' (*ibid.*, at pp. 367, 368).

He adds that it is permitted to adopt a measure of assigned residence only towards persons whom the occupying power 'considers dangerous to its security' (*ibid.*, at p. 368). This approach - which derives from the provisions of the Convention - was adopted by this court in the past. We have held repeatedly that the measures of administrative internment - which is the measure considered by art. 78 of the Fourth Geneva Convention together with assigned residence - may be adopted only in the case of a 'danger presented by the acts of the petitioner to the security of the area' [...]. In one case Justice Bach said:

> 'The respondent may not use this sanction of making deportation orders merely for the purpose of deterring others. Such an order is legitimate only if the person making the order is convinced that the person designated for deportation constitutes a danger to the security of the area, and that this measure seems to him essential for the purpose of neutralizing this danger' (HCJ 814/88 *Nasralla v. IDF Commander in West Bank*, at p. 271).

This conclusion is implied also by the construction of the Amending Order itself, from which it can be seen that one may only adopt a measure of assigned residence on account of a danger presented by the person himself. But beyond all this, this conclusion is required by our Jewish and democratic values. From our Jewish heritage we have learned that 'Fathers shall not be put to death because of their sons, and sons shall not be put to

death because of their fathers; a person shall be put to death for his own wrongdoing' (Deuteronomy 24, 16). 'Each person shall be liable for his own crime and each person shall be put to death for his own wrongdoing' (...); 'each person shall be arrested for his own wrongdoing - and not for the wrongdoing of others' [...]. It should be noted that the purpose of assigned residence is not penal. Its purpose is prevention. It is not designed to punish the person whose place of residence is assigned. It is designed to prevent him from continuing to constitute a security danger. This was discussed by President Shamgar, who said:

> 'The authority is preventative, i.e., it is prospective and may not be exercised unless it is necessary to prevent an anticipated danger The authority may not be exercised unless the evidence brought before the military commander indicates a danger that is anticipated from the petitioner in the future, unless the measures designed to restrict his activity and prevent a substantial part of the harm anticipated from him are adopted' [...].

25. What is the level of danger that justifies assigning a person's place of residence, and what is the likelihood thereof? The answer is that any degree of danger is insufficient. In view of the special nature of this measure, it may usually only be exercised if there exists administrative evidence that - even if inadmissible in a court of law - shows clearly and convincingly that if the measure of assigned residence is not adopted, there is a reasonable possibility that he will present a real danger of harm to the security of the territory (see Pictet, at p. 258, and the examples given by him [...]. Moreover, just as with any other measure, the measure of assigned residence must be exercised proportionately. 'There must be an objective relationship - a proper relativity or proportionality - between the forbidden act of the individual and the measures adopted by the Government' [...]. An appropriate relationship must exist between the purpose of preventing danger from the person whose place of residence is being assigned and the danger that he would present if this measure were not exercised against him [...]; the measure adopted must be the one that causes less harm; and it is usually necessary that the measure of assigned residence is proportionate to the benefit deriving from it in ensuring the security of the territory [...].

26. Within the framework of proportionality we should consider two further matters that were discussed by President Shamgar in a case that concerned the administrative internment of residents from Judaea and Samaria, where he said:

> 'The internment is designed to prevent and frustrate a security danger that arises from the acts that the internee may perpetrate and which may not reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences (for the purpose of reaching conclusions from past acts with regard to future danger)' [...].

These remarks are also relevant to the issue of assigned residence. Therefore each case must be examined to see whether filing a criminal

indictment will not prevent the danger that the assigned residence is designed to prevent. Moreover, the measure of assigned residence - as discussed in art. 78 of the Fourth Geneva Convention - is generally a less serious measure than the measure of internment. This matter must be considered in each case on its merits, in the spirit of Pictet's remarks that:

'Internment is the more severe as it generally implies an obligation to live in a camp with other internees. It must not be forgotten, however, that the terms "assigned residence" and "internment" may be differently interpreted in the law of different countries. As a general rule, assigned residence is a less serious measure than internment' (*ibid.*, at p. 256).

27. May the military commander, when making a decision about assigned residence, take into account considerations of deterring others? As we have seen, what underlies the measure of assigned residence is the danger presented by the person himself if his place of residence is not assigned, and deterring that person himself by assigning his place of residence. The military commander may not, therefore, adopt a measure of assigned residence merely as a deterrent to others. Notwithstanding, when assigning a place of residence is justified because a person is dangerous, and the question is merely whether to exercise this authority, there is no defect in the military commander taking into account considerations of deterring others. Thus, for example, this consideration may be taken into account in choosing between internment and assigned residence. This approach strikes a proper balance between the essential condition that the person himself presents a danger - which assigned residence is designed to prevent - and the essential need to protect the security of the territory. It is entirely consistent with the approach of the Fourth Geneva Convention, which regards assigned residence as a legitimate mechanism for protecting the security of the territory. It is required by the harsh reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of 'human bombs' that is engulfing the area.

28. [...] These provisions give the military commander broad discretion. He must decide whether decisive security reasons - or imperative reasons of security - justify assigned residence. In discussing this, Pictet said:

'It did not seem possible to define the expression "security of the State" in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence' (*ibid.*, at p. 257).

Note that the considerations that the military commander may take into account are not merely 'military' reasons (see, for example, arts. 5, 16, 18, 53, 55, 83 and 143 of the Fourth Geneva Convention). Article 78 of the Fourth Geneva Convention extends the kind of reasons to 'reasons of security' (see, for example, arts. 9, 42, 62, 63, 64 and 74 of the Fourth Geneva Convention). Indeed, the Fourth Geneva Convention clearly distinguishes between 'imperative reasons of security' and 'imperative military reasons'. The concept of reasons of security is broader than the concept of military reasons.

29. The discretion of the military commander to order assigned residence is broad. But it is not absolute discretion. The military commander must exercise his discretion within the framework of the conditions that we have established in this judgment and as prescribed in art. 78 of the Fourth Geneva Convention and the Amending Order. The military commander may not, for example, order assigned residence for an innocent person who is not involved in any activity that harms the security of the State and who does not present any danger, even if the military commander is of the opinion that this is essential for decisive reasons of security. He also may not do so for a person involved in activity that harms the security of the State, if that person no longer presents any danger that assigned residence is designed to prevent. Indeed, the military commander who wishes to make use of the provisions of art. 78 of the Fourth Geneva Convention must act within the framework of the parameters set out in that article. These parameters create a 'zone' of situations - a kind of 'zone of reasonableness' - within which the military commander may act. He may not deviate from them.

30. The Supreme Court, when sitting as the High Court of Justice, exercises judicial review over the legality of the discretion exercised by the military commander. [...] In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted [...].

    Admittedly, 'security of the State' is not a 'magic word' that prevents judicial review [...]. [W]e will not be deterred from exercising review of the decisions of the military commander under art. 78 of the Fourth Geneva Convention and the Amending Order merely because of the important security aspects on which the commander's decision is based. Notwithstanding, we will not replace the discretion of the military commander with our discretion. We will consider the legality of the military commander's discretion and whether his decisions fall into the 'zone of reasonableness' determined by the relevant legal norms that apply to the case. [...]

From the general to the specific

Amtassar Muhammed Ahmed Ajuri (HCJ 7019/02)

31. Amtassar Muhammed Ahmed Ajuri (an unmarried woman aged 34) is the sister of the terrorist Ahmed Ali Ajuri. Much terrorist activity is attributed to the brother, Ahmed Ali Ajuri, including sending suicide bombers with explosive belts, and responsibility, *inter alia*, for the terrorist attack at the Central Bus Station in Tel-Aviv in which five people were killed and many others were injured. The Appeals Board (chaired by Col. Gordon), in its decision of 12 August 2002, held - on the basis of privileged material presented to it and on the basis of testimonies of members of the General Security Service - that the petitioner directly and substantially aided the unlawful activity of her brother, which was intended to harm innocent citizens. The Board

determined that there was more than a basis for the conclusion that the petitioner knew about the forbidden activity of her brother - including his being wanted by the Israeli security forces - and that she knew that her brother was wounded when he was engaged in preparing explosives, and prima facie she also knew that her brother was armed and had hidden in the family apartment an assault rifle. It was also held that the petitioner aided her brother by sewing an explosive belt. The Board pointed out that, on the basis of privileged evidence, which it found 'reliable and up-to-date', it transpired that the petitioner indeed aided her brother in his unlawful activity. It held that this was a case of 'direct and material aid in the preparation of an explosive belt, and the grave significance and implications of this aid were without doubt clear and known [to the petitioner]'. Admittedly, the petitioner testified before the Board that she was not involved in anything and did not aid her brother, but the Board rejected this testimony as unreliable. It pointed out that 'we found her disingenuous and evasive story totally unreasonable throughout her testimony before us, and it was clear that she wished to distance herself in any way possible from the activity of her brother her disingenuous story left us with a clear impression of someone who has something to hide and this impression combines with the clear and unambiguous information that arises from the privileged material about her involvement in preparing an explosive belt. 'For these reasons, the appeal of the petitioner to the Appeals Board was denied. It should also be pointed out that in the Respondent's reply in the proceeding before us - which was supported by an affidavit - it was stated that 'the petitioner aided her brother in the terrorist activity and, *inter alia*, sewed for his purposes explosive belts' - explosive belts, and not merely one explosive belt.

32. It seems to us that in the case of the petitioner, the decision of the Respondent is properly based on the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. Very grave behaviour is attributed to the petitioner, and the danger deriving therefrom to the security of the State is very real. Thus, for example, the petitioner prepared more than one explosive belt. It was argued before us that the petitioner did not know about her brother's activity. This story was rejected by the Appeals Board, and we will not intervene in this finding of the Appeals Board. The behaviour of the petitioner is very grave. It creates a significant danger to the security of the area, and it goes well beyond the minimum level required by the provisions of art. 78 of the Fourth Geneva Convention and the Amending Order. Indeed, assigning the place of residence of the petitioner is a rational measure - within the framework of the required proportionality - to reduce the danger she presents in the future. We asked counsel for the State why the petitioner is not indicted in a criminal trial. The answer was that there is no admissible evidence against her that can be presented in a criminal trial, for the evidence against her is privileged and cannot be presented in a criminal trial. We regard this as a satisfactory answer. Admittedly, the petitioner is subject to administrative internment (which will end in October 2002). However the possibility of extending this is being considered. It seems to us that the choice between administrative

internment and assigned residence, in the special case before us, is for the Respondent to make, and if he decided to terminate the administrative internment and determine instead assigned residence, there is no basis for our intervention in his decision. This is the case even if his decision was dictated, *inter alia*, by considerations of a general deterrent, which the Respondent was entitled to take into account.

Kipah Mahmad Ahmed Ajuri (the first petitioner in HCJ 7015/02)

33. Kipah Mahmad Ahmed Ajuri (hereafter - the first petitioner) (aged 38) is married and is the father of three children. He is the brother of the petitioner. His brother is, as stated, the terrorist Ahmed Ali Ajuri, to whom very grave terrorist activity is attributed (as we have seen). The petitioner before us admitted in his police interrogation (on 23 July 2002) that he knew that his brother Ali Ajuri was wanted by the Israeli security forces 'about matters of explosions' and was even injured in the course of preparing an explosive charge. The first petitioner said in his interrogation that his brother stopped visiting his home because he was wanted, and also that he carried a pistol and had in his possession two assault rifles. Later on during his interrogation (on 31 July 2002) he admitted that he knew that his brother was a member of a military group that was involved 'in matters of explosions'. He also said that he saw his brother hide a weapon in the family home under the floor, and that he had a key to the apartment in which the group stayed and prepared the explosive charges. He even took from that apartment a mattress and on that occasion he saw two bags of explosives and from one of these electric wires were protruding. On another occasion, the first petitioner said in his police interrogation that he acted as look-out when his brother and members of his group moved two explosive charges from the apartment to a car that was in their possession. On another occasion - so the first petitioner told his interrogators - he saw his brother and another person in a room in the apartment, when they were making a video recording of a person who was about to commit a suicide bombing, and on the table in front of him was a Koran. The first petitioner said in his interrogation that he brought food for his brother's group. [...]

36. We think that also in the case of the first petitioner there was no defect in the decision of the Respondent. The first petitioner helped his brother, and he is deeply involved in the grave terrorist activity of that brother, as the Appeals Board determined, and we will not intervene in its findings. Particularly serious in our opinion is the behaviour of the first petitioner who acted as a look-out who was supposed to warn his brother when he was involved at that time in moving explosive charges from the apartment where he was staying - and from which the first petitioner took a mattress in order to help his brother - to a car which they used. By this behaviour the first petitioner became deeply involved in the grave terrorist activity of his brother and there is a reasonable possibility that he presents a real danger to the security of the area. Here too we asked counsel for the Respondent why the first petitioner is not indicted in a criminal trial, and we were told by him that this possibility is not practical. The measure of assigning the place of residence of the first

petitioner is indeed a proportionate measure to prevent the danger he presents, since the acts of this petitioner go far beyond the minimum level required under the provisions of art. 78 of the Fourth Geneva Convention. Since this is so, the respondent was entitled to take into account the considerations of a general deterrent, and so to prefer the assigned residence of this petitioner over his administrative internment. There is no basis for our intervention in this decision of the Respondent.

Abed Alnasser Mustafa Ahmed Asida (the second petitioner in HCJ 7015/02)

37. Abed Alnasser Mustafa Ahmed Asida (hereafter - the second petitioner) (aged 35) is married and a father of five children. He is the brother of the terrorist Nasser A-Din Asida. His brother is wanted by the security forces for extensive terrorist activity including, *inter alia*, responsibility for the murder of two Israelis in the town of Yitzhar in 1998 and also responsibility for two terrorist attacks at the entrance to the town of Immanuel, in which 19 Israelis were killed and many dozens were injured. The second petitioner was interrogated by the police. He admitted in his interrogation (on 28 July 2002) that he knew that his brother was wanted by the Israeli security forces for carrying out the attack on Yitzhar. The second petitioner said that he gave his brother food and clean clothes when he came to his home, but he did not allow him to sleep in the house. He even said that he gave his private car on several occasions to his brother, although he did not know for what purpose or use his brother wanted the car. He further said that he stopped giving his brother the car because he was afraid that the Israeli security forces would assassinate his brother inside his car. On another occasion, he drove his wanted brother to Shechem (Nablus), although on this occasion too the second petitioner did not know the purpose of the trip. The second petitioner also said that he saw his brother carrying an assault rifle. On another occasion he helped another wanted person, his brother-in-law, by giving him clean clothes, food and drink when he visited him in his home, and even lent him his car and drove him to Shechem several times. While the second petitioner claimed that he did not know for what purpose the car was used and what was the purpose of the trips to Shechem, the second petitioner told the police that he drove his brother to the hospital when he was injured in the course of preparing an explosive charge and he lent his car - on another occasion - in order to take another person who was also injured while handling an explosive charge; at the same time, the second petitioner claimed in his interrogation that he did not know the exact circumstances of the injury to either of those injured.

38. In his evidence before the Appeals Board, the second petitioner confirmed that he knew that his brother was wanted. He testified that he did indeed drive his brother but he did not give him the car. He testified that he saw his brother with a weapon and that he wanted to give him food during the brief visits to him, but he did not have time. The Appeals Board, in its decision (on 12 August 2002), held that the second petitioner did indeed know of the deeds of his brother and that he possessed a weapon and that he was in close contact with him, including on the occasions when he gave him - at his home - clean clothes and food. The Board held that the second petitioner

did not only drive his wanted brother in his car but also lent the car to his brother and to another wanted person. The Board pointed out that 'we are not dealing with minor offences', but it added that 'the contact between the [second petitioner] and his brother and his material help to him are significantly less grave than those of [the first petitioner]'. The Board added, against this background, that 'we direct the attention of the area commander to the fact that his personal acts are less grave than those of [the first petitioner], for the purpose of the proportionality of the period'.

39. We are of the opinion that there was no basis for assigning the place of residence of the second petitioner. Admittedly, this petitioner was aware of the grave terrorist activity of his brother. But this is insufficient for assigning his place of residence. The active deeds that he carried out, in helping his brother, fall below the level of danger required under the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. His behaviour does not contain such a degree of involvement that creates a real danger to the security of the area, thereby allowing his place of residence to be assigned. This petitioner claimed - and the Appeals Board did not reject this - that he did not know what use his brother made of the car that the second petitioner made available to him, and that he did not know, when he drove his brother, what was the brother's purpose. It should be noted that we think that the behaviour of the second petitioner - even though it derived from close family ties - was improper. It is precisely that help that family members give to terrorists that allows them to escape from the security forces and perpetrate their schemes. Nonetheless, the mechanism of assigned residence is a harsh measure that should be used only in special cases in which real danger to security of the area is foreseen if this measure is not adopted (cf. HCJ 2630/90 *Sarachra v. IDF Commander in Judaea and Samaria* [33]). We do not think that the case of the second petitioner falls into this category. It seems to us that the danger presented to the security of the area by the actions of the second petitioner does not reach the level required for adopting the measure of assigned residence. It appears that the Appeals Board was also aware of this, when it considered the possibility of reducing the period of the assigned residence. In our opinion, the case of the second petitioner does not fall within the 'zone of reasonableness' prescribed by art. 78 of the Fourth Geneva Convention and the Amending Order, and there is no possibility of assigning the residence of this petitioner. Admittedly, we are prepared to accept that assigning the place of residence of the second petitioner may deter others. Nonetheless, this consideration - which may be taken into account when the case goes beyond the level for adopting the mechanism of assigned residence - cannot be used when the conditions for exercising art. 78 of the Fourth Geneva Convention and the Amending Order do not exist.

Conclusion

40. Before we conclude, we would like to make two closing remarks. *First*, we have interpreted to the best of our ability the provisions of art. 78 of the Fourth

Geneva Convention. According to all the accepted interpretive approaches, we have sought to give them a meaning that can contend with the new reality that the State of Israel is facing. We doubt whether the drafters of the provisions of art. 78 of the Fourth Geneva Convention anticipated protected persons who collaborated with terrorists and 'living bombs'. This new reality requires a dynamic interpretive approach to the provisions of art. 78 of the Fourth Geneva Convention, so that it can deal with the new reality.

41. *Second*, the State of Israel is undergoing a difficult period. Terror is hurting its residents. Human life is trampled upon. Hundreds have been killed. Thousands have been injured. The Arab population in Judaea and Samaria and the Gaza Strip is also suffering unbearably. () The State seeks to act within the framework of the lawful possibilities available to it under the international law to which it is subject and in accordance with its internal law. As a result, not every effective measure is also a lawful measure. Indeed, the State of Israel is fighting a difficult war against terror. It is a war carried out within the law and with the tools that the law makes available. The well-known saying that 'In battle laws are silent' (*inter arma silent leges* - Cicero, *pro Milone* 11; see also W. Rehnquist, *All the Laws but One*, 1998, at p. 218) does not reflect the law as it is, nor as it should be. This was well-expressed by Lord Atkin in *Liversidge v. Anderson* [37], at p. 361, when he said:

> 'In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'

The result is that we are denying the petition in HCJ 7019/02, and the petition in HCJ 7015/02, in so far as it concerns the first petitioner. We are making the show-cause order absolute with regard to the second petitioner in HCJ 7015/02. [...]

DISCUSSION

1. Is there an armed conflict in the West Bank (Judaea and Samaria)? Do you agree that it is not a police action but an armed struggle? Does this classification have an impact upon our case? If it was not an armed struggle, would the assignment to residence be unlawful? In that case would IHL still apply? (*Cf.* Arts. 2 and 6 (3) of Convention IV.)

2. Is it conceivable, that, as argued by the respondent, the provisions of the Hague Regulations on belligerent occupation apply to a territory, but those of Geneva Convention IV do not? (*Cf.* Art. 2 of Convention IV and Art. 42 of the Hague Regulations.)

3. Was the procedure that assigned the petitioners to residence in conformity with the requirements of Article 78 of Convention IV? Even the fact that they did not have access to the evidence existing against them?

4. Is Article 78 of Convention IV *lex specialis* in respect to Article 49? May an occupying power therefore assign protected persons to residence even outside the occupied territory? On its own territory? On another occupied territory? According to the HCJ? In your opinion? Do Arts. 49 and 78 not deal with two distinct issues? In order to respect IHL must a measure not comply with both?

5. a. Is Gaza situated within the same occupied territory as the West Bank? Which factors tend in favour and against such an understanding? Is it conceivable for Gaza to be a separate occupied territory for the purpose of applying Convention IV according to its object and purpose, and for them to be one single territory for the purpose of peace negotiations? (*Cf.* Arts. 2, 47 and 78 of Convention IV.)

   b. Is Gaza (or rather the parts of Gaza no longer controlled by Israeli forces) in any way still occupied, although it is under effective control of the Palestinian Authority? According to the HCJ? In your opinion? According to the HCJ, if it is no longer an occupied territory, is subjecting the petitioners to assigned residence lawful? (*Cf.* Arts. 6 and 78 of Convention IV; Art. 42 of the Hague Regulations.)

   c. How can the Israeli military commander ensure the respect of Article 39 of Convention IV in the parts of Gaza he does not control?

6. a. May a protected person be subject to assigned residence in order to punish him or her for past behaviour? To hinder his or her threat to the security of the occupying power? To deter him or her? To deter other persons? (*Cf.* Arts. 33 (1) and 78 of Convention IV.)

   b. May the deterrent effects of internment or assigned residence be taken into account when deciding to subject a protected person to those measures? When choosing between those two measures? (*Cf.* Arts. 33 (1) and 78 of Convention IV.)

   c. Is assignment to residence a subsidiary measure to criminal indictment? Is it admissible if evidence for a past crime is inadmissible in a court of law? (*Cf.* Arts. 71, 72 and 78 of Convention IV.)

7. a. What explanation would you give as to why the evidence that Amtassar Muhammed Ahmed Ajuri sewed explosive belts cannot be presented in a criminal trial? Why is the option of indicting Kipah Mahmad Ahmed Ajuri for his knowledge of his brother's terrorist activities or for acting as a lookout (according to his own confession) "[...] not practical" (*Cf.* para. 36 of the judgment)? What danger do each of them present in the future? (*Cf.* Arts. 31, 71, 72 and 78 of Convention IV.)

   b. What threat does Abed Alnasser Mustafa Ahmed Asida present in the future? What is the difference between him and the two other petitioners? May the gravity of his past involvement in terrorist acts be taken into account in evaluating the danger he presents in the future? (*Cf.* Art. 78 of Convention IV.)

Case No. 116, Israel, Evacuation of Bodies in Jenin

[See as well on "Operation Defensive Wall": United Nations, A/ES-10/186, Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10 (Report on Jenin), 30 July 2002, http://www.un.org/peace/jenin]

THE CASE

[**Source:** "Evacuation of bodies in Jenin- Decision of the Supreme Court Sitting as a High Court of Justice- April 14, 2002", available on http://www.court.gov.il]

Evacuation of bodies in Jenin
Decision of the Supreme Court
Sitting as a High Court of Justice

14 Apr 2002

H.C. 3114/02
MOHAMMED BARAKEH, M.K. [Member of the Israeli Parliament]

v.

THE MINISTER OF DEFENCE, BENJAMIN BEN ELIEZER
THE CHIEF OF THE GENERAL STAFF OF THE I.D.F., SHAUL MOFAZ
THE COMMANDER OF I.D.F. FORCES IN THE JENIN AREA

H.C. 3115/02
AHMED TIBI, M.K. [Member of the Israeli Parliament]

v.

THE PRIME MINISTER, ARIEL SHARON
THE MINISTER OF DEFENCE, BENJAMIN BEN ELIEZER
THE CHIEF OF THE GENERAL STAFF OF THE I.D.F., SHAUL MOFAZ
THE COMMANDER OF THE CENTRAL COMMAND, YITZCHAK EITAN

H.C. 3116/02
ADALAH - THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL
CANON - LAW - THE PALESTINIAN ORGANIZATION FOR THE DEFENCE OF HUMAN RIGHTS

v.

THE COMMANDER OF I.D.F. FORCES IN THE WEST BANK

In the Supreme Court sitting as the High Court of Justice
Barak P., Or J., and Beinisch J.

Judgment

Barak P.

1. Combat activities have been taking place during the recent days in the areas of Judea and Samaria ("operation Defensive Wall"). The operation began (on March 29th 2002) as a result of a government decision. Its

objective - to defeat the Palestinian terror infrastructure, and to prevent the reoccurrence of the multiple terrorist attacks which have plagued Israel. In the framework of this activity, I.D.F. forces entered (on April 3rd, 2002) the area of the city of Jenin, and the refugee camp adjacent to it. According to the information relayed to us by the Respondents' counsel, Mr. Blass, a widespread terror infrastructure (a bona fide "Palestinian Military Industries", in the words of Mr. Blass) has developed in the city of Jenin and in the refugee camp. More than twenty three suicide bombers have come from that area, about one fourth of all of the terrorists who have committed suicide bombing attacks (including the attacks during Passover, in the Matza Restaurant in Haifa and in the Sbarro Restaurant in Jerusalem; the train station in Benyamina; the bus attack at the Mosmos junction and the attack at the junction adjacent to Army Base 80).

2. As I.D.F. forces entered the refugee camp, they found that a large proportion of the houses were empty. The civilian population was mainly in the center of the camp. As I.D.F. forces arrived, they called out a general appeal to residents to come out of the houses. According to what has been relayed to us, the call was not answered until the night of April 7, 2002. At that point, approximately one hundred people left the camp. In order to apprehend the terrorists, weapons, and explosives, I.D.F. forces began combat activity from house to house. Among other reasons, this technique was adopted in order to prevent massive casualties to innocent civilians. A skirmish developed. It turned out that empty houses had been booby-trapped. As a result of this fighting, 23 of our soldiers fell in battle. After a few days of combat, from house to house, the army achieved control of the camp. According to the claim of Respondents' counsel, after a stage in which a call was given to evacuate the houses, bulldozers destroyed the houses during the fighting, and some Palestinians were killed.

3. Bodies of Palestinians remained in the camp. Until the camp was completely under control of the I.D.F., it was impossible to evacuate them. When the camp was under control, a process of searching began, during which the explosive charges which the Palestinians had scattered around the refugee camp were neutralized and removed. Up to the point when these petitions were served, thirty seven bodies had been found. Eight bodies were given over to the Palestinian side. Twenty six bodies have not yet been evacuated.

4. In the three petitions before us, we were asked to order the Respondents to refrain from locating and evacuating the bodies of Palestinians in the Jenin refugee camp. In addition, we were asked to order the Respondents to refrain from burying the bodies of those determined to be terrorists in a cemetery in the Jordan Valley. The Petitioners request that the task of locating and collecting the bodies be given to medical teams and representatives of the Red Cross. In addition, they request that the family members of the deceased be allowed to bring their dead to a timely, appropriate and respectable burial.

5. [...] [T]he President of this Court decided to give a temporary order forbidding the evacuation of bodies of Palestinians from the places where they lay, until the hearing. [...]

7. The principle which serves as a starting point, is that in the circumstances of this case, the responsibility for the location, identification, evacuation and burial of the bodies belongs to the Respondents. These are their obligations according to the rules of international law. The Respondents accept this position, and it guides their action. In the framework of this position - and according to the procedures which were decided upon - teams were assembled, including the bomb squad unit, medical representatives and other professionals. These teams will locate the bodies. They will expedite the identification process. They will evacuate the bodies to a central point. In response to our questions, Mr. Blass responded that the Respondents are willing to include representatives of the Red Cross in the various teams. In addition, they are willing to consider, with a positive outlook - according to the judgment of the Military Commander, in consideration of the changing circumstances - the participation of a representative of the Red Crescent in the location and identification process. We suggest that a representative of the Red Crescent be included, subject, of course, to the judgments of the military commanders. It is also acceptable to the Respondents that the process of identification, during the stage after the location and evacuation of the bodies, will include local representatives who are capable of assisting in this matter. Identification activities on the part of the I.D.F. will include, among other things, photography and documentation according to standard procedure. These activities will be done as quickly as possible, with respect for the dead and while safeguarding the security of the acting forces. These principles are also acceptable to the Petitioners.

8. At the end of the identification process, the burial stage will begin. The position of the Respondents is that burial will be performed in a timely manner, by the Palestinian side. Successful expedition obliges agreement between the Respondents and the Palestinian side, of course. If it turns out that the Palestinian side is refraining from bringing the bodies to immediate burial, the possibility of bringing the bodies to immediate burial by the Respondents - in light of the concern that such a situation will compromise security - will be weighed. Needless to mention, the Respondents' position is that such burial, if performed by the Respondents, will be done in an appropriate and respectful way, while ensuring respect for the dead. In this, no differentiation will be made between located bodies, and no differentiation will be made between bodies of armed terrorists and civilians. This position is acceptable to the Petitioners.

9. Indeed, there is no real argument between the parties. The location, identification and burial of bodies are very important humanitarian acts. They are deduced from the principle of respect for the dead. Respect for all dead. They are placed at the base of our existence as a state whose values are Jewish and democratic. The Respondents declared that they are acting in accordance with this attitude, and their attitude seems to us to be

appropriate. That is to say: in order to prevent rumors, it is fitting to include, in the body location stage, representatives of the Red Crescent. It is also fitting - and this is acceptable to the Respondents - that during the identification of bodies, local Palestinian authorities will be included. Finally, it is fitting - and this is even the original position of the Respondents - that the burial should be done respectfully, according to the religious customs, by local Palestinian authorities. All these acts need to be done in as timely a manner as possible. All the parties are in agreement in that regard. Needless to say, all the above is subject to the security situation in the field, and to the judgment of the Military Commander.

10. On the humanitarian issues, it is indeed usually possible to arrive at understanding and arrangement. Respect for the dead is important to us all, for humankind was created in the likeness of God. All the parties hope to finish the location, identification, and burial process as soon as possible. The Respondents are willing to include representatives of the Red Cross, and, during the identification stage after the location and evacuation stages, even local authorities (subject to specific decision of the Military Commander). All are in agreement that burial should be done with respect, according to religious custom, in a timely manner.

11. It was claimed in the petitions that a massacre had been committed in the Jenin refugee camp. The Respondents disagree most strongly. In Jenin there was a battle - a battle in which many of our soldiers fell. The army fought from house to house, not by bombing from the air, in order to prevent, to the extent possible, civilian casualties. Twenty three I.D.F. soldiers lost their lives. Scores of soldiers were wounded. The Petitioners did not lift the burden of evidence which laid on their shoulders. A massacre is one thing. A difficult battle is something else. The Respondents repeat their claim before us, that they wish to hide nothing, and that they have nothing to hide. The pragmatic arrangement to which we have arrived is an expression of that position.

12. It is good that the parties to these petitions before us reached understanding. This understanding is desirable. It respects the living, and the dead. It avoids rumors. Of course, legal rules apply always and immediately. Mr. Blass relayed to us that in all their activities, the military authorities are advised by the Chief Military Attorney. This is how it should be. Even in a time of combat, the law applying to combat must be upheld. Even in a time of combat, all must be done in order to protect the civilian population [...]. Clearly this court will take no position regarding the way the combat is being managed. As long as the soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangers the soldiers. Nor was the claim made before us that by giving the temporary order there is any danger to soldiers. On the contrary; the arrangement to which we arrived is an arrangement in which all are interested.

In light of the arrangement detailed above, it is acceptable to all the parties before us, that the petitions are rejected.

Judgment given on April 14, 2002

DISCUSSION

1. How would you qualify the hostilities that took place in Jenin? Was it an international or a non-international armed conflict? Is Jenin's location in Palestinian occupied territory or in autonomous Palestinian territory crucial in determining the applicable humanitarian law? Is Convention IV applicable to this situation? Even if Israel declared that it only accepted to *de facto* apply the "humanitarian provisions" of Convention IV, which it has ratified?

2. Is the destruction of housing in conformity with International Humanitarian Law? If the houses were booby-trapped? If there were an element of doubt? If there were a high level of risk that the destructions would cause civilian casualties? As an act of reprisal against suicide attacks committed by Palestinians from Jenin? (*Cf.* Arts. 23 (g) and 50 of the Hague Regulations; Arts. 33, 53 and 147 of Convention IV.)

3. a. Which IHL provisions are concerned with the identification, repatriation and burial of the deceased? (*Cf.* Arts. 15 (1), 16 and 17 of Convention I; Arts. 18 (1) and 20 of Convention II; Art. 120 of Convention III; Art. 130 of Convention IV; Arts. 17 (2), 32, 33 (4) and 34 of Protocol I.) Are some of these provisions applicable to the case at hand? If not why? If yes, which ones? In which capacity? Do some have a customary value?

   b. If the aforementioned provisions are not applicable why does the Court estimate that "the responsibility for the location, identification, evacuation and burial of the bodies belongs to the Respondents", and that these are obligations "according to the rules of international law" (*Cf.* para. 7.)? To what provisions of international law could the Court be referring? Are the aforementioned provisions part of the "humanitarian provisions" that Israel accepts to apply? Are there "non-humanitarian" provisions in IHL? (*See also* **Case No. 114**, Israel, Cases Concerning Deportation Orders. p. 1244.)

   c. Is the involvement of civilian societies and in particular of the "Palestinian Red Crescent" in these activities obligatory? Optional? Why is it necessary in this case?

   d. Is the ICRC's participation in these activities obligatory? Optional? What is the ICRC's mandate? May it play a role in regard to people deceased during the conflict? Is this not mainly the task of the parties to the conflict? May the ICRC nevertheless offer its services? (*Cf.* Arts. 10, 140 and 143 of Convention IV.)

   e. Was an agreement between the Israeli and Palestinian authorities vital? Recommended in these circumstances? Could the military authorities bring these agreements to an end for security reasons as the Court seems to say? Could they cease to comply with their obligations "according to the rules of international law" for the same reasons?

Case No. 117, Israel, The Rafah Case

THE CASE

[**Source:** Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip, HCJ 4764/04, The Supreme Court Sitting as the High Court of Justice, May 30, 2004.]

HCJ 4764/04
1. Physicians for Human Rights *et al*

v.

1. Commander of the IDF Forces in the Gaza Strip

The Supreme Court Sitting as the High Court of Justice
[May 30, 2004]

Before President A. Barak, Justice J. Türkel and Justice D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice [...]

Judgment

President A. Barak

Is the State of Israel, during the current military operations in Rafah, fulfilling its duties under international humanitarian law? This is the question before us.

Background

1. Since May 18, 2004, combat activities have been conducted in the area of Rafah in the Gaza Strip. [...] According to respondent, these combat activities, broad in scope, are directed against the terrorist infrastructure in that area. Their central objective is to locate the underground tunnels which are used to smuggle arms from the Egyptian side of Rafah to the Palestinian side. In addition, the military operations are aimed at arresting those wanted for terrorist activity and locating arms caches in the Rafah area. The activity includes battles against armed opponents. Explosive charges and gunfire have been directed against the Israeli Defense Forces ("IDF"). [...]

3. The city of Rafah consists of several neighborhoods. Most of the military operations took place in the neighborhood of Tel A-Sultan. The IDF also entered the neighborhood of Brazil. Between the time that this petition was submitted (May 20, 2004), and heard the next morning (May 21, 2004), the IDF withdrew from these two neighborhoods. The neighborhoods, however, remained surrounded and controlled by the IDF. [...]

5. Before the start of the military operations, the IDF, having learned from similar operations in the past, took three steps in anticipation of any humanitarian problems that could arise. First, a "Humanitarian Hotline" was established. The Hotline was to serve as a contact for organizations outside the area of operations. Human rights organizations, for example, would be able to contact the Hotline and immediate efforts would be made to resolve specific

humanitarian problems. Second, a District Coordination Office ("DCO") was established. The DCO was to stay in constant communication with the Palestinian Ministry of Health, the Red Crescent, the International Red Cross, and local hospitals. The DCO, headed by Col. I. Mordechai, would resolve humanitarian problems that had arisen as a result of the operations. Third, a liaison officer of the Coordination Office was placed with every battalion in the area of operations. The liaison officer was to contend with humanitarian problems, such as the evacuation of Palestinian casualties. [...]

The Petition

7. Petitioners are four human rights organizations. They point to harm that has been caused to the local civilian population in Rafah as a result of the military operations - the demolition of houses and injuries caused to civilians. The petition asks that the IDF allow medical teams and ambulances to reach and evacuate the wounded in Rafah, that such evacuation not require coordination with the Hotline, that medical teams be neither threatened nor harmed, and that the transport of medical equipment into Rafah be allowed. The petition further asks that electricity and water provisions be restored to the neighborhood of Tel A-Sultan, that the IDF allow the provision of food and medicines to the residents of that neighborhood, and that a medical team of Petitioner 1 be allowed to enter hospitals in the Gaza Strip and assess the medical situation there. Finally, petitioners ask that a full investigation be made into an incident in which a number of residents were killed when a crowd of protesting civilians was shelled. Moreover, petitioners ask for an order prohibiting the shelling of civilians, even when among them are armed combatants, who do not pose an immediate threat to life. [...]

Judicial Review

13. "Israel is not an isolated island. She is a member of an international system." HCJ 5592/02 *Yassin v. Commander of the Kziot Military Camp*. The military operations of the IDF are not conducted in a legal vacuum. There are legal norms - of customary international law, of treaties to which Israel is party, and of the fundamental principles of Israeli law - which set out how military operations should be conducted. In HCJ 3451/02 *Almandi v. The Minister of Defense*, I noted that:

14. Israel finds itself in the middle of a difficult battle against a furious wave of terrorism. Israel is exercising its right of self defense. *See* The Charter of the United Nations, art. 51. This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, "When the cannons roar, the muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. The foundation of this approach is not only the pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of

upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law's war against those who rise up against it. [...] Moreover, the State of Israel is founded on Jewish and democratic values. We established a state that upholds the law-it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these - the vision and the law - there lies only harmony, not conflict.

Indeed, all of the IDF's operations are subject to international law. For example, in HCJ 3114/02 *Barak v. Minister of Defense* I noted that "[e]ven in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population."

15. In general, the judicial review of this Court is exercised ex post facto. A petition is submitted against an action that has already been taken. Occasionally, a significant period of time can elapse between the time the action is taken and before that action is examined by this Court. This, however, is not the case here. Petitioners have not requested that we examine the legal import of military operations that have already concluded. The purpose of this petition is to direct the present actions of the military. This is *ex ante* judicial review, exercised while military operations are currently underway. This imposes certain constraints on the Court. [...] [T]he current petition is unique in that it asks us to review military operations while they are underway and while IDF soldiers are subject to the dangers inherent to combat. As such, it is appropriate to emphasize that:

16. Clearly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangered the lives of soldiers. [...]

17. [...] [W]e presume that the operations in Rafah are necessary from a military standpoint. The question before us is only whether these military operations adhere to domestic and international law. The fact that operations are necessary from a military standpoint does not automatically mean that they fulfill legal requirements. Of course, with regard to issues of military concern, we do not stand in the stead of the military commander, and we do not substitute our discretion for his own. That is his expertise. We examine the legal import of his decisions. That is our expertise. [...]

The Normative Framework

19. The military operations of the IDF in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 [hereinafter - the Hague Convention] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of Was 1949 [hereinafter - the Fourth Geneva Convention]. In addition, they are also governed by the principles of Israeli administrative law. [...] According to these principles, the IDF must act with integrity (both substantive and

procedural), with reasonableness and proportionality, and appropriately balance individual liberty and the public interest. [...]

21. For our purposes, the central injunction of international humanitarian law applicable in times of combat is that civilian persons are "entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof." Fourth Geneva Convention, para. 27. See also the Hague Convention, para. 46. [...]

The basic assumption of this injunction is the recognition of the importance of man, the sanctity of his life, and the value of his liberty. *Compare* The Basic Law: Human Dignity and Liberty, para. 1; J.S. Pictet, Commentary: Fourth Geneva Convention 199 (1958). His life may not be harmed, and his dignity must be protected. This basic duty, however, is not absolute. It is subject to "such measures of control and security in regard to protected persons as may be necessary as a result of the war." *See* Fourth Geneva Convention, para. 27. These measures may not "affect the fundamental rights of the persons concerned." *See* Pictet, at 207. These measures must be proportionate. *See* Fleck, at 220. The military operations are directed against terrorists and hostile combatants. They are not directed against civilians. *See* Fleck, at 212. When civilians, as often happens, enter a zone of combat - and especially when terrorists turn civilians into "human shields" - everything must be done in order to protect the dignity of the local civilian population. The duty of the military commander is double. First, he must refrain from operations that may cause harm to the civilian population. This duty is formulated in the negative. Second, he must take all measures required to ensure the safety of civilians. This latter duty calls for positive action. *See* Fleck, at 212. Both these duties - which are not always easily distinguishable - should be reasonably and proportionately implemented given considerations of time and place.

23. Together with this central injunction regarding civilians' human dignity during times of combat, international humanitarian law imposes several specific obligations. These obligations do not exhaust the fundamental principle. They only constitute specific expressions of that principle. We shall note two of these obligations that are relevant to the case at hand.

24.

1. *The Provision of Food and Medicines*: "The Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." The Fourth Geneva Convention, para. 55; Pictet, at 300. As such, the Red Cross and other humanitarian organizations must be allowed to provide food and medicines. The Fourth Geneva Convention, para. 59. Free passage of these consignments must be allowed. *Id.*; *See also Id.*, at para. 23. Of course, the consignments may be searched to ensure that they are intended for humanitarian concerns. *Id*, at para. 59. [...]

3. *Medical Supplies:* The proper operation of medical establishments must be ensured. Fourth Geneva Convention, para. 56. Persons engaged in searching for the wounded must be protected. *Id.*, at para 20. The Red Cross and the Red Crescent must be allowed to pursue their activities in accordance with the principles of the International Red Cross. *Id.*, at para. 63.
4. From the General to the Particular [...]

Water

27. Petitioners asserted that the entrance of tanks into the neighborhood of Tel A-Sultan has wrecked the water infrastructure and, as a result, the provision of water in all of Rafah has been disrupted. [...] Petitioners ask that we order respondent to restore the provision of water to the neighborhood of Tel A-Sultan. During oral arguments Col. Mordechai confirmed that the wells in the neighbourhood of Tel A Sultan have indeed been damaged. Repairs have been delayed as the Palestinian repair team, wary of the hostilities, did not want to enter Tel A-Sultan. Later, under the initiative of Col. Mordechai, the Red Cross entered the neighborhood and most wells were repaired. In areas where running water is as yet unavailable, as in Tel A-Sultan, the military has allowed water tankers to enter. Currently, there are five water tankers in Tel A-Sultan, and residents may reach them without difficulty. As he was explaining the situation to us, it was reported to Col. Mordechai - and he, in turn, reported to us - that six additional water tankers had entered the neighborhood. [...] As such, there is currently running water in all neighborhoods of Rafah. [...]

29. It is the responsibility of the military commander to ensure the provision of water in the area of combat activities. This includes not only the responsibility to ensure that no damage is caused to the sources of water, but also the positive obligation to provide water in areas of shortage. Everything should be done in order to ensure the provision of water; sources of water must be repaired with due speed. Water tankers should be provided if no running water is available. As Col. Mordechai has informed us, these issues have been resolved. Of course, the lessons learned here must serve the army in the future. [...]

Electricity

31. Petitioners claim that Rafah's neighborhoods are without electricity. An attempt to connect the Tel A Sultan neighborhood failed, and the entire city is without electricity. They ask that we order respondent to restore electricity to the affected areas. [...] The IDF - in coordination with the Rafah municipality - is working on repairing the damage. The repairs take time, as the workers occasionally have difficulty finding the source of the problem. In addition, the battles taking place on the scene make the proper reestablishment of the electrical network difficult. At the moment, there is electricity in the great majority of Rafah, and everything will be done to ensure that electricity is restored to the entire area. In light of all this, we believe that this Court need not make any additional orders concerning this issue. [...]

Medical Equipment and Medicines

33. Petitioners claimed that there is a severe shortage of medicines, medical equipment, and donated blood in the A-Najar hospital, which, although located outside the area of combat, serves the area which is controlled by the IDF. The shortage was reported by the hospital to Professor Donchin, a member of Petitioner 1 (Physicians for Human Rights). Petitioner 1 prepared a vehicle full of medicines, bandages, and donated blood. The vehicle is waiting outside Erez Crossing, and it is not permitted to enter the Gaza Strip. Petitioners request that we order respondent to allow the supply of medicines to the residents in the Tel ASultan neighborhood. They also request that we order respondent to allow the passage of vehicles carrying medical equipment between Rafah and the hospitals outside of it, in Khan Younis and Gaza City. Col. Mordechai mentioned in his written response that medicines and medical equipment are being allowed to be brought into the Rafah area. There is nothing preventing the transfer of medical equipment from one area to another. The international border crossing at Rafah, which had been closed due to the combat, was opened for this specific purpose, in order to enable trucks bearing medical equipment from Egypt to enter the Gaza Strip area. In his oral response Col. Mordechai added that the entrance to the combat zone is through Karni Crossing. Any medical equipment brought to that gate will be transferred immediately to its destination, on condition that it is not accompanied by Israeli civilians, for fear that they may be taken hostage. [...]

35. It is the duty of the military commander to ensure that there is enough medical equipment in the combat zone. This is surely his obligation towards his soldiers; but his obligation is also towards the civilian population under his control. In the framework of the preparation for a military operation, this issue - which is always to be expected - must be taken into account. In this regard, both the local medical system as well as the ability of local hospitals to give reasonable medical care during combat must be examined in advance. Medical equipment must be prepared in advance in case of shortage; provision of medical equipment from different sources must be allowed in order to relieve the shortage; contact must be maintained, to the extent possible, with the local medical services. The obligation is that of the military commander, and the receipt of assistance from external sources does not release him from that obligation. *Compare* the Fourth Geneva Convention, para. 60. However, such external assistance is likely to lead to the fulfillment of the obligation, *de facto*. It seems to us now that this issue is reaching solution and we do not think that there is a need for additional remedies from this court.

Food

36. According to petitioners, a full curfew and sealing off of some of the neighborhoods of Rafah were imposed along with the commencement of military activity. These are lifted and imposed intermittently, according to the area in which combat is taking place at any given time. In the neighborhood of Tel A Sultan, continuous combat has been taking place since the morning of

May 18, 2004. For three days now, the curfew has cut the residents of the neighborhood off from the outside world. They suffer a shortage of water (*see supra* para. 14), medicine (*see supra* para. 17), and food. In four Rafah neighborhoods, there is no milk or basic food products. Contact with other neighborhoods - which would solve the problem - is denied by the IDF; nor is food provided to the area. Petitioners ask that we order respondent to allow food supply to the residents of the neighborhood of Tel A-Sultan. In his response, Col. Mordechai mentioned that, when a curfew is imposed, standard procedure s to allow restocking of food 72 hours from the curfew's commencement. In this case, the IDF allowed trucks laden with food, prepared by the Red Cross, into the area within 48 hours. Food stations were designated in different parts of the neighborhoods, and food was distributed to the residents. For this purpose, the IDF is in contact with the mayor of Rafah and with the Ministries of the Palestinian Authority. During the day, additional food trucks were allowed in. Every request from an outside source to supply food will be approved and expedited. The same applies to milk. In Col. Mordechai's opinion, there is currently no shortage of food. He emphasized that, even before the operation, UNRWA was allowed to fill its warehouses with food. [...]

38. On the normative level, the rule is that a military commander that takes over an area by way of combat must provide for the nutritional needs of the local residents under his control. The specific details of this obligation depend, of course, upon the current state of the combat. However, it is prohibited for combat to cause the starvation of local residents under the control of the army. [...] On the practical level, it seems to us that the food problem has been solved. Nonetheless, we must note once again, that just like the medicine problem, the issue of food for the civilian population must be part of any advance planning for a military operation. The full responsibility for this issue lies with the IDF. The IDF is, of course, likely to be assisted by international organizations, such as the Red Cross and UNRWA. However, the actions of the latter do not relieve the army, which has effective control of the area, from its basic obligation towards the civilian population under its control. Compare the Fourth Geneva Convention, para. 60. [...]

Evacuation of Casualties

40. Petitioners claim that, as the military operation commenced, the road from Rafah to Khan Younis was blocked in both directions. That morning, ambulances evacuating casualties from Rafah to Khan Younis did not succeed in returning to Rafah. Therefore, wounded persons remained in the A-Najar hospital. That hospital is not equipped or advanced enough to treat the tens of wounded arriving. Due to the blocking of the road, the lives of many wounded are in danger. Moreover, evacuation of the wounded from A-Najar hospital in Rafah to hospitals outside of Rafah is allowed only on the condition that the name and identification number of the wounded person and the license number of the ambulance intended to evacuate him are provided. Whereas the demand for the license number of the ambulance is possible to satisfy - though with difficulty - it is impossible to provide the

name and identification number of the wounded. The reason for this is that many of the wounded are not conscious and their identity is not known. As such, ambulances are unable to evacuate unidentifiable casualties. Moreover, the entrance of additional ambulances into the A-Sultan neighborhood is prevented due to the excavations that the IDF is carrying out in the area. In one instance, shots were even fired on an ambulance of the Red Crescent. Petitioners request that we order the IDF to refrain from hurting or threatening the medical teams or civilians engaged in the evacuation of casualties. They also request that medical teams and Palestinian ambulances be allowed to reach the wounded in Rafah in order to evacuate them to hospitals. Finally, they request that we order respondent to allow the transfer of wounded in ambulances from the hospital in Rafah to other hospitals in the Gaza Strip with no need for advance permission, or provision of the identities of the wounded. [...]

42. [...] Col. Mordechai stated that the IDF allows the entrance of ambulances and medical teams into Rafah to evacuate casualties. The evacuation is coordinated with Red Cross and Red Crescent officials, the Palestinian Civilian Liaison office, various UNRWA officials, different Palestinian officials, and Israeli human rights organizations that contacted the Humanitarian Hotline. [...] Regarding the demand for the identification of the ambulances and the wounded, Col. Mordechai mentioned, [...], that these demands are based on the desire to ensure that Palestinian medical teams are indeed transferring people who are wounded, and that the vehicles are indeed ambulances and not vehicles used for other purposes. In past experience, Palestinian terrorists have used ambulances for terrorist activities, including the transportation of armed Palestinians and the smuggling of arms from one area to another. [...], Col. Mordechai added that a Coordination Office Officer is attached to each battalion. One of his main duties is to insure the orderly evacuation of the wounded, in coordination with the ambulance teams. During the operation, more than eighty ambulances have passed from the northern Gaza Strip to Rafah in the south. The IDF permits the passage of any ambulance, provided that such passage is coordinated with it. The search of the ambulance - to ensure that forbidden combat equipment is not being transferred from one area to another - is completed in a matter of minutes. The evacuation of the wounded is not contingent upon the relaying of their names and identification numbers. Those whose identities are not known are also being evacuated. [...] Col. Mordechai mentioned, regarding the evacuation of wounded to locations outside of Rafah, that more than 40 ambulances have exited Rafah, heading north. Every ambulance requesting exit is allowed to do so. All that is required is coordination regarding the route. As for the shooting upon an ambulance, Col. Mordechai stressed that it was not intentional. [...]. "Ambulances are out of bounds" - so stated Col. Mordechai before us. [...] It is to be regretted if a single exception occurred. Wireless contact exists between ambulance drivers and officers of the DCO, by which proper coordination between forces maneuvering in the field and ambulances is maintained. When the passage of an

ambulance is prevented by dirt piled on the road, all is done - after coordination - to bring a bulldozer to remove the obstacle. [...]

44. There is no disagreement regarding the normative framework. The army must do all possible, subject to the current state of the combat, to allow the evacuation of local residents wounded during combat activities. On this issue, Justice Dorner gave the ruling of this court more than two years ago in HCJ 2936/02 *Physicians for Human Rights v. Commander of IDF Forces in the West Bank:*

45. [...] [O]ur combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill, and bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is also the position of the State. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state. [...]

It appears to us that the passage of ambulances to and from Rafah proceeded properly. This was made possible, among other means, by the contact between the IDF - via officers of the DCO - and the ambulances. This contact was proper, and it was put into effect properly. In addition, ambulances move freely to and from the area. The demand of the IDF regarding the license plate numbers of ambulances is reasonable. It is appropriate not to make the transfer of wounded contingent upon the relaying of their names and identification numbers. However, we see no fault in the attempt to receive this information when it is attainable, assuming that receipt of this data is not a condition for transport outside of the combat area and does not cause unreasonable delay in transport. The single instance of shooting on an ambulance was an exception. We have been convinced that the instructions forbidding such activity are clear and unequivocal. It seems to us, therefore, that as far as this issue is concerned, the petition has been satisfied.

Burying the Dead

46. Petitioners' attorney maintains that, at A-Najar Hospital in Rafah, there are 37 bodies of residents that were killed during the course of the IDF operation. It is not possible to bury them due to the restrictions imposed by the army. In his response before us, Col. Mordechai noted that, as far as the army is concerned, there is no impediment to the burial of the dead in cemeteries. These are located, to the best of his knowledge, outside the neighborhood of Tel A-Sultan and, as such, the burials can be carried out immediately. In their response, petitioners noted that the funerals had not been conducted because the army has surrounded the neighborhood of Tel A-Sultan, and is not allowing relatives of the dead to participate in the funerals. Col. Mordechai admitted that this is true. [...]

48. This response does not satisfy us. We noted that a solution to this problem must be found quickly. Thus, for example, we asked why the relatives, whether all or some or some of them, are not being allowed to participate in the funerals. Col. Mordechai promised us an answer to this question. In an updated statement we received on May 23, 2004, we were informed by respondent, on behalf of Col. Mordechai, that respondent had decided (on May 21, 2004) to allow a number of family members of all those killed to leave the Tel A-Sultan neighborhood in order to conduct funerals. This proposal was rejected by the Palestinians. That statement also noted that on that same day (May 21, 2004) respondent had offered, as a goodwill gesture, to allow two vehicles from each family to leave the area of Tel A-Sultan in order to participate in their relatives' funerals. This proposal was also rejected by the Palestinians. On Saturday (May 22, 2004) respondent was prepared, as a goodwill gesture and in response to a request by the Red Cross, to allow the family members of all of the dead to leave the neighborhood in order to take part in funeral ceremonies, without limit on number, provided that the funerals not all be conducted at the same time. The Palestinians rejected this proposal as well. On Sunday (May 23, 2004) respondent announced that he was prepared, as a goodwill gesture, and in coordination with the Palestinian Authority, to allow several buses to leave the neighborhood in order to allow family members to take part in their relatives' funerals. According to respondent, the Palestinians had begun organizing the buses needed to transport those family members leaving Tel A-Sultan for the funerals. A complementary statement from the respondent (dated May 25, 2004) informed us that the attempt (on May 23, 2004) to transport family members out of the neighborhoods on organized buses for the funerals had not been successful due to the opposition of the Palestinians. Respondent added that on that same day (May 23, 2004), after IDF troops pulled out of the Tel A-Sultan neighborhood, 22 funerals took place, and there had been no impediment to the participation of family members who reside in the neighborhood of Tel A-Sultan, as traffic between the neighbourhood and the area where the funerals took place was not held up by the IDF. [...]

50. In their response of May 24, 2004, petitioners reported, after discussions with the mayor of Rafah, that the residents of Rafah had indeed refused the IDF's proposals, and that this had significantly limited the participation of families in the funerals. The residents preferred to perform the funerals after the curfew was lifted in order to ensure that the prayer for the dead was recited and that a temporary structure would be erected for the mourners so that they could receive those who come to comfort them, in line with Islamic law. We were further informed that the mayor of Rafah had announced that, since the end of the closure on Tel A-Sultan, the residents of Rafah had begun organizing a mass funeral for 23 dead. The funeral would take place in the afternoon and was expected to continue until the late afternoon due to the large number of dead. [...]

52. The problem of burying the dead was resolved. Nevertheless, there are lessons to learn form the incident. Our assumption is that the fundamental

principle that the dignity of local residents must be protected, as enshrined in section 27 of the Fourth Geneva Convention, encompasses not only local residents who are living, but also the dead. [...] Human dignity includes the dignity of the living and the dignity of the dead. The same applies with regard to domestic Israeli law. [...] The military commander is duty-bound to search for and locate dead bodies. [...] After bodies are found, he is obligated to ensure that they are accorded a dignified burial. In the *Barake* case, which discussed the duty of the military commander regarding dead bodies during army operations, we stated:

53. Our starting point is that, under the circumstances, respondents are responsible for the location, identification, evacuation, and burial of the bodies. This is their obligation under international law. Respondents accept this position The location, identification, and burial of bodies are important humanitarian acts. They are a direct consequence of the principle of respect for the dead-respect for all dead. They are fundamental to our existence as a Jewish and democratic state. Respondents declared that they are acting according to this approach, and this attitude seems appropriate to us Indeed, it is usually possible to agree on humanitarian issues. Respect for the dead is important to u all, as man was created in the image of God. All parties hope to finish the location, identification, and burial process as soon as possible. Respondents are willing to include representatives of the Red Cross and, during the identification stage after the location and evacuation stages, local authorities as well (subject to specific decision of the military commander). All agree that burials should be performed with respect, according to religious custom, in a timely manner. *Id*, at 15.

The army attempted to act according to these principles in the case at hand. The dead were identified and transferred to A-Najar Hospital. At both these stages the Red Cross and the Red Crescent were involved. The problem here, however, concerned burial. Respondent was obviously prepared to bury the dead, but it believed that it had discharged this duty by transferring the bodies to A-Najar Hospital. This was not the case. The duty of the respondent is to ensure a dignified burial for the bodies. To this end, he must negotiate with the local authorities, to the extent that they are functioning, and find respectful ways to carry out this duty. As is clear from the information presented to us, the main difficulty which arose was the participation of the relatives of the dead. [...] Clear procedures should be fixed regarding the different stages of the process. Of course, if, at the end of the day, the dead are in a hospital and their relatives refuse to bury them, they should not be forced to do so. Nevertheless, everything should be done in order to reach an agreement on this matter.

Shelling of the March

54. Petitioners claim that on Wednesday, May 19, 2004, thousands of Palestinians from Rafah participated in a quiet and non-violent procession. They marched in the direction of Tel A-Sultan. Some of the participants were armed and masked. The marchers included men and women, both children and

adults. [...] While they were marching three or four tank shells and two helicopter missiles were fired towards them. According to reports from the marchers, the fire came only from the direction Tel Al-Zuareb observation post, a post manned by the IDF. The fire towards the marchers caused the deaths of eight civilians. About half of the casualties were minors. Petitioners ask that we order a probe of the incident by Military Police Investigations. They also ask that we order respondent to issue an unequivocal order absolutely forbidding the shooting or shelling of civilian gatherings, even if there are armed elements among them, if they do not pose an immediate danger to life. [...]

56. Respondent informed us that an initial investigation was conducted immediately. It found that there was a mishap while firing tank shells towards an abandoned building, and the eight Palestinians were killed by shrapnel. One of them was an armed activist of the Islamic Jihad. The other seven victims were completely innocent. It was emphasized that there is a great deal of arms in Rafah, including armorpiercing weapons. It was also emphasized that, in the past, terrorists have often attempted to use civilians as cover to strike at the IDF. It was also feared that the protesters would climb onto the armored vehicles with soldiers inside them. The procession took place in a combat zone. Among the marchers were armed elements. In initial negotiations with the protesters, the attempt was made to halt the procession. The attempt failed. Afterwards, deterrents were employed. These also failed and the procession continued on its way. It was then decided to fire hollow shells toward the abandoned building.

57. [...] Respondent added that IDF rules of engagement for opening fire, which also address situations of civilian gatherings, incorporate the legal and ethical stance of preventing harm to the innocent. Nevertheless, he reiterated that this was a situation of active warfare and danger to troops in an area densely populated with civilians, where the combatants do not differentiate themselves from the civilian population, but conceal themselves within it. The deliberate use of the population as a human shield, in contravention of the basic rules of combat, constitutes a war crime.

58. [...] At this stage, in the absence of facts, we can only repeat the obvious: the army must employ all possible caution in order to avoid harming a civilian population, even one that is protesting against it. The necessary precautions are, obviously, a function of the circumstances, such as the dangers posed to the civilians and the soldiers. [...]

The Future

66. According to the humanitarian principles of international law, military activities require the following: First, that the rules of conduct be taught to, and that they be internalized by, all combat soldiers, from the Chief of General Staff down to new recruits. [...] Second, that procedures be drawn up that allow implementation of these rules, and which allow them to be put into practice during combat. An examination of the conduct of the army while fighting in Rafah, as detailed in the petition before us - and we have

nothing other than what has been presented to us - progress compared to the situation two years ago. [...] This is the case regarding the implementation of the duty to ensure water, medical equipment, medicines, food, evacuation of the wounded, and the burial of the dead. This is also the case regarding the preparation of the army, and the design of procedures that allow humanitarian obligations to be satisfied. The establishment of the Humanitarian Hotline and the District Coordination Office, as well as the assignment of a liaison officer of the Coordination Office to every battalion, greatly aided the implementation of humanitarian principles. [...]

68. In the framework of our discussion regarding the internalization of humanitarian laws, we emphasize that it is the duty of the military commander not only to prevent the army from harming the lives and dignity of the local residents (the "negative" duty: *see supra* para. 11). He also has a "positive" duty (*para.* 11). He must protect the lives and dignity of the local residents. [...] The recognition that the basic duty belongs to the military commander must be internalized, and it is his job to adopt different measures from the outset so that he can fulfill his duty on the battlefield. [...]

72. With the conclusion of the arguments in the petition, we ordered that the military staff in the area ensure that they solve not only the problems raised by petitioners, but also anticipate new problems that, in the nature of things, will arise in the future. For this reason it has been decided that Col. Mordechai will appoint a senior officer who will remain in direct contact with petitioners. This is the least that should have been done at the time the events were unfolding. The main thing is that it must be done now in order to learn lessons from the episode. [...]

76. The outcome is, therefore, that the petition is granted regarding six of petitioners' seven requests. The seventh request - the entry of Israeli doctors from Petitioner 1 to the area in general and A-Najar Hospital in particular - is denied, due to the danger to the doctors. In this matter one must be satisfied by the proposal of respondent - which has been rejected by petitioners - that non-Israeli doctors (whether from the Gaza Strip, Judea and Samaria, Israel, or anywhere else in the world), will be allowed to enter the area. [...]

DISCUSSION

1. How would you qualify the combat activities that took place in Rafah between 18th and 24th May 2004? What provisions of International Humanitarian Law (IHL) cover this type of combat activity? Do you agree with the Court's assessment of the applicable Conventions (para. 19.)?

2. What do you think of the preventive measures that were taken before the start of the operation such as the "Humanitarian hotline"? To what extent do they fulfil Israel's obligations as the occupying power?

3. a. What are Israel's obligations for the provision of water? Have these been respected? According to the petitioner? The respondent? The Court? What do

you think? (*Cf.* Arts. 56 and 60 of Convention IV; Arts. 14 (1), 54 and 69 of Protocol I.)

b. How about the provision of electricity?

4. Did the military commander fulfil his obligations to provide medical equipment and medicines? If not, should the Court have ordered additional remedies? Why has this not been the case? (*Cf.* Arts. 55, 57 and 69 of Convention IV; Arts. 14 and 69 of Protocol I.)

5. What do you think of the Court's decision pertaining to food distribution? Did the defendant fulfil his obligations under IHL? (*Cf.* Arts. 55, 56 and 60 of Convention IV; Art. 14 of Protocol I.)

6. a. According to the petitioners' description of the facts, which provisions of the Geneva Conventions were being breached by the restrictions imposed on the evacuation of the wounded? (*Cf.* Art. 17 of Convention IV; Arts. 21-31 of Protocol I.)

   b. Do you think that the restrictions described by the respondent are justifiable? In the light of the past abusive use of medical stations by the Palestinian forces?

7. According to IHL, what are the respondent's duties towards the dead? As by the end of the case the dead had been or were going to be buried according to their faith, even thought no agreement had been reached between the parties, was the issue solved? What more could the Court have done? (*Cf.* Art. 130 of Convention IV; Art. 34 of Protocol I.)

8. Does the IDF appear to have respected IHL during the shelling of the march (para. 54)? Is the shelling of an abandoned building in close proximity to a large number of civilians a violation of IHL? Was there a clear military objective in the attack? If yes, how would the expected military advantage balance with the civilian deaths? Does the death of an armed activist change the balance?

2. Positions of the International Community

[*See also* **Document No. 106**, ICRC Appeals on the Near East. [C., 5th December Declaration, at the Occasion of the High Contracting Parties Conference on the Fourth Geneva Convention.] p. 1145.]

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention

THE CASE

A. UN Security Council Resolution 681 (1990)

[**Source:** United Nations, S/RES/681, 20 December 1990; available on http://www.un.org]

The Security Council, [...]

Having received the report of the Secretary-General submitted in accordance with Security Council resolution 672 (1990) of 12 October 1990 on ways and means for ensuring the safety and protection of the Palestinian civilians under Israeli occupation and taking note in particular of paragraphs 20 to 26 thereof,[...]

Gravely concerned at the dangerous deterioration of the situation in all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and at the violence and rising tension in Israel, [...]

2. *Expresses its grave concern* over the rejection by Israel of Security Council resolutions 672 (1990) of 12 October 1990 and 673 (1990) of 24 October 1990;

3. *Deplores* the decision by the Government of Israel, the occupying Power, to resume deportations of Palestinian civilians in the occupied territories;

4. *Urges* the Government of Israel to accept the *de jure* applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to all the territories occupied by Israel since 1967, and to abide scrupulously by the provisions of the Convention;

5. *Calls upon* the High Contracting Parties to the said Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof;

6. *Requests* the Secretary-General, in co-operation with the International Committee of the Red Cross, to develop further the idea, expressed in his report, of convening a meeting of the High Contracting Parties to the said Convention to discuss possible measures that might be taken by them under the Convention and, for this purpose, to invite the Parties to submit their views on how the idea could contribute to the goals of the Convention, as well as on other relevant matters, and to report theron to the Council; [...]

B. UN General Assembly Resolution ES-10/2

[**Source:** UN Doc. A/RES/ES-10/2 (May 5, 1997); footnotes omitted; available on http://www.un.org]

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.1 and Add.1)]

Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory

The General Assembly,

Aware of the commencement, after the adoption of General Assembly resolution 51/223 of 13 March 1997, of construction by Israel, the occupying Power, of a new settlement in Jebel Abu Ghneim to the south of East Jerusalem on 18 March 1997, and of other illegal Israeli actions in Jerusalem and the rest of the Occupied Palestinian Territory, [...]

Reaffirming also the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, [...] and the Regulations annexed to the Hague Convention IV of 1907 to the Occupied Palestinian Territory, including Jerusalem, and all other Arab territories occupied by Israel since 1967,

Recalling the obligation of the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to respect and ensure respect for the Convention in all circumstances, in accordance with article 1 of the Convention,

Conscious of the serious dangers arising from persistent violation and grave breaches of the Convention and the responsibilities arising therefrom,

Convinced that ensuring respect for treaties and other sources of international law is essential for the maintenance of international peace and security, and determined, in accordance with the preamble to the Charter of the United Nations, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,

Also convinced, in this context, that the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security,

Increasingly concerned about the actions of armed Israeli settlers in the Occupied Palestinian Territory, including Jerusalem,

Aware that, in the circumstances, it should consider the situation with a view to making appropriate recommendations to the States Members of the United Nations, in accordance with General Assembly resolution 377 A (V) of 3 November 1950, [...]

5. *Demands also* that Israel accept the *de jure* applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949,1 to all the territories occupied since 1967, and that it

comply with relevant Security Council resolutions, in accordance with the Charter of the United Nations; [...]

7. *Calls* for the cessation of all forms of assistance and support for illegal Israeli activities in the Occupied Palestinian Territory, including Jerusalem, in particular settlement activities;

8. *Recommends* to the States that are High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to take measures, on a national or regional level, in fulfilment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention; [...]

C. UN General Assembly Resolution ES-10/3

[**Source:** United Nations, A/RES/ES-10/3, July 15 1997; available on http://www.un.org]

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [Without reference to a Main Committee (A/ES-10/L.2/Rev.1)]

Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory

The General Assembly,

Having received with appreciation the report of the Secretary-General, [A/ES-10/6; S/1997/494 and Add.1 [available on http://www.un.org]], [...]

Reaffirming its resolution ES-10/2 of 25 April 1997, [available on http://www.un.org],

Having been informed in the report of the Secretary-General that, inter alia, the Government of Israel, as of 20 June 1997, has not abandoned its construction of the new Israeli settlement at Jebel Abu Ghneim and that settlement activity, including the expansion of existing settlements, the construction of bypass roads, the confiscation of lands adjacent to settlements and related activities, in violation of Security Council resolutions on the matter, continues unabated throughout the Occupied Palestinian Territory, and also that the Israeli Prime Minister and other representatives of the Government continue to reject the terms of resolution ES-10/2 requiring the cessation of those activities,

Aware that, in the light of the position of the Government of Israel, as indicated in the report of the Secretary-General, the General Assembly should once more consider the situation with a view to making additional appropriate recommendations to States Members of the United Nations, in accordance with General Assembly resolution 377 A (V) of 3 November 1950, [available on http.//www.un.org],

1. *Condemns* the failure of the Government of Israel to comply with the demands made by the General Assembly at its tenth emergency special session in resolution ES-10/2; [...]

6. *Recommends* to Member States that they actively discourage activities which directly contribute to any construction or development of Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, as these activities contravene international law;

7. *Demands* that Israel, the occupying Power, make available to Member States the necessary information about goods produced or manufactured in the illegal settlements in the Occupied Palestinian Territory, including Jerusalem;

8. *Stresses* that all Member States, in order to ensure their rights and benefits resulting from membership, should fulfil in good faith the obligations assumed by them in accordance with the provisions of the Charter of the United Nations;

9. *Emphasizes* the responsibilities, including personal ones, arising from persistent violations and grave breaches of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949;

10. *Recommends* that the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War convene a conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect, in accordance with common article 1, and requests the Secretary-General to present a report on the matter within three months; [...]

D. UN Secretary-General's Report

[**Source:** United Nations, A/ES-10/16 and S/1997/798, 14 October 1997; available on http://www.un.org]

ILLEGAL ISRAELI ACTIONS IN OCCUPIED EAST JERUSALEM AND THE REST OF THE OCCUPIED PALESTINIAN TERRITORY

Report of the Secretary-General submitted in accordance with General Assembly resolution ES-10/3

I. INTRODUCTION

1. The present report is submitted pursuant to resolution ES-10/3 adopted on 15 July 1997 by the General Assembly at its tenth emergency special session. [...]

2. In order to fulfil my reporting responsibilities, on 31 July 1997, I addressed a *note verbale* to the Permanent Observer of Switzerland to the United Nations requesting the Government of Switzerland, in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to provide me, in due course, with the necessary information.

II. INFORMATION PROVIDED BY THE GOVERNMENT OF SWITZERLAND

3. On 7 October 1997, the Government of Switzerland conveyed to me the following information:

"In response to the note of the Secretary-General, the Government of Switzerland sought the views of the 188 States parties to the Fourth Geneva Convention. The notes addressed to the States parties stated, *inter alia*, the following:

'It is the responsibility of the States parties to the Fourth Convention, after considering the recommendation addressed to them, to determine how they wish to follow it up. As depositary, the Swiss Government is interested in knowing their views. Therefore, the Embassy has the honour to consult the Ministry and to invite it to submit its comments on possible measures to follow up paragraph 10 of resolution ES-10/3, including comments on the convening of a conference, as recommended, and on the results that might thereby be achieved.'

"To date, 53 States parties to the Convention have sent written replies to the note requesting their views. These views are as follows:

[follows a list of opinions expressed by States, including:]

- One State said that it had 'no objection to the proposal to convene a conference of experts from the interested parties, with a view to discussing the existing humanitarian problems in the Palestinian territory'. That State also felt that 'another possible measure ... would be for the interested parties to appeal to the International Fact-Finding Commission (article 90 of Additional Protocol I of 1977). The Commission is competent to facilitate, through its good offices, the restoration of an attitude of respect for the 1949 Conventions'. That State believes, in that regard, 'that the fact that Israel has not acceded to Additional Protocol I of 1977 should not prevent the Commission from resolving the issue on an ad hoc basis'. In the view of this State, 'the implementation of either of these two measures would be a positive step and would encourage a normalization of the humanitarian situation in the Palestinian territory'. [...]

- One State thought it would be preferable, 'given the delicate situation in the Middle East, to await progress on the efforts being made to bring about the resumption of the peace process, particularly at a time when meetings are planned in the near future between the parties directly involved'.

- One State wrote that it wished 'to try to exchange views with other Governments in order to ensure that the convening of the conference at the current stage will not provoke further tensions in Israeli-Palestinian relations and will not endanger the fragile peace which has already been threatened by the outbreak of violence'. [...]

"Similarly, the Secretary-General of the League of Arab States sent a letter expressing 'the approval of all the Arab countries of the contents of the letter from the Swiss Government concerning the holding of such a conference', adding, in a subsequent letter, that 'the Arab countries would hope that this conference will

be held as soon as possible in order to safeguard the interests of the Palestinian people'.

"Lastly, the Presidency of the Council of the European Union stated that it had been 'authorized by the 15 States members of the European Union, High Contracting Parties to the Geneva Conventions, to transmit a joint reply from the 15 member States concerning the follow-up to resolution ES-10/3, paragraph 10 of which provides for the convening of a conference'. In this joint reply, the member States said that they 'believe that the convening of a conference in the immediate future would, in the present circumstances, risk giving rise to additional complications unless it was carefully prepared'. The member States therefore suggested that 'the possibilities should be explored of convening a meeting of experts which would be charged with examining the political and legal context before a conference of the High Contracting Parties was convened. The meeting of experts could also examine the broader implications of such a conference'.

"Upon receipt of these collective replies, the depositary indicated that, out of a concern for clarity and precision, it would, as far as possible, like to be able to obtain individual replies from the States concerned. A number of those States acceded to the depositary's request and sent individual replies, included in the 53 mentioned above, along the lines of the reply sent by the body of which those States were members."

E. UN General Assembly Resolution ES-10/4

[**Source:** UN Doc. A/RES/ES-10/4 (November 19, 1997); footnotes omitted; available on http://www.un.org]

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY
[without reference to a Main Committee (A/ES-10/L.3 and Add.1)]

Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory

The General Assembly,

Having received the report of the Secretary-General submitted in accordance with paragraph 10 of its resolution ES-10/3 of 15 July 1997, [...]

Reiterating the demands made in resolutions ES-10/2 and ES-10/3, [...]

Having been informed in the report of the Secretary-General of the responses of the High Contracting Parties to the Geneva Convention and of the collective responses transmitted through letters from the President of the Coordinating Bureau of the Movement of Non-Aligned Countries, the Secretary-General of the League of Arab States and the Presidency of the Council of the European Union, to the note sent by the Government of Switzerland in its capacity as the depository of the Convention, [...]

Gravely concerned at the continuing deterioration of the Middle East peace process and the lack of implementation of the agreements reached,

Reaffirming that all illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, especially settlement activities, and the practical results thereof, cannot be recognized irrespective of the passage of time,

Recalling its rejection of terrorism in all its forms and manifestations in accordance with all relevant resolutions and declarations of the United Nations ()

3. *Reiterates its recommendation* to the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to take measures on a national or regional level, in fulfilment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention, as well as its recommendation to Member States to actively discourage activities that directly contribute to any construction or development of Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, as these activities contravene international law;

4. *Reiterates also its recommendation* that the High Contracting Parties to the Geneva Convention convene a conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect in accordance with common article 1;

5. *Recommends* to the Government of Switzerland, in its capacity as the depository of the Geneva Convention, to undertake the necessary steps, including the convening of a meeting of experts in order to follow up on the above-mentioned recommendation, as soon as possible and with a target date not later than the end of February 1998;

6. *Requests* the Government of Switzerland to invite the Palestine Liberation Organization to participate in the above-mentioned conference and any preparatory steps for that conference; [...]

F. Press Release, Expert Meeting, June 1998

[**Source:** Federal Department of Foreign Affairs, Switzerland, Geneva, 11 June 1998; available on http://www.dfae.admin.ch/eda/e/home/recent/press.html]

Experts' meeting on the application of the Fourth Geneva Convention

An experts' meeting on the application of the Fourth Geneva Convention was held at Sarasin Villa, near Geneva, from 9 to 11 June 1998. The meeting chaired by Switzerland brought together Israeli and Palestinian representatives in the presence of the International Committee of the Red Cross. The President of the Swiss Confederation, Flavio Cotti, took the opportunity to meet the delegations and express the support of the Swiss government for the ongoing efforts with regard to this important issue.

Bearing in mind several Emergency Session Resolutions of the General Assembly of the United Nations, Switzerland, depository of the Geneva Conventions, convened this meeting after having conducted extensive con-

sultations with the High Contracting Parties and in particular with states and organisations concerned.

This meeting was the first part of a package of two measures proposed by Switzerland. The second measure, an experts' meeting of the High Contracting Parties of the Geneva Conventions on problems of the Fourth Geneva Convention (in general, and in particular in occupied territories), will be proposed in the early days of July. It is expected to take place in early autumn 1998.

Parties participating at the meeting held at Sarasin Villa agreed to hold their discussions in camera and to commonly issue the present press release.

Main issues regarding the application of the IVth Geneva Convention have been raised. Significant conceptual differences have emerged concerning the implementation of the IVth Geneva Convention, its relation with the peace process in the Middle East and the security environment.

The discussions have been frank and constructive and have been held in a spirit of respect and understanding. Israeli and Palestinian representatives have agreed to follow the three principles proposed by Switzerland for meetings on this issue:

- contribute to real improvements in the respect for the international humanitarian law on the ground;
- avoid any politicisation of international humanitarian law, and
- support the peace process in the Middle East.

The parties exchanged views on the feasibility of establishing mechanisms and taking concrete measures to implement the Fourth Geneva Convention. All delegations have reaffirmed that the Geneva Conventions are a core value of international law and have to be respected.

With a view to continuing the dialogue, the parties agreed to meet again to take into consideration ideas and suggestions that can foster respect of the Fourth Geneva Convention.

G. Chairman's Report, Expert Meeting, October 1998

[**Source:** Conference of States Parties to the fourth Geneva Convention, expert's meeting on the IV Geneva Convention, Geneva, 27-29 October, 1998; available on http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html]

Expert Meeting on the Fourth Geneva Convention
Geneva, 27-29 October 1998
Chairman's Report

I. Introduction

An expert meeting on the Fourth 1949 Geneva Convention, relative to the protection of civilian persons in time of war (the Fourth Convention), took place in Geneva from 27 to 29 October 1998. It was held in order to analyse general problems regarding the application of the Fourth Convention - in general and, in particular, in occupied territories -, to consider measures aimed at overcoming

those problems and to examine the necessary means to implement such measures.

Representatives of 118 States Parties to the Fourth Convention and 15 delegations of observers took part in the Meeting. Participants were provided with a report for the Meeting prepared by the International Committee of the Red Cross.

The Meeting was convened by the Swiss authorities as part of a package of measures that emerged from a long consultation process with the States Parties to the Fourth Convention and the organisations most closely concerned, bearing in mind the message conveyed to the States Parties by an emergency special session of the United Nations General Assembly.

In his opening statement, which is attached to the present report, the Chairman pointed out that several delegations had expressed diverging views as to whether the Meeting constituted a preliminary step to the conference recommended in Paragraph 3 of resolution ES-10/5 of the General Assembly of the United Nations. He emphasised that the Swiss authorities deemed that the holding of this Meeting, which would not be devoted to any specific situation, should not in one way or another prejudice the positions of the States Parties with regard to the implementation of resolution ES-10/5 or possible recommendations that the General Assembly of the United Nations might make on these questions in the future. Indeed, it would be up to the States Parties to evaluate the results of the Meeting and to consider the advisability and modalities of possible subsequent action. In the course of the proceedings, several delegations later referred to their own views on the matter and to concrete examples. In addition, reference was made to particular regional contexts to illustrate problems of a general nature regarding the application of the Fourth Convention. In instances where recounting such examples, or the examples themselves, went further than simply illustrating general problems, the Chairman intervened to remind the delegations of the rules of the Meeting. In conformity with what was announced by the Chairman in his opening statement, this report makes no reference either to a specific situation or to a particular regional context.

The Chairman also stressed that the Expert Meeting, which was organised along the lines of the First Periodical Meeting on International Humanitarian Law held in January 1998, was not held as part of the process of Periodical Meetings. The Expert Meeting was not held either within the framework of the International Red Cross and Red Crescent Movement, or under the auspices of the United Nations. Moreover, in view of the general principles governing the Meeting, the participants were not called upon to proceed to elections, to cast votes or to reach any decisions.

The Chairman informed the attending delegations that concerning the questions of the participation of the Palestinian delegation and that of the delegation of the Federal Republic of Yugoslavia, consultations had led to the same solutions as those adopted for the 26th International Conference of the Red Cross and the Red Crescent in 1995, and for the First Periodical Meeting on International Humanitarian Law in January 1998.

With regard to the issue of Palestine, the Chairman read the declaration contained in his opening statement, which had been distributed to all

participants. At the request of the Palestinian delegation, and with the agreement of the principal delegations concerned, the Chairman gave clarifications on, among other things, the term "Palestine ". These clarifications are enclosed in the appendix to this report.

A declaration by the Federal Republic of Yugoslavia was also distributed to the delegations. The delegations of the Republic of Croatia, of the former Yugoslav Republic of Macedonia and of the Republic of Slovenia also prepared a declaration for the participants. Both declarations are included in the appendix.

At the end of the Meeting, the Chairman presented his summary of the discussions. This summary- identifies general problems regarding the application of the Fourth Geneva Convention - in general and, in particular, in occupied territories -, considers a number of possible measures aimed at overcoming these problems and examines the means required to implement such measures. The summary is the Chairman's personal account of the Meeting, and is not binding on the delegations which participated at it.

* * * * *

II. Chairman's summary

1. General problems identified

It emerged from the exchange of views and from the discussions that it is not technical problems that are hindering the application of the Fourth Geneva Convention but essentially political and legal disputes over its applicability:

- In today's armed conflicts the great suffering of the civilian population is most often not only the result of ignorance of the obligations contained in the Fourth Geneva Convention, but of political and legal disputes over its applicability or the duration of its applicability. Such problems arise as a result of States Parties concerned denying the existence of an international armed conflict (or any armed conflict beyond that of a police operation or the struggle against terrorism), or contesting the legal status of certain territories, or claiming that the Convention lacks clarity on various issues, and so forth;
- The obligation of the States Parties to ensure respect for the Convention's rules in accordance with its Article 1, is frequently subordinated to considerations of political expediency;
- Parties to an armed conflict often fail to agree on the establishment of protected zones.

2. Identified violations of the Fourth Convention

In the light of the general problems listed above, the following violations of the Fourth Convention were identified by the participants in particular. It emerges in particular that in many recent armed conflicts and in situations in occupied territories, civilians are no longer merely victims of hostilities but have become the actual target of them:

In armed conflicts in general:

- Killing, torture, rape, pillage, hostage-taking;
- Displacement of civilians not justified by security reasons;
- Repatriation of foreign nationals in violation of the principle of non-refoulement, or their detention under inhuman conditions;
- Violation of family rights;
- Refusal to grant providers of humanitarian assistance or religious personnel access to civilian victims, particularly children, women, the elderly, and the medically dependent;
- Deportation or expulsion of civilians, as in the practice of ethnic cleansing;
- Use of anti-personnel mines to terrorise civilians or to prevent their safe return;
- Destruction of hospitals and places of worship;
- Destruction of property without military justification;
- Destruction of the environment.

In occupied territories:

- Destruction of the economic and social structures of the occupied territory, failure to respect local customs, substitution of the occupying power's laws for those previously in force;
- Restrictions on the local population communication with the outside world, thus impeding the intellectual, economic and structural development of the occupied territory;
- Destruction of the cultural heritage;
- Deportation and displacement of civilians not justified by the safety of the civilians themselves or by imperative military considerations;
- Arbitrary detention;
- Confiscation and destruction of property not rendered absolutely necessary by military operations;
- Transfer by the occupying power of a part of its own population to the occupied territory, which could amount to the territory's gradual annexation;
- Ill-treatment of and violence against civilian populations, such as rape, torture, summary execution and measures of collective punishment - sometimes continuing.

3. Principal measures proposed by the States Parties to solve the problems and to prevent future violations

On the basis of the identified violations of the Fourth Convention, the participants at the Expert Meeting examined aspects of possible solutions and reviewed appropriate measures to implement such solutions. The participants proposed a series of concrete measures aimed at overcoming the problems encountered

and to prevent future violations. Some of these measures explicitly require the States Parties to do everything to ensure full respect for the Fourth Convention in armed conflicts, in general and in occupied territories in particular. The participants were unanimous in underscoring the need for better implementation. Nevertheless, diverging views were expressed concerning some of the envisaged measures, in particular, those which were proposed in relation to specific situations. The measures which were discussed are the following:

- Ensure observance, in all circumstances and by all parties to an armed conflict, including the occupiers and the inhabitants of occupied territory, of the principles of humanity and of the dignity to which all human beings are entitled;
- Recognise that the humanitarian objective of the Fourth Convention, i.e. the protection of the civilian population during armed conflicts and in situations of occupation, must not be jeopardised by unduly narrow interpretations of the provisions defining the Convention's applicability;
- Ensure, both in international and non-international armed conflicts, full and non-selective respect for the Convention in accordance with Article 1 common to the1949 Geneva Conventions;
- Accede to other instruments of international humanitarian law (IHL) protecting the civilian population in armed conflicts, such as the two Additional Protocols to the 1949 Geneva Conventions, Protocol II to the 1980 UN Convention on Certain Conventional Weapons as amended on 3 May 1996, and the 1997 Convention on the prohibition of anti-personnel mines;
- Encourage, through diplomatic dialogue, parties to an armed conflict to ensure respect for the Fourth Convention;
- Organise regular meetings of States Parties to examine, in the tradition of the humanitarian dialogue - for example, within the framework of Periodical Meetings as decided at the 26"' International Conference of the Red Cross and the Red Crescent -, general problems regarding the application of the Fourth Convention;
- Organise meetings which would be attended by States or by entities particularly concerned as well as, when appropriate, by a certain number of States Parties to examine specific situations;
- Examine, both in general and in particular cases, the advisability of convening meetings of States Parties on specific situations for the purpose of determining i.a. if and to what extent such meetings can contribute to making concrete improvements to the fate of victims; and examine the modalities for convening and holding such meetings;
- Co-operate in taking sanctions and other coercive measures which would be decided by the Security Council in accordance with the UN Charter against States Parties which seriously and systematically violate the Convention, and in allocating just compensation to the victims;

- Prosecute on a national level individual violators, and support international efforts to try alleged perpetrators of war crimes, including through ratification of the Statute of the International Criminal Court;
- Recognise, where appropriate, the competence of the International Humanitarian Fact-Finding Commission pursuant to Article 90 of Additional Protocol I to the 1949 Geneva Conventions, or make use of the procedure which allows the Commission to open an inquiry with the consent of the parties to a conflict;
- Enact appropriate national legislation to prevent and repress violations of IHL, bearing in mind the availability of the ICRC advisory services;
- Establish programmes to disseminate IHL in armed forces and in civilian society, and support the activities of the ICRC and of the National Red Cross and Red Crescent Societies in this regard;
- Establish a mechanism allowing States Parties to exchange views and experiences in the field of dissemination;
- Encourage the United Nations to establish a programme for teaching IHL to peacekeeping forces that may also serve as a model for the dissemination of IHL in national armed forces;
- Establish national committees to assist different branches of government in the implementation of IHL;
- Support the activities of the ICRC and the National Red Cross and Red Crescent Societies, as well as those of the non-governmental organisations that provide humanitarian assistance.

Geneva, 11 December 1998

The Chairman of the Expert Meeting on the Fourth Geneva Convention

Walter B. Gyger

H. UN General Assembly Resolution ES-10/6

[**Source:** United Nations, A/RES/ES-10/6, 24 February 1999, footnotes omitted; available on http://www.un.org]

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.5/Rev.1)]

Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory

The General Assembly, [...]

3. *Reiterates* in the strongest terms all the demands made of Israel, the occupying Power, in the [...] resolutions of the tenth emergency special session, including the immediate and full cessation of the construction at Jebel Abu Ghneim and of all other Israeli settlement activities, as well as of

all illegal measures and actions in Occupied East Jerusalem, the acceptance of the *de jure* applicability of the Fourth Geneva Convention and compliance with relevant Security Council resolutions, the cessation and reversal of all actions taken illegally against Palestinian Jerusalemites and the provision of information about goods produced or manufactured in the settlements; [...]

I. Declaration adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001

[**Source:** Declaration adopted at the Conference of High Contracting Parties to the fourth Geneva Convention, 5 December 2001; available on http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html]

CONFERENCE OF HIGH CONTRACTING PARTIES TO THE FOURTH GENEVA CONVENTION

Geneva, 5 December 2001

DECLARATION

1. This Declaration reflects the common understanding reached by the participating High Contracting Parties to the reconvened Conference of High Contracting Parties to the Fourth Geneva Convention. The Conference of 15 July 1999, recommended by United Nations' General Assembly Resolution ES-10/6 in an Emergency Special Session, issued a statement as follows: "The participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory. Taking into consideration the improved atmosphere in the Middle East as a whole, the Conference was adjourned on the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field."

2. The participating High Contracting Parties express deep concern about the deterioration of the humanitarian situation in the field. They deplore the great number of civilian victims, in particular children and other vulnerable groups, due to indiscriminate or disproportionate use of force and due to lack of respect for international humanitarian law.

3. Taking into account art. 1 of the Fourth Geneva Convention of 1949 and bearing in mind the United Nations' General Assembly Resolution ES-10/7, the participating High Contracting Parties reaffirm the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem and reiterate the need for full respect for the provisions of the said Convention in that Territory. Through the present Declaration, they recall in particular the respective obligations under the Convention of all High Contracting Parties (para 4-7), of the parties to the conflict (para 8-11) and of the State of Israel as the Occupying Power (para 12-15).

4. The participating High Contracting Parties call upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances, to disseminate and take measures necessary for the prevention and suppression of breaches of the Conventions. They reaffirm the obligations of the High Contracting Parties under articles 146, 147 and 148 of the Fourth Geneva Convention with regard to penal sanctions, grave breaches and responsibilities of the High Contracting Parties.

5. The participating High Contracting Parties stress that the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances.

6. The participating High Contracting Parties see the need to recall basic humanitarian rules with regard to persons taking no active part in the hostilities, which shall be treated humanely without any discrimination, and to recall the prohibition at any time and in any place whatsoever of acts of violence to life and person, torture, outrages upon personal dignity and of arbitrary or extra-judiciary executions.

7. The participating High Contracting Parties express their support for the endeavours of the humanitarian relief societies in the field in ensuring that the wounded and sick receive assistance, and for the activities of the International Committee of the Red Cross (ICRC), the United Nations Relief and Works Agency in the Near East (UNRWA) and of other impartial humanitarian organisations. They also express their support for the efforts of the United Nations High Commissioner for Human Rights and of UN Special Rapporteurs in order to assess the situation in the field and they take note of the reports and recommandations of the High Commissioner for Human Rights

   (E/CN/4/2001/114) and of the Commission of Inquiry (E/CN/4/2001/121). [available on http://www.unhchr.ch]

8. The participating High Contracting Parties call upon the parties to the conflict to ensure respect for and protection of the civilian population and civilian objects and to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives. They also call upon the parties to abstain from any measures of brutality and violence against the civilian population whether applied by civilian or military agents and to abstain from exposing the civilian population to military operations.

9. The participating High Contracting Parties call upon the parties to the conflict to respect and to protect at all times the fixed establishments and mobile medical units of the Medical Services and to facilitate the operations of the humanitarian relief societies in the field, including the free passage of their ambulances and medical personnel, and to guarantee their protection.

10. The participating High Contracting Parties call upon the parties to the conflict to facilitate the activities of the ICRC, within its particular role

conferred upon it by the Geneva Conventions, the UNRWA and of other impartial humanitarian organisations. They recognise and support their efforts to assess and to improve the humanitarian situation in the field. They invite the parties to the conflict to co-operate with independent and impartial observers such as the Temporary International Presence in the City of Hebron (TIPH).

11. The participating High Contracting Parties call upon the parties to the conflict to consider anew suggestions made at the meeting of experts of High Contracting Parties in 1998 to resolve problems of implementation of the Fourth Geneva Convention and to respect and to ensure respect in all circumstances for the rules of international humanitarian law and to co-operate within the framework of direct contacts, including procedures of inquiry and of conciliation. They encourage any arrangements and agreements supported by the parties to the conflict on the deployment of independent and impartial observers to monitor, inter alia, breaches of the Fourth Geneva Convention as a protection and confidence building measure, with the aim to ensure effectiveness of humanitarian rules.

12. The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention. They reaffirm the illegality of the settlements in the said territories and of the extension thereof. They recall the need to safeguard and guarantee the rights and access of all inhabitants to the Holy Places.

13. The participating High Contracting Parties call upon the Occupying Power to immediately refrain from committing grave breaches involving any of the acts mentioned in art. 147 of the Fourth Geneva Convention, such as wilful killing, torture, unlawful deportation, wilful depriving of the rights of fair and regular trial, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. The participating High Contracting Parties recall that according to art. 148 no High Contracting Party shall be allowed to absolve itself of any liability incurred by itself in respect to grave breaches. The participating High Contracting Parties also recall the responsibilities of the Occupying Power according to art. 29 of the Fourth Geneva Convention for the treatment of protected persons.

14. The participating High Contracting Parties also call upon the Occupying Power to refrain from perpetrating any other violation of the Convention, in particular reprisals against protected persons and their property, collective penalties, unjustified restrictions of free movement, and to treat the protected persons humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

15. The participating High Contracting Parties call upon the Occupying Power to facilitate the relief operations and free passage of the ICRC, UNRWA, as well as any other impartial humanitarian organisation, to guarantee their

protection and, where applicable, to refrain from levying taxes and imposing undue financial burdens on these organisations.

16. The participating High Contracting Parties stress that respect for the Fourth Geneva Convention and international humanitarian law in general is essential to improve the humanitarian situation in the field and to achieve a just and lasting peace. The participating High Contracting Parties invite the parties concerned to bring the conflict to an end by means of negotiation and to settle their disputes in accordance with applicable international law.

17. The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties, to follow up on the implementation of the present Declaration.

18. The participating High Contracting Parties express their gratitude to the Depositary of the Fourth Geneva Convention for its good services and offices.

J. UN General Assembly Resolution ES-10/10

[**Source:** United Nations, A/RES/ES-10/10, 7 Mai 2002, available on http://www.un.org]

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.9/Rev.1)]

Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory

The General Assembly, [...]

5. *Calls* for the implementation of the declaration adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention, reconvened in Geneva on 5 December 2001, through concrete action on the national, regional and international levels to ensure respect by Israel, the occupying Power, of the provisions of the Convention; [...]

K. UN General Assembly Resolution ES-10/15

[**Source:** United Nations, A/RES/ES-10/15, 2 August 2004, available on http://www.un.org]

Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, including in and around East Jerusalem

[*See* **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [*Cf.* A., ICJ, Legal Consequences of the Construction of a Wall.] p. 1151.]

The General Assembly [...],

Having received with respect the advisory opinion of the Court on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, rendered on 9 July 2004 [*See* **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory, p. 1151.],

[...]

3. *Calls upon* all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion;

4. *Requests* the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion;

[...]

7. *Calls upon* all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention, and invites Switzerland, in its capacity as the depositary of the Geneva Conventions, to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention;

[...]

DISCUSSION

1. a. What demands does Art. 1 common to the Geneva Conventions impose on States parties to "ensure respect" of International Humanitarian Law (IHL)? Does the demand issued by the UN General Assembly Resolution for Israel to accept the *de jure* applicability of Convention IV and for it to respect its provisions allow the States Parties to fulfil their obligations towards common Article 1 in a satisfactory way? Even if Israel does not respect these resolutions?

   b. How should States Parties implement Art. 1? How could they "ensure respect" of the Conventions? What means must they use in order to act in conformity with Art. 1? What means may they use? What means may they not use?

   c. What do you think of the resort to public opinion as a way of pressurising States that are not fulfilling their obligations? Confidential or public approaches by inter-governmental or non-governmental organisations? What if these methods fail?

   d. Are States in violation of Article 1 if they uphold or authorise, on their territory, actions by people advocating violations of IHL?

   e. Under Article 1, must or may States ban the import of goods produced by Israel in the settlements established in violation of Article 49 (6) of Convention IV (as suggested in document H, para. 3, above)?

f. Does this obligation to "respect and ensure respect" for the Conventions only issue from the Conventions? Or is it also a general principle of IHL? Of conventional law? Does this principle apply to all multilateral treaties? (*See* **Case No. 130**, ICJ, Nicaragua v. US [*Cf.* para. 220.] p. 1365.)

2. a. What is the legal value of General Assembly Resolutions? Does the reference to the resolution "Uniting for Peace" (Resolution 377 (V) of 3 November 1950; available on http://www.un.org/Depts/dhl/landmarks/amajor.htm) in which the General Assembly states that it will take over the functions of the Security Council when the latter is paralysed by the veto of a permanent member, reinforce this value? Does this mean that the States Parties to the Conventions do not need to respect the recommendations made in para. 10 of document C above? Does each State not have an individual obligation to ensure respect of the Conventions?

b. Should the General Assembly have reminded the States Parties of their conventional obligations? Is it adequate for the UN, which is neither a State Party to the Conventions nor an implementing mechanism foreseen by these Conventions, to call for the application of common Art. 1? (*Cf.* Art. 89 of Protocol I.)

3. Why did Switzerland twice make preliminary inquiries on the idea of a Conference of all States parties? What is the depositary State's role in the implementation of the Conventions? Does the depositary have a specific role in case of violations? May the depositary convene a Conference of the States Parties? In regard to the Conventions? In regard to Protocol I? (*Cf.* Arts. 7, 97 and 98 of Protocol I.) Under what conditions and with which aim?

4. a. Do the States parties not have a legal interest for the treaty to be respected? Is taking no action to "ensure respect" of IHL a violation of common Art.1?

b. Are the legal arguments of the State that wishes to call on the International Fact Finding Commission sound? (*Cf.* Art. 90 Protocol I and document D, above.) Does each State party have an obligation to ask the commission to hold an inquiry in cases of ongoing violations? At least in cases were the Commission has jurisdiction? Is such a request by a State party a means to satisfy the obligation under common Art. 1? What could the Commission do in the present case? Are there facts that need to be established?

c. What do you think of the replies by States who fear a negative impact on the peace process? Do they fear such an impact because the Conference may consider questions that are important for the peace process? (*Cf.* Document D, above.) Or do they fear that a discussion on the respect of IHL will lead the international community to lose sight of the main aim, which is the peace process? Can the respect of IHL be an alternative to peace? Is lasting peace a realistic option as long as the violations of IHL have not been redressed?

5. a. Was the aim of the meetings of June and October 1998 to implement the requests formulated by the General Assembly Resolutions? Were they violations of these resolutions? Were they useful? (*Cf.* Documents F and G, above.)

b. Did the meeting of October 1998 bring new conclusions or recommendations that reach further than existing IHL? (*Cf.* Document G, above.)

6. a. Must common Art. 1 be implemented separately by each State party? What are the measures that can be implemented separately? Which measures require collective action? Is a coordination of the measures taken by virtue of Article 1 necessary? Useful? How can this coordination be most effectively organised?

b. Is a Conference of all States parties a useful tool for the coordination of the measures taken by virtue of Art. 1? What are the dangers and opportunities of such a conference?

c. Do the Conventions foresee the organisation of a conference of all the States parties? What about Protocol I? (*Cf.* Art. 7 of Protocol I.) May such a conference deal with a specific context? Does treaty law foresee the organisation of a Conference of all the States parties? Are States obliged to participate? During these Conferences may they make binding decisions?

d. Could and must the Conference mentioned in Document I and envisaged in Document L take place if Israel were not taking part? Is the objective of these Conferences to discuss the violations committed by Israel or the obligations of third States?

e. Did the Conference of States parties of December 2001 bring new conclusions or recommendations that exceeded the scope of existing IHL? Did it have the expected impact on the situation in the Middle East? Would it have had a greater impact if all the States Parties had participated? (*Cf.* Document I, above.)

f. Does the General Assembly Resolution adopted after this Conference and requesting the application of the Declaration have a greater legal value? Does it have a greater impact? (*Cf.* Document J, above.)

g. What is the purpose of the Conference envisaged in Document K?

3. Positions of Third Countries

Case No. 119, UK, Position on Applicability of Fourth Convention

THE CASE

[**Source:** Extract from *United Kingdom Materials on International Law*, The British Yearbook of International Law LXIX (1998), pp. 598-600.]

The following observations were made by Mr M. Eaton, Deputy Legal Advisor, FCO, at an Experts' Meeting on the Fourth Geneva Convention on Humanitarian Law, held in Geneva on 27-29 October 1998:

Greatest problem in relation to implementation of the GCIV is that of refusal to recognise its applicability. As ICRC says "when confronted with situations in which the Convention should be applied, the state party to it almost invariably cite some grounds or other on which in their view it is not applicable".

Has also been rightly said "The law of belligerent occupation has had a poor record of compliance for most of the twentieth century. The principal problem has been the reluctance of states to admit that the law applies at all." This is not a problem of a single situation of occupation - it is a widespread and long observed phenomenon. But, since a particular current occupation situation has frequently been mentioned here, I wish to state that the British position on the *de jure* application of the Convention to the territories occupied by Israel after 1967 is well-known, and does not need to be rehearsed.

Unfortunately the question of applicability of GCIV is very frequently bedevilled and confused by that of title to the territory in question. If applicability of the law were dependent on the resolution of underlying questions of title it would almost never be applied.

In fact the law does not make it a precondition that the territory occupied must have belonged to the displaced sovereign prior to occupation. It might appear so from GCIV Article 2 (2): "The Convention shall apply in all cases of partial or total occupation of the territory of an ACP [*sic*], even if the occupation meets with no armed resistance."

But this is not the primary criterion for application. It is, rather, a residual role. The *primary* rule is in Article 2 (1): "The Convention shall apply to all cases of declared war or other armed conflict."

So if, during an armed conflict, a state takes military control of a territory it did not control before the conflict the Convention is applicable, whatever the underlying disputes about title.

To restate a very well-known, yet often not-respected, principle of IHL [International Humanitarian Law], the application of IHL is not concerned with the rights and wrongs and origins of the conflict. The sole question is, is there an

armed conflict, international or internal? If so, the relevant rules of IHL apply. Of course, that question itself is not always easy to answer, but my point is that the application of IHL depends upon a factual situation of occupation. For the sake of the civilians caught up in the situation it needs to be applied notwithstanding legal arguments over status, whether of territory or of parties to the conflict. The drafters of the Convention did their best to exclude such arguments. It is sad that they are still used to justify its non-application.

If I may be permitted a personal reminiscence of the Protocol I negotiations in the Third Committee of the Diplomatic Conference of 1974-77 [...]: there was a proposal to characterise occupation as inherently wrong.

It was resisted by the Rapporteur, Ambassador George Aldrich of the USA, who recalled that his country, with France, the Soviet Union and the UK was an occupying power in Berlin and he saw nothing wrong in that. The proposal was promptly dropped.

So it is not occupation *per se* that offends against IHL (I leave aside other legal questions of use of force etc). It is refusal of occupants fully to apply the rules of IHL to the occupied territory as a matter of law. There is no particular weakness in the law, save that it is not applied.

To state this is easy. To put it into practice very hard, because neither the Fourth Convention nor Additional Protocol I sets up an independent arbiter to determine when they apply. It is not the job of the ICRC. The international community and HCPs individually or collectively, indeed, should say what they think. But ultimately it depends on the political will of the HCP concerned in any given situation of occupation.

Of course it is welcome when the Convention is applied voluntarily and *de facto* in situations where there is dispute as to its application *de jure*, even if such application is only partial. If civilians *in practice* are protected that is the most important thing. But it can never be a completely satisfactory substitute for *de jure* application, being both partial and dependent upon a consent which can always be withdrawn.

Finally, it has been suggested that the law of belligerent occupation is ill-suited to long-running occupations of the kind we have seen relatively often since 1945, being essentially designed for temporary situations. There is some force in that. It is possible to pick out particular GCIV provisions which are hard to apply in a long-running occupation. But what do you put in its place? Any change which recognises a permanency to the situation, or gives occupying power greater power to make changes there, would tend to legitimize the substitution of the occupant for the former sovereign power.

So, once again it does not seem to my delegation that there is any need to embark on the difficult exercise of trying to agree new provisions to apply in long-running occupations. Better to apply the existing law, which is in our view elastic enough. None of the difficulties of application is insuperable.

(Text provided by the FCO)

DISCUSSION

1. a. How do States Parties justify the non-applicability of Convention IV? Is the dispute over the title of the territory in question a defendable justification of the non-application of Convention IV? (*Cf.* Art. 2 common to the Conventions.)

2. Would characterising occupation as inherently wrong be a realistic solution?

3. Would third party determination on when Convention IV applies resolve the problem of classification? Has the determination been left to the political will of the occupying power concerned?

4. a. Should Convention IV be amended in order to adapt it to long-term occupation? Why or why not?

   b. Do you agree that the existing law is "elastic enough" to cover both short and long-term occupation?

Document No. 120, Switzerland, Prohibition of Deportation from Israeli Occupied Territories

[**Source:** "Le droit de la guerre" in *Annuaire Suisse de Droit International*, 1989, p. 248; original in French, unofficial translation.]

10.2 Prohibition on expelling and deporting the population of an occupied territory. Applicability to the territories occupied by Israel of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

The following note was drawn up by the Directorate for Public International Law. It relates to the lawfulness of the expulsion and deportation to Lebanon of four Palestinian activists from the West Bank of the Jordan.

1. Notwithstanding Resolution 607 (1988) adopted unanimously by the Security Council on 5 January, which obliges Israel to refrain from deporting Palestinian civilians from the occupied territories and calls upon it to meet the obligations imposed upon it by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter referred to as the Fourth Convention), the Israeli authorities expelled four Palestinian activists from the West Bank and deported them to Lebanon.

   The question arises as to the lawfulness of such a measure with regard to international law and the Fourth Convention in particular. To resolve that matter, consideration should first be given to the question of whether [that Convention] applies to the territories which have been occupied by Israel since 1967.

2. Israel has always disputed the applicability in law of the Fourth Convention in the occupied territories, proceeding from a literal interpretation of the second paragraph of Article 2 of that Convention under which

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

The Israeli argument is that in cases of occupation that instrument covers only situations where the ousted power enjoys legitimate sovereignty and that that was not the case with regard to the Kingdom of Jordan which had, from 1950 to 1967, annexed the West Bank in violation of the 1949 Armistice Agreement.

By contrast, the overwhelming majority of the international community (including the United States) has always maintained that the Fourth Convention is applicable *de jure* in accordance with the first paragraph of Article 2 which stipulates that

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

However, it is precisely as a result of such a conflict (the Six Day War) between the States Parties to the Fourth Convention (Israel and Jordan) that Israel occupied the West Bank. That interpretation, which is based essentially on the aim of the Fourth Convention - to grant special protection to civilians who take no part in the hostilities - is further borne out by Article 4 which states that

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Thus, there is a widely accepted opinion that the Fourth Convention does apply in the occupied territories with regard to anyone other than Israeli citizens. Incidentally, the meaning of occupation is defined in Article 32 [sic] of Hague Convention No. 4 of 18 October 1907 Respecting the Laws and Customs of War, i.e. territory is considered occupied when it is actually placed under the authority of the hostile army.

However, the question of the applicability in law of the Fourth Convention would appear to be a theoretically one and may remain unresolved as Israel has always declared that it intends to apply it *de facto* in the occupied territories. The Israeli delegate repeated as much to the Security Council on 16 December 1987 in that he said However, we have decided, since 1967, to act *de facto* in accordance with the humanitarian provisions of that Convention.

Therefore, consideration must be given to the question of whether or not the expulsion of the four Palestinian civilians constitutes a violation of the Fourth Convention.

3. The first paragraph of Article 49 of the Fourth Convention specifically prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, regardless of their motive. It is an absolute prohibition to which there are no exceptions other than the derogation provided for in the second paragraph (temporary total or partial evacuation of a given area if the security of the population or imperative military reasons so demand). Article 78 dispels any remaining doubts that might exist on the lawfulness of such a decision:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

In other words, the maintenance of law and order cannot justify any measure taken in that respect, even against activists. In particular, forcible evacuation is among the measures prohibited by the Convention. In this context it should not be forgotten that the very clear prohibition on such practices is due to the tragic experience of the Second World War. The fact that mere expulsions and not collective evacuations are involved alters nothing in terms of their legal nature. The abovementioned Article 49 prohibits any individual or mass forcible transfers.

Although the Fourth Convention reserves the right of the occupying power to subject the population to criminal provisions which it deems essential for the orderly government of the territory, the criminal provisions laid down and implemented by the occupying power may not pose any obstacle to the clearly stated prohibition on deportations.

Therefore, it would appear that by evacuating four Palestinian civilians - irrespective of whether or not they were agitators - Israel contravened the Fourth Convention. Moreover, it is a grave breach within the meaning of Article 147 which deems unlawful deportation or transfer to constitute such a breach. It is in those terms - grave breach - that the International Committee of the Red Cross publicly condemned the recent Israeli decision.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs dated January 20, 1988.

Unpublished document.

4. Reports by Non-Governmental Organisations

Case No. 121, Amnesty International, Breach of the Principle of Distinction

THE CASE

A. Amnesty International Report Calls on Palestinian Armed Groups to Stop Civilian Killings

[**Source:** AMNESTY INTERNATIONAL, "Amnesty International report calls on Palestinian armed groups to stop civilian killings" AI INDEX: MDE 15/104/2002, PRESS RELEASE, 11 July 2002 ; available on http://www.amnesty.org]

PRESS RELEASE-AI INDEX: MDE 15/104/2002
11 July 2002
[...]

Since the beginning of the *Al-Aqsa intifada* in September 2000 at least 350 civilians, most of them Israeli, have been killed in over 128 attacks by Palestinian armed groups and Palestinian individuals, Amnesty International documented in a report launched in Gaza.

The report "*Without distinction: attacks on civilians by Palestinian armed groups*" is the seventh major report on the human rights situation in the region published by the organization since the beginning of the *intifada*.

"*Whatever the cause for which people are fighting, there can never be a justification for direct attacks on civilians*," said Amnesty International.

The victims of these attacks ranged from children as young as five months to elderly people. The oldest was Chanah Rogan, aged 90. She was killed in the bombing of a hotel at the celebration of Passover on 27 March 2002 in Netanya. Most victims were killed by suicide bomb attacks within Israel claiming 184 victims of the 350 civilians killed.

Palestinian armed groups offer a variety of reasons for targeting Israeli civilians from retaliating against Israeli killing of Palestinian civilians to fighting an occupying power. Other justifications claim that Israeli settlers are not civilians or that striking at civilians is the only way to make an impact on a powerful adversary.

Under international law there is no justification for attacking civilians. Targeting civilians is contrary to fundamental principles of humanity enshrined in international law which should apply in all circumstances at all times. Amnesty International unreservedly condemns attacks on civilians, whatever reason the perpetrators give to their action.

"*Civilians should never be the focus of attacks, not in the name of security and not in the name of liberty. We call on the leadership of all Palestinian armed*

groups to cease attacking civilians, immediately and unconditionally," Amnesty International stressed.

The organization urges the Palestinian Authority to arrest and bring to justice those who order, plan or carry out attacks on civilians. The Palestinian Authority and Israel have a duty to take measures to prevent attacks on civilians. Such measures must always be in accordance with international human rights standards.

Amnesty International also calls on Israel to ensure that all its actions against armed groups and individuals suspected of involvement in attacks against civilians comply with international human rights and humanitarian law standards. Amnesty International calls on the international community to assist the Palestinian Authority to improve the effectiveness of its criminal justice system and its compliance with international human rights standards, in particular by offering international experts to advise on and monitor investigations into attacks against civilians and legal proceedings against those alleged to be responsible.

A growing number of Palestinians believe that targeting civilians is morally wrong. Amnesty International welcomes Palestinian and other voices who publicly condemn attacks on civilians and urges Palestinians and people around the world to appeal to armed groups to end attacks on civilians.

Background:

Amnesty International has for many years documented and condemned violations of international human rights and humanitarian law by Israel directed against the Palestinian population of the Occupied Territories. They include unlawful killings, extra-judicial executions, torture and ill-treatment, arbitrary detention and collective punishments such as punitive closures of areas and destruction of homes.

Palestinian armed groups and Palestinian individuals who may not have been acting on behalf of a group are estimated to have killed more than 350 civilians since the 29 September 2000. Among the victims were over 60 children and 64 of the people killed were older than 60 years of age.

Of the 128 lethal attacks against civilians studied by Amnesty International in this report 25 were committed by people who had strapped explosives to themselves and died in the attacks. On six other occasions civilians were killed by explosives that were planted, thrown or fired. Other incidents involved shootings and stabbing.

The great majority of attacks took place in the Occupied Territories. While there were far fewer attacks within Israel, they claimed 210 victims of the 350 civilians killed.

Armed groups reportedly claimed responsibility for about half of the lethal attacks on civilians of the 128 attacks surveyed by Amnesty International. The main groups involved were *Izz al-Din al-Qassam Brigades (Hamas)*, Al-Aqsa Martyrs Brigade, *Palestinian Islamic Jihad* and the *Popular Front for the Liberation of Palestine* (PLPF).

The UN General Assembly has recognized the legitimacy of the struggle of peoples against foreign occupation in the exercise of their right to self-determination and independence. However, international law requires all parties involved in a conflict to always distinguish between civilians and people actively taking part in the hostilities. They must make every effort to protect civilians from harm.

B. Amnesty International, Without Distinction

[**Source:** Amnesty International, ISRAEL AND THE OCCUPIED TERRITORIES AND THE PALESTINIAN AUTHORITY *Without distinction - attacks on civilians by Palestinian armed groups.* AI INDEX: MDE 02/003/2002, 11 July 2002. Footnotes are not reproduced; available on http://www.amnesty.org]

[...]

Attacks on civilians as a violation of basic principles of international humanitarian law

[...]

Civilians and combatants

[...] Palestinian armed groups and their supporters have suggested that the prohibition on attacking civilians does not apply to settlers in the Occupied Territories because the settlements are illegal under international humanitarian law; because settlements may have military functions; and because many settlers are armed.

Many settlements do indeed have military functions. Settlements account for one third of the total area of the Gaza Strip. Each of these settlements holds military bases and are heavily militarily defended. Although the militarization of settlements is strongest in Gaza, some of the settlements in the West Bank also have military functions. The IDF [Israeli Defence Forces] may use them as staging posts for their operations or to detain people in their custody. A large number of settlers are armed and settlers have sometimes attacked Palestinians and destroyed Palestinian houses and other property. However, settlers as such are civilians, unless they are serving in the Israeli armed forces.

Fatah considers attacks against settlers within the Occupied Territories to be legitimate. *Fatah* Secretary General Marwan Barghouti has stated to Amnesty International delegates that Fatah considers that no Israelis in the West Bank and Gaza are civilians because "*it is all an occupied country*" and Palestinians are fighting for their independence. He has also stated publicly that while he and the Fatah movement oppose attacking civilians inside Israel, "*our future neighbour, I reserve the right to protect myself and resist the Israeli occupation of my country and to fight for my freedom.*"

Israeli settlements in the Occupied Territories are unlawful under the provisions of international humanitarian law. The Fourth Geneva Convention prohibits the transfer of civilians from the occupying power's territory into the occupied territory (Article 49 (6)). However, the unlawful status of Israeli settlements does not affect the civilian status of settlers. Settlers, like any other civilians, cannot be targeted and only lose their protection from attack if and for such time as they take a direct part in hostilities (Article 51 (3) Protocol 1). Similarly, Palestinian residents of the West Bank and Gaza are civilians benefiting from the protection of the Fourth Geneva Convention unless and for such time as they take direct part in hostilities. [...]

DISCUSSION

1. How do you qualify the conflict with which this Case is concerned? Is it an international armed conflict? Are there hostilities between two High Contracting Parties? If not, why would the International Humanitarian Law (IHL) of international armed conflict be applicable? Because it is a war of national liberation within the meaning of Art. 1(4) of Protocol I? Even though Israel is not party to the Protocol? Because of the Israeli occupation of territories? Is it important, in order to answer this question, to know whether the territory belongs or belonged to Jordan, Egypt or "Palestine"? (*Cf.* Art. 2 common to the Conventions, Art. 1 of Protocol I.)

2. a. Are suicide attacks organized by Palestinian armed groups acts of terrorism? How would you define an "act of terrorism"? Does a clear definition exist in international law? In IHL? In your country's domestic law?

   b. Is terrorism prohibited by IHL? If acts of terrorism were not specifically prohibited, would they still be banned by more general provisions of IHL? Which ones? (*Cf.* Art. 33 (1) of Convention IV, Arts. 48 and 51 of Protocol I, Arts. 4 (2) (d) and 13 (2) of Protocol II.)

   c. Can such acts be justified by a "just cause," such as the struggle against a foreign occupier? Can they be justified as reprisals? Are reprisals acceptable in IHL? Even in reaction to violations of IHL such as "unlawful killings, extra-judicial executions, torture, and ill-treatment, arbitrary detention and collective punishments"? (*Cf.* Arts. 46/47/13 (3)/33, respectively, of the four Conventions, Arts. 20, 51 (6) and 52 (1) of Protocol I.)

3. a. Who can be held responsible at the international level for these suicide attacks? Only those in charge of the armed groups that organize them? Do such groups have international responsibility, just as States do? (*Cf.* **Case No. 38**, [*Cf.* A., Art. 10 and its commentary.] p. 805.) Could the Palestinian Authority be held responsible for attacks carried out from the autonomous territories? Even when it condemns the attacks? Does it have a responsibility to "arrest" and "bring to justice those who order, plan or carry out attacks"? Is this an obligation laid down by IHL? Is the Palestinian Authority bound by IHL? On what grounds? Because the Palestine Liberation Organization declared on 21 June 1989 that it would accede to the Geneva Conventions? Does Israel have a responsibility to arrest and bring these persons to justice? Can it do so? Even if that involves police or military operations in autonomous Palestinian territory? (*Cf.* Arts. 29, 146 and 148 of Convention IV, Arts. 85 (1) and 91 of Protocol I.)

   b. Are suicide attacks as a means of warfare prohibited by IHL? Even if committed against a legitimate military objective? Will your answer differ depending on whether the attacker carries arms openly or has a distinctive sign? Can the instigators and organizers of a suicide attack also be held responsible for the death of its perpetrator? Do you think they ought to be? (*Cf.* Arts. 37 (1) (c), 43, 44 and 51 of Protocol I.)

4. a. Are Israeli settlements in the occupied territories military objectives? Are they if they are defended by a military base? Are they if many settlers are armed? What is the definition of a military objective? (*Cf.* Arts. 48 and 52 of Protocol I.)

   b. Is an armed civilian a combatant? Is an armed civilian a legitimate target? In what circumstances? Are settlers always civilians "unless they serve in the Israeli armed forces"? Even those organized in self-defence militias? Even those who carry out attacks against Palestinians or destroy their homes? (*Cf.* Art. 4 of Convention III, Arts. 43, 44, 50 and 51 (3) of Protocol I.)

   c. Is an unarmed settler a civilian? Even if he belongs to a self-defence militia of his settlement? Does he forfeit the protection offered by IHL owing to the fact that the settlements are illegal under international law (*Cf.* Art. 49 (6) of Convention IV.)? Does that violation justify violations of IHL committed against the settlers? (*Cf.* Art. 50 of Protocol I.)

5. Lebanon

Case No. 122, ICRC/Lebanon, Sabra and Chatila

THE CASE

[**Source:** *ICRC Annual Report*, 1982, p. 57.]

LEBANON

The nature of ICRC activities in Lebanon changed substantially after the intervention of the Israeli armed forces in that country on June 6. [...]

[...]

With a view to the protection not only of the civilian population but also of the combatants captured by the various forces involved in the hostilities, on 7 June the ICRC appealed to the belligerents to respect their obligations under prevailing humanitarian law. Two days later the ICRC made another strong and solemn appeal to the Israeli authorities, requesting that all possible measures be taken to ensure that civilians of all nationalities were spared in the conflict. For its part, the Palestine Liberation Organization (PLO) officially announced that it had decided to respect the Geneva Conventions and Additional Protocol I of 1977. [...]

The massacres at the Palestinian camps of Sabra and Chatila led the ICRC to address an appeal to the international community on 18 September. In the wake of these massacres medical and, above all, protective measures were taken as soon as the ICRC was able to enter the camps on 18 September. [...]

MASSACRES AT SABRA AND CHATILA

The ICRC delegates had been in the habit of making daily visits to the southern suburbs of Beirut in order to provide assistance and protection for the civilian population until access to that zone, in which the Palestinian refugee camps were situated, was denied to them by the Israeli army with effect from 15 September.

By 17 September the delegates had been able to transfer the most serious cases being treated in the Gaza and Akka hospitals on the outskirts of the camps to other hospitals in the capital but they were not in a position to intervene until they were able to enter the precincts of the camps the following day, 18 September. (The massacres began on the 16th).

On that date, September 18, the ICRC addressed an appeal to the international community in which it condemned the fact that, according to reports from its delegates in Beirut, "hundreds of women, children, adolescents and elderly persons have been killed in Beirut in the district of Chatila, the streets of which are strewn with their bodies. The ICRC is also aware that wounded persons have

been killed in hospital beds and that others, including doctors, have been abducted". The ICRC further announced that its delegates had evacuated two hospitals and that hundreds of persons were seeking refuge at the delegation. The appeal ended with the words: "The ICRC solemnly appeals to the international community to intervene to put an immediate stop to the intolerable massacre perpetrated on whole groups of people and to ensure that the wounded and those who treat them are respected and that the basic right to life is observed".

At the same time, in a letter from President Hay to Mr Begin, the ICRC reminded the occupying authorities that, under the provisions of the Fourth Geneva Convention, it was their duty to restore and ensure public order and safety.

On September 18, the Gaza and Akka hospitals at Beirut were completely evacuated. Due to overcrowded conditions in the Beirut hospitals and the prevailing state of insecurity, the ICRC placed the Gaza, Lahoud, Amel-Moussaitb and Najjar hospitals under its own control and protection for several days. About 5,000 persons seeking refuge at the ICRC delegation were given temporary shelter under its protection.

From 18 September the ICRC also organized and participated in the identification and interment of the victims of the massacres. To this end it received substantial help from the Lebanese Red Cross, whose relief workers took part in the operation with the utmost devotion to duty. ICRC medical personnel based in other parts of the country also came to Beirut to help.

Once this first phase was completed, the ICRC continued its daily visits to the camps in order to reassure the population through its presence. A permanent medical service was provided at the Akka and Gaza hospitals until October 11 and 13, respectively.

Due to the prevailing insecurity in southern Lebanon, the delegates made daily visits to the Palestinian camps from September until December in order to protect and reassure the population. [...]

DISCUSSION

1. How would you qualify the armed conflict in Lebanon in the summer of 1992? Can IHL of international armed conflicts be applied although Israeli forces were not fighting against Lebanese forces but mainly against the PLO? What was the status of PLO soldiers under IHL? Had Israel any obligations as an occupying power over Sabra and Chatila at the time of the massacre? (*Cf.* Arts. 2 and 4 of Convention III, Art. 2 of Convention IV and Art. 42 of the Hague Regulations.)

2. Were the inhabitants of Sabra and Chatila considered protected persons under Convention IV? (*Cf.* Art. 4 of Convention IV.)

3. The massacre having been committed by the Lebanese militias:
   a. Which provisions of Convention IV should they have respected? If Convention IV was not applicable to the Lebanese militias, was their

behavior not prohibited by other provisions of IHL? (*Cf.* Arts. 3, 4 and 29 of Convention IV.)

b. Could the massacre also be attributed to Israel as a violation of IHL? Even though those who actually committed it did not receive Israeli orders? Even if Israel was not aware of the militias' actions? (*Cf.* Arts. 4 and 27 of Convention IV and Arts. 42 and 43 of the Hague Regulations.)

Case No. 123, ICRC/South Lebanon, Closure of Insar Camp

THE CASE

[**Source:** *ICRC Press Release,* No. 1504, Geneva, April 4, 1985.]

SOUTH LEBANON - CLOSURE OF INSAR CAMP

Geneva (ICRC) - On April 2, 1985, the Israeli Occupation authorities notified the International Committee of the Red Cross (ICRC) of their intention to close Insar camp, in South Lebanon, which contained at the end of March more than 1,800 prisoners regularly visited by ICRC delegates.

A thousand detainees have been transferred to Israel, violating articles 49 and 76 of the Fourth Geneva Convention. The Israeli authorities have told the ICRC that these prisoners will be eventually taken back to Lebanese territory, to a new camp now being built.

The other Insar prisoners, more than 700 people, were handed over to the ICRC on 3 April. ICRC delegates are helping them to rejoin their families.

DISCUSSION

1. Under which conditions did those persons detained in Insar, who were members of the "Palestine Liberation Army" (the military branch of the PLO) resisting Israeli occupation of Lebanon with the agreement of the Lebanese government, have prisoner-of-war status? If so, would it be to deport and detain such prisoners of war in Israel? Would Israel have invoked such a justification for deporting the inmates of Insar to Israel? (*Cf.* Arts. 4, 21 and 22 of Convention III.)

2. a. Are all inmates of Insar (arrested in Lebanon) who are not prisoners of war civilians? Regardless of their nationality? Even if they were stateless Palestinian refugees? Even those who fought for the "Palestine Liberation Army" but did not qualify for prisoner-of-war status? (*Cf.* Arts. 4 and 5 of Convention IV.)

   b. May an Occupying Power transfer protected civilians from an occupied territory to its own territory? Does it matter that the transfer is temporary? When is evacuation permissible? What if evacuation to Israel were

unavoidable in order to maintain the living conditions or security of those detained? (*Cf.* Arts. 49 and 76 of Convention IV.)

c. Was the deportation at least admissible for those who had been convicted of a crime and had not yet served their sentence? (*Cf.* Arts. 76 and 77 of Convention IV.)

d. Was the deportation at least admissible for those who were detained without trial for imperative security reasons, taking into account that Arts. 79-135 of Convention IV does not contain any prohibition of deportations? Why do Arts. 79-135 contain no such prohibition, unlike what Art. 76 provides for other detainees? (*Cf.* Arts. 49 and 79 of Convention IV.)

Case No. 124, Lebanon, Helicopter Attack on Ambulances

THE CASE

[**Source:** *ICRC Press Release,* December 23, 1987; original in French, unofficial translation.]

INTERNATIONAL COMMITTEE OF THE RED CROSS
DELEGATION IN LEBANON

On December 21, 1987, in the course of a military operation which took place near Nabatiyeh in southern Lebanon, two ambulances, one from the Lebanese Red Cross Society and the other from the Risali Movement, suffered direct hits from helicopter gunfire. A Red Cross first-aid worker was wounded, while two Scout first-aiders and a patient in the other ambulance were killed.

The International Committee of the Red Cross (ICRC) is deeply dismayed to note that first-aid staff have once again become the victims of hostilities while performing their humanitarian duty.

Deeply saddened by this incident, the ICRC delegation in Lebanon appeals to the parties concerned to respect everywhere and at all times the emblem of the Red Cross and Red Crescent, which protects those who provide assistance to all victims of the Lebanese conflict.

Beirut, 23 December 1987

DISCUSSION

1. Why was the attack on the ambulances a violation of IHL? Because each ambulance bore a protected emblem and attack of protected emblems is prohibited under IHL? Or simply because they were ambulances? If ambulances do not gain additional legal protection by the emblem, why is it useful to mark them with the emblem? Would it have been lawful to attack the ambulance if its

use of the emblem was not lawful? If it transported wounded "terrorists"? (*Cf., e.g.,* Arts. 19, 21, 24-26 and 35 of Convention I and Art. 21 of Convention IV.)

2. Which emblems does IHL protect? Who may use these emblems? In which circumstances and under what conditions? Can you assume that the ambulances mentioned in the case were lawfully marked with the emblem? (*Cf.* Art. 23 (f) of the Hague Regulations, Arts. 38 and 53 of Convention I, Arts. 41-43 of Convention II, Arts. 8 (l) and 18 of Protocol I, Arts. 4-5 of Annex I of Protocol I and Art. 12 of Protocol II.)

3. What is the purpose of the emblem? How can it be assured that this purpose is achieved? And that disrespect for the emblem is prevented?

Case No. 125, Israel, Navy Sinks Dinghy off Lebanon

THE CASE

[**Source:** Brilliant, J., *The Jerusalem Post*, August 1, 1990.]

NAVY SINKS DINGHY OFF LEBANON

HAIFA - An IDF [Israel Defence Force] Dabur patrol boat early yesterday morning sank a small rubber dinghy, off the south Lebanese coast, apparently killing the two men in it. The dinghy appeared to be on its way to Israel but it is unclear whether its passengers were armed.

The Dabur suffered no losses.

The Dabur's crew sighted the dinghy at about 3 a.m. some 2.5 kilometers offshore between Tyre and Ras al-Bayda, in the security zone, shortly after receiving a warning about a possible target from a radar station in the area. A few minutes later the Dabur's cannon and machineguns sank the dinghy with a few bursts.

The rapid chain of events was described at a press conference yesterday with the Dabur's commander, identified as 'Uri,' and Navy Commander Micha Ram. [...]

On this radar screen Uri detected a small dot moving down the coast at about 25 knots, in the direction of Israel.

He ordered his crew to battle stations, manning the cannon, machine guns and detection devices. The Dabur proceeded on an interception course. Three minutes later the crew spotted the dinghy's foam and then the vessel itself.

Uri came within 300 meters of the target and turned on the Dabur's projector. He saw two men on board the dinghy. The Dabur gunners opened fire.

Several Dabur crew members said later they believed the enemy had returned fire but Ram suggested that they were mistaken. Uri said he did not spot any guns aboard the dinghy.

Apparently the enemy vessel was hit immediately. The men on board "tried to disengage, turning southeast, then northwest and later northeast," but the Dabur gunners kept firing.

Thirty to 40 seconds after the initial burst of fire the two men on the dinghy were "blown into the water," Uri related. The dinghy's engine continued working and it began to run around in circles. Two more bursts from the Dabur and the dinghy began to sink.

The Dabur's crew spotted one of the men 50 meters ahead. The Dabur turned both its cannon on the man, and "opened fire and he drowned." The second man was not found.

Asked about the shooting of men in the water, Ram said the "terrorist" did not raise his hands to indicate he was surrendering. There had been cases in which the enemy, under similar circumstances, fired at Israeli craft.

A Red Cross legal expert said that the second Geneva Convention stipulates that shots may not be fired at wounded navy men or "as soon soon [sic] as someone is shipwrecked." But the convention does not cover someone "swimming around and fighting."

Uri, a first lieutenant, turned to leave the press conference, but Ram detained him and promoted him to the rank of captain.

DISCUSSION

1. Is IHL applicable here? Because since 1949 Israel has been in a state of war with Lebanon? Because Israel occupied a "security zone" in Southern Lebanon?

2. a. Were the men in the dinghy combatants? Or civilians? Had the crew of the Dabur to ascertain before initially firing whether the men in the dinghy were combatants or civilians? Should they have? (*Cf.* Arts. 51 (2) and 85 (3) of Protocol I and Art. 13 of Protocol II.)

   b. Is the distinction between combatants and civilians relevant for being considered shipwrecked? (*Cf.* Arts. 12 and 13 of Convention II and Arts. 8 (b) and 10 of Protocol I.) Does this distinction result in different protection of the shipwrecked in the present case?

3. a. When is one considered shipwrecked? Does protection depend on a further indication of surrender, *e.g.,* raising one's hands? Is there a difference between the regime of protection of shipwrecked and that of wounded and sick? Have wounded and sick to surrender to gain protection under IHL? (*Cf.* Art. 12 (2) of Convention II, Art. 8 (b) and 41 (2) of Protocol I, and Art. 7 of Protocol II.)

   b. Once the men from the dinghy were in the water, was it a violation of IHL to fire upon them? To destroy the wreckage? (*Cf.* Arts. 12 (2) and 18 of Convention II and Art. 10 of Protocol I.) Do such actions constitute grave breaches of IHL? (*Cf.* Art. 51 of Convention II and Art. 85 (2) of Protocol I.) Could firing on shipwrecked, therefore, ever be justified by military necessity under IHL?

c. Did the crew of the Dabur not have a responsibility to collect the shipwrecked onto their ship? (*Cf.* Art. 18 of Convention II, Art. 17 (2) of Protocol I, and Art. 8 of Protocol II.)

4. How would answers to the above questions change if the man in the water had fired at the Dabur? Would he still be considered shipwrecked? (*Cf.* Art. 12 of Convention II and Art. 8 (b) of Protocol I.)

Case No. 126, Israel, Taking Shelter in Ancient Ruins

THE CASE

[**Source:** Cockburn, P., *The Independent*, December 10, 1997, p. 10.]

ISRAELI SOLDIERS TAKE SHELTER IN ANCIENT RUINS AS HIZBOLLAH GUERRILLA SQUADS LIE IN WAIT

From massive fortresses overlooking the Israeli occupation zone in south Lebanon, Israeli troops play a lethal game of cat-and-mouse with Hizbollah guerrillas. [...]

Karkum is a fortress out of the Middle Ages, its garrison protected by 50-foot-high ramparts of concrete and tumbled stone. From steel observation posts capable of withstanding a direct hit from a mortar round, Israeli soldiers peer into the mist, trying to detect Hizbollah guerrilla squads moving through the steep hills of south Lebanon. [...]

Some 219 Israeli troops have been killed and 694 wounded since 1985, in addition to 358 soldiers from the 2,500-strong South Lebanon Army. Divisions in Israel spring from the fact that these seem to be lives wasted because Israel has no policy in Lebanon and because, as never happened with Palestinian guerrillas, Hizbollah shows equal skill to the Israelis in small unit actions.

Karkum, which in Hebrew means "crocus", is a good place from which to view the guerrilla campaign in south Lebanon. In other parts of the zone the front line positions are manned by the SLA [South Lebanon Army]. But Karkum, although it is only just north of the Israeli border, is an Israeli base which has come under repeated attack because here the zone is only 2.5 miles wide, compared to 14 miles at its widest point.

"In the last one-and-a-half years we have been rebuilding all our posts so they can resist mortars," says an Israeli officer. "They are not dangerous so long as you obey regulations," says another commander, explaining that by this he means staying inside the bunker. At Karkum, bizarrely, the tops of ancient Greek columns from a temple which once crowned the hilltop stick out of the Israeli fortifications.

The base has come under co-ordinated attack from Hizbollah three times this year, not counting sporadic bombardment by mortars. On one occasion two

Hizbollah were seen on a hill top and pursued, but they turned out to be the bait for an ambush. More recently an Israeli patrol saw several Hizbollah soldiers on the base's helicopter pad. When they followed them the patrol's tracker saw they were walking into brush where Hizbollah had prepared bomb traps. In each case moves by Hizbollah infantry, anti-tank and mortar units were carefully co-ordinated. [...]

DISCUSSION

1. What protection does IHL provide to cultural objects? What constitutes a cultural object? Do the ancient ruins in this article constitute a cultural object? (*Cf.* Art. 27 of the Hague Regulations, Arts. 52, 53 and 85 (4) (d) of Protocol I, Art. 16 of Protocol II, and The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954; *see* **Document No. 3**, [*Cf.* A.] p. 525.)

2. a. If considered a cultural object, are the Hizbollah violating IHL by attacking the site? Are Israeli troops violating IHL by taking shelter in the ancient ruins? (*Cf.* Art. 53 of Protocol I and Art. 16 of Protocol II.)

   b. How does the stationing of Israeli troops there impact the fortress' status? Does, *e.g.*, the protection of the object cease under IHL? Does IHL now permit the Hizbollah to attack this cultural object because it has become a legitimate military objective? (*Cf.* Art. 52 (2) of Protocol I.) If so, what, if any, precautions must be taken prior to attack? (*Cf.* Art. 57 of Protocol I.)

XV. CYPRUS

Case No. 127, ECHR, Cyprus v. Turkey

THE CASE

[**Source:** European Court of Human Rights, Judgement of 10 May 2001, available on http://hudoc.echr.coe.int.]

Case of Cyprus v. Turkey
The European Court of Human Rights

(Application no. 25781/94)

Judgment

Strasbourg, 10 May 2001 [...]

PROCEDURE [...]

3. The applicant Government alleged with respect to the situation that has existed in Cyprus since the start of Turkey's military operations in northern Cyprus in July 1974 that the Government of Turkey ("the respondent Government") have continued to violate the Convention [...]. The applicant Government invoked in particular Articles 1 to 11 and 13 of the Convention as well as Articles 14, 17 and 18 read in conjunction with the aforementioned provisions. They further invoked Articles 1, 2 and 3 of Protocol No. 1.

These complaints were invoked, as appropriate, with reference to the following subject-matters: Greek-Cypriot missing persons and their relatives; the home and property of displaced persons; the right of displaced Greek Cypriots to hold free elections; the living conditions of Greek Cypriots in northern Cyprus; and the situation of Turkish Cypriots and the Gypsy community living in northern Cyprus. [...]

THE FACTS

THE CIRCUMSTANCES OF THE CASE

A. General context

13. The complaints raised in this application arise out of the Turkish military operations in northern Cyprus in July and August 1974 and the continuing division of the territory of Cyprus. At the time of the Court's consideration of the merits of the Loizidou v. Turkey case in 1996, the Turkish military presence at the material time was described in the following terms [...]

"16. Turkish armed forces of more than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication. [...]"

14. A major development in the continuing division of Cyprus occurred in November 1983 with the proclamation of the "Turkish Republic of Northern Cyprus" (the "TRNC") and the subsequent enactment of the "TRNC Constitution" on 7 May 1985.

This development was condemned by the international community. On 18 November 1983 the United Nations Security Council adopted Resolution 541 (1983) declaring the proclamation of the establishment of the "TRNC" legally invalid and calling upon all States not to recognise any Cypriot State other than the Republic of Cyprus. A similar call was made by the Security Council on 11 May 1984 in its Resolution 550 (1984). In November 1983 the Committee of Ministers of the Council of Europe decided that it continued to regard the government of the Republic of Cyprus as the sole legitimate government of Cyprus and called for respect of the sovereignty, independence, territorial integrity and unity of the Republic of Cyprus.

15. According to the respondent Government, the "TRNC" is a democratic and constitutional State which is politically independent of all other sovereign States including Turkey, and the administration in northern Cyprus has been set up by the Turkish-Cypriot people in the exercise of its right to self-determination and not by Turkey. Notwithstanding this view, it is only the Cypriot government which is recognised internationally as the government of the Republic of Cyprus in the context of diplomatic and treaty relations and the working of international organisations.

16. United Nations peacekeeping forces ("UNFICYP") maintain a buffer-zone. () Furthermore, and of relevance to the instant application, in 1981 the United Nations Committee on Missing Persons ("CMP") was set up to "look into cases of persons reported missing in the inter-communal fighting as well as in the events of July 1974 and afterwards" and "to draw up comprehensive lists of missing persons of both communities, specifying as appropriate whether they are still alive or dead, and in the latter case approximate times of death". The CMP has not yet completed its investigations. [...]

D. The Commission's findings of fact in the instant application [...]

1. Alleged violations of the rights of Greek-Cypriot missing persons and their relatives [...]

22. The Commission proceeded on the understanding that its task was not to establish what actually happened to the Greek-Cypriot persons who went missing following the Turkish military operations conducted in northern Cyprus in July and August 1974. Rather, it saw its task as one of determining whether or not the alleged failure of the respondent State to clarify the facts surrounding the disappearances constituted a continuing violation of the Convention. [...]

24. In the present case, the Commission further recalled that in its 1983 report it found it established that there were sufficient indications in an indefinite number of cases that missing Greek Cypriots had been in Turkish custody in 1974 and that this finding once again created a presumption of Turkish responsibility for the fate of these persons.

25. The Commission found that the evidence submitted to it in the instant case confirmed its earlier findings that certain of the missing persons were last seen in Turkish or Turkish-Cypriot custody. [...]

26. The Commission concluded that, notwithstanding evidence of the killing of Greek-Cypriot prisoners and civilians, there was no proof that any of the missing persons were killed in circumstances for which the respondent State could be held responsible; nor did the Commission find any evidence to the effect that any of the persons taken into custody were still being detained or kept in servitude by the respondent State. On the other hand, the Commission found it established that the facts surrounding the fate of the missing persons had not been clarified by the authorities and brought to the notice of the victims' relatives.

27. The Commission further concluded that its examination of the applicant Government's complaints in the instant application was not precluded by the ongoing work of the CMP. It noted in this connection that the scope of the investigation being conducted by the CMP was limited to determining whether or not any of the missing persons on its list were dead or alive; nor was the CMP empowered to make findings either on the cause of death or on the issue of responsibility for any deaths so established. Furthermore, the territorial jurisdiction of the CMP was limited to the island of Cyprus, thus excluding investigations in Turkey where some of the disappearances were claimed to have occurred. The Commission also observed that persons who might be responsible for violations of the Convention were promised impunity and that it was doubtful whether the CMP's investigation could extend to actions by the Turkish army or Turkish officials on Cypriot territory.

2. Alleged violations of the rights of the displaced persons to respect for their home and property

28. The Commission established the facts under this heading against the background of the applicant Government's principal submission that over 211,000 displaced Greek Cypriots and their children continued to be prevented as a matter of policy from returning to their homes in northern Cyprus and from having access to their property there for any purpose. The applicant Government submitted that the presence of the Turkish army together with "TRNC"-imposed border restrictions ensured that the return of displaced persons was rendered physically impossible and, as a corollary, that their cross-border family visits were gravely impeded. [...]

30. The Commission found that it was common knowledge that with the exception of a few hundred Maronites living in the Kormakiti area and Greek Cypriots living in the Karpas peninsula, the whole Greek-Cypriot population

which before 1974 resided in the northern part of Cyprus had left that area, the large majority of these people now living in southern Cyprus. The reality of this situation was not contested by the respondent Government. [...]

***3. Alleged violations arising out of the living conditions of Greek Cypriots in northern Cyprus** [...]*

39. The Commission further found that there existed a functioning court system in the "TRNC" which was in principle accessible to Greek Cypriots living in northern Cyprus. It appeared that at least in cases of trespass to property or personal injury there had been some successful actions brought by Greek-Cypriot litigants before the civil and criminal courts. However, in view of the scarcity of cases brought by Greek Cypriots, the Commission was led to conclude that the effectiveness of the judicial system for resident Greek Cypriots had not really been tested.

40. In a further conclusion, the Commission found that there was no evidence of continuing wrongful allocation of properties of resident Greek Cypriots to other persons during the period under consideration. However, the Commission did find it established that there was a continuing practice of the "TRNC" authorities to allocate to Turkish-Cypriots or immigrants the property of Greek Cypriots who had died or left northern Cyprus.

41. In the absence of legal proceedings before the "TRNC" courts, the Commission noted that it had not been tested whether or not Greek Cypriots or Maronites living in northern Cyprus were in fact considered as citizens enjoying the protection of the "TRNC Constitution". It did however find it established that, in so far as the groups at issue complained of administrative practices such as restrictions on their freedom of movement or on family visits which were based on decisions of the "TRNC Council of Ministers", any legal challenge to these restrictions would be futile given that such decisions were not open to review by the courts.

42. Although the Commission found no evidence of cases of actual detention of members of the enclaved population, it was satisfied that there was clear evidence that restrictions on movement and family visits continued to be applied to Greek Cypriots and Maronites notwithstanding recent improvements. [...]

43. The Commission found it established that there were restrictions on the freedom of movement of Greek-Cypriot and Maronite schoolchildren attending schools in the south. [...]

44. As to educational facilities, the Commission held that, although there was a system of primary-school education for the children of Greek Cypriots living in northern Cyprus, there were no secondary schools for them. The vast majority of schoolchildren went to the south for their secondary education and the restriction on the return of Greek-Cypriot and Maronite schoolchildren to the north after the completion of their studies had led to the separation of many families. [...]

47. As to alleged restrictions on religious worship, the Commission found that the main problem for Greek Cypriots in this connection stemmed from the fact that there was only one priest for the whole Karpas area and that the Turkish-Cypriot authorities were not favourable to the appointment of additional priests from the south. The Commission delegates were unable to confirm during their visit to the Karpas area whether access to the Apostolos Andreas Monastery was free at any time for Karpas Greek Cypriots. [...]

4. Alleged violations in respect of the rights of Turkish Cypriots and the Turkish-Cypriot Gypsy community in northern Cyprus *[...]*

52. The Commission found that there existed rivalry and social conflict between the original Turkish Cypriots and immigrants from Turkey who continued to arrive in considerable numbers. Some of the original Turkish Cypriots and their political groups and media resented the "TRNC" policy of full integration for the settlers.

53. Furthermore, while there was a significant incidence of emigration from the "TRNC" for economic reasons, it could not be excluded that there were also cases of Turkish Cypriots having fled the "TRNC" out of fear of political persecution. The Commission considered that there was no reason to doubt the correctness of witnesses' assertions that in a few cases complaints of harassment or discrimination by private groups of or against political opponents were not followed up by the "TRNC" police. However, it concluded that it was not established beyond reasonable doubt that there was in fact a consistent administrative practice of the "TRNC" authorities, including the courts, of refusing protection to political opponents of the ruling parties. [...]

54. Regarding the alleged discrimination against and arbitrary treatment of members of the Turkish-Cypriot Gypsy community, the Commission found that judicial remedies had apparently not been used in respect of particularly grave incidents such as the pulling down of shacks near Morphou and the refusal of airline companies to transport Gypsies to the United Kingdom without a visa.

55. In a further conclusion, the Commission observed that there was no evidence before it of Turkish-Cypriot civilians having been subjected to the jurisdiction of military courts during the period under consideration. [...]

THE LAW

I. PRELIMINARY ISSUES [...]

Issues reserved by the Commission to the merits stage [...]

3. As to the respondent State's responsibility under the Convention in respect of the alleged violations

69. The respondent Government disputed Turkey's liability under the Convention for the allegations set out in the application. In their submissions to the

Commission, the respondent Government claimed that the acts and omissions complained of were imputable exclusively to the "Turkish Republic of Northern Cyprus" (the "TRNC"), [...].

77. [...] Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey. [...]

***4. As to the requirement to exhaust domestic remedies** [...]*

101. The Court does wish to add, [...] that the applicant Government's reliance on the illegality of the "TRNC" courts seems to contradict the assertion made by that same Government that Turkey is responsible for the violations alleged in northern Cyprus - an assertion which has been accepted by the Court [...]. It appears indeed difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts. To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimisation of a regime which is unlawful under international law. [...]

102. The Court concludes accordingly that, for the purposes of former Article 26 (current Article 35 para. 1) of the Convention, remedies available in the "TRNC" may be regarded as "domestic remedies" of the respondent State and that the question of their effectiveness is to be considered in the specific circumstances where it arises. [...]

III. ALLEGED VIOLATIONS OF THE RIGHTS OF GREEK-CYPRIOT MISSING PERSONS AND THEIR RELATIVES

A. Greek-Cypriot missing persons [...]

2. As to the merits of the applicant Government's complaints

(a) Article 2 of the Convention [Right to life] [...]

129. The Court observes that the applicant Government contend first and foremost that the missing persons must be presumed to be still alive unless there is clear evidence to the contrary [...]. Although the evidence adduced before the Commission confirms a very high incidence of military and civilian deaths during the military operations of July and August 1974, the Court reiterates that it cannot speculate as to whether any of the missing persons have in fact been killed by either the Turkish forces or Turkish-Cypriot paramilitaries into whose hands they may have fallen. [...]

130. The Court notes that the evidence given of killings carried out directly by Turkish soldiers or with their connivance relates to a period which is outside the scope of the present application. [...] The Court concludes, therefore, that it cannot accept the applicant Government's allegations that the facts disclose a substantive violation of Article 2 of the Convention in respect of any of the missing persons.

131. For the Court, the applicant Government's allegations must, however, be examined in the context of a Contracting State's procedural obligation under Article 2 to protect the right to life. It recalls in this connection that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State [...].

133. Against this background, the Court observes that the evidence bears out the applicant Government's claim that many persons now missing were detained either by Turkish or Turkish-Cypriot forces. Their detention occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. [...]

134. [...] The Court cannot but note that the authorities of the respondent State have never undertaken any investigation into the claims made by the relatives of the missing persons that the latter had disappeared after being detained in circumstances in which there was real cause to fear for their welfare. [...] It does not appear either that any official inquiry was made into the claim that Greek-Cypriot prisoners were transferred to Turkey.

135. The Court agrees with the applicant Government that the respondent State's procedural obligation at issue cannot be discharged through its contribution to the investigatory work of the CMP. Like the Commission, the Court notes that, although the CMP's procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations [...].

136. Having regard to the above considerations, the Court concludes that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances. [...]

(c) Article 5 of the Convention [Right to liberty and safety] [...]

143. According to the applicant Government, the fact that the authorities of the respondent State had failed to carry out a prompt and effective investigation into the well-documented circumstances surrounding the detention and

subsequent disappearance of a large but indefinite number of Greek-Cypriot missing persons gave rise to a violation of the procedural obligations inherent in Article 5. [...]

147. The Court stresses at the outset that the unacknowledged detention of an individual is a complete negation of the guarantees of liberty and security of the person contained in Article 5 of the Convention and a most grave violation of that Article. Having assumed control over a given individual, it is incumbent on the authorities to account for his or her whereabouts. [...]

148. The Court refers to the irrefutable evidence that Greek Cypriots were held by Turkish or Turkish-Cypriot forces. There is no indication of any records having been kept of either the identities of those detained or the dates or location of their detention. From a humanitarian point of view, this failing cannot be excused with reference either to the fighting which took place at the relevant time or to the overall confused and tense state of affairs. Seen in terms of Article 5 of the Convention, the absence of such information has made it impossible to allay the concerns of the relatives of the missing persons about the latter's fate. Notwithstanding the impossibility of naming those who were taken into custody, the respondent State should have made other inquiries with a view to accounting for the disappearances. [...]

150. The Court concludes that, during the period under consideration, there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared. [...]

B. Greek-Cypriot missing persons' relatives

1. Article 3 of the Convention [Prohibition of torture and inhuman or degrading treatment or punishment] [...]

156. The Court recalls that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie - in that context, a certain weight will attach to the parent-child bond -, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court further recalls that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct [...].

157. The Court observes that the authorities of the respondent State have failed to undertake any investigation into the circumstances surrounding the disappearance of the missing persons. In the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time. [...] [The Court] recalls that the military operation resulted in a considerable loss of life, large-scale arrests and detentions and enforced separation of families. The overall context must still be vivid in the minds of the relatives of persons whose fate has never been accounted for by the authorities. They endure the agony of not knowing whether family members were killed in the conflict or are still in detention or, if detained, have since died. The fact that a very substantial number of Greek Cypriots had to seek refuge in the south coupled with the continuing division of Cyprus must be considered to constitute very serious obstacles to their quest for information. The provision of such information is the responsibility of the authorities of the respondent State. This responsibility has not been discharged. For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3. [...]

IV. ALLEGED VIOLATIONS OF THE RIGHTS OF DISPLACED PERSONS TO RESPECT FOR THEIR HOME AND PROPERTY [...]

B. As to the merits of the applicant Government's complaints

1. Article 8 of the Convention [Right to the respect of private and family life, home and correspondence] [...]

171. The Court notes that in the proceedings before the Commission the respondent Government did not dispute the applicant Government's assertion that it was not possible for displaced Greek Cypriots to return to their homes in the north. [...]

172. The Court observes that the official policy of the "TRNC" authorities to deny the right of the displaced persons to return to their homes is reinforced by the very tight restrictions operated by the same authorities on visits to the north by Greek Cypriots living in the south. Accordingly, not only are displaced persons unable to apply to the authorities to reoccupy the homes which they left behind, they are physically prevented from even visiting them.

173. The Court further notes that the situation impugned by the applicant Government has obtained since the events of 1974 in northern Cyprus. It would appear that it has never been reflected in "legislation" [...].

174. The Court would make the following observations in this connection: firstly, the complete denial of the right of displaced persons to respect for their homes has no basis in law within the meaning of Article 8 para. 2 of the

Convention [...]; secondly, the inter-communal talks cannot be invoked in order to legitimate a violation of the Convention; thirdly, the violation at issue has endured as a matter of policy since 1974 and must be considered continuing.

175. In view of these considerations, the Court concludes that there has been a continuing violation of Article 8 of the Convention by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus. [...]

2. Article 1 of Protocol No. 1 [Property rights] *[...]*

183. The Commission [...] concluded that during the period under consideration there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.

184. The Court agrees with the [...] analysis. [...] It would appear that the legality of the interference with the displaced persons' property is unassailable before the "TRNC" courts. Accordingly, there is no requirement for the persons concerned to use domestic remedies to secure redress for their complaints.[...]

187. [...] The continuing and total denial of access to their property is a clear interference with the right of the displaced Greek Cypriots to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 of Protocol No. 1. It further notes that, as regards the purported expropriation, no compensation has been paid to the displaced persons in respect of the interferences which they have suffered and continue to suffer in respect of their property rights. [...]

189. For the above reasons the Court concludes that there has been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights. [...]

V. ALLEGED VIOLATIONS ARISING OUT OF THE LIVING CONDITIONS OF GREEK CYPRIOTS IN NORTHERN CYPRUS

207. The applicant Government asserted that the living conditions to which the Greek Cypriots who had remained in the north were subjected gave rise to substantial violations of the Convention. They stressed that these violations were committed as a matter of practice and were directed against a depleted and now largely elderly population living in the Karpas area of northern Cyprus in furtherance of a policy of ethnic cleansing, the success of which could be measured by the fact that from some 20,000 Greek Cypriots living in the Karpas in 1974 only 429 currently remained. Maronites,

of whom there were currently 177 still living in northern Cyprus, also laboured under similar, if less severe, restrictions. [...]

B. As to the merits of the applicant Government's complaints [...]

4. Article 9 of the Convention [Freedom of religion]

241. The applicant Government alleged that the facts disclosed an interference with the enclaved Greek Cypriots' right to manifest their religion, in breach of Article 9 of the Convention [...].

243. The Commission observed that the existence of a number of measures limited the religious life of the enclaved Greek-Cypriot population. It noted in this respect that, at least until recently, restrictions were placed on their access to the Apostolos Andreas Monastery as well as on their ability to travel outside their villages to attend religious ceremonies. In addition, the "TRNC" authorities had not approved the appointment of further priests for the area, there being only one priest for the whole of the Karpas region. [...]

244. The Commission accordingly concluded that during the period under consideration there had been a violation of Article 9 of the Convention in respect of Greek Cypriots living in northern Cyprus.

245. The Court accepts the facts as found by the Commission, which are not disputed by the applicant Government. It has not been contended by the applicant Government that the "TRNC" authorities have interfered as such with the right of the Greek-Cypriot population to manifest their religion either alone or in the company of others. Indeed there is no evidence of such interference. However, the restrictions placed on the freedom of movement of that population during the period under consideration considerably curtailed their ability to observe their religious beliefs, in particular their access to places of worship outside their villages and their participation in other aspects of religious life.

246. The Court concludes that there has been a violation of Article 9 of the Convention in respect of Greek Cypriots living in northern Cyprus. [...]

7. Article 1 of Protocol No. 1 [Right to and respect of property] *[...]*

265. In a further submission, the applicant Government pointed to their claim that third parties interfered with the property of the persons concerned, whether situated inside their villages or beyond the three-mile zone and that the "TRNC" authorities acquiesced in or tolerated these interferences. In the applicant Government's view, the evidence adduced before the Commission clearly demonstrated that the local police did not, as a matter of administrative practice, investigate unlawful acts of trespass, burglary and damage to property, [...].

268. As to the criminal acts of third parties referred to by the applicant Government, the Commission considered that the evidence did not bear out their allegations that the "TRNC" authorities had either participated in or encouraged criminal damage or trespass. It noted that a number of civil and

criminal actions had been successfully brought before the courts in respect of complaints arising out of such incidents and that there was a recent increase in criminal prosecutions. [...]

269. The Court notes from the facts established by the Commission that, as regards ownership of property in the north, the "TRNC" practice is not to make any distinction between displaced Greek-Cypriot owners and Karpas Greek-Cypriot owners who leave the "TRNC" permanently, with the result that the latter's immovable property is deemed to be "abandoned" and liable to reallocation to third parties in the "TRNC".

For the Court, these facts disclose a continuing violation of Article 1 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory.

270. The Court further observes that the evidence taken in respect of this complaint also strongly suggests that the property of Greek Cypriots in the north cannot be bequeathed by them on death and that it passes to the authorities as "abandoned" property. [...]

8. Article 2 of Protocol No. 1 [Right to education] [...]

277. The Court notes that children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of the Greek language are obliged to transfer to schools in the south, this facility being unavailable in the "TRNC" ever since the decision of the Turkish-Cypriot authorities to abolish it. Admittedly, it is open to children, on reaching the age of 12, to continue their education at a Turkish or English-language school in the north. [...]

278. [...] [I]n the Court's opinion, the option available to Greek-Cypriot parents to continue their children's education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there. The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language. [...]

VII. ALLEGED VIOLATIONS IN RESPECT OF THE RIGHTS OF TURKISH CYPRIOTS, INCLUDING MEMBERS OF THE GYPSY COMMUNITY, LIVING IN NORTHERN CYPRUS [...]

C. The merits of the applicant Government's complaints [...]

3. Alleged violation of Article 6 of the Convention [Right to fair and regular trial]

354. The applicant Government contended that the "TRNC" authorities, as a matter of law and practice, violated Article 6 of the Convention in that civil rights and obligations and criminal charges against persons could not be determined by an independent and impartial tribunal established by law within the meaning of that provision. [...]

355. The applicant Government further submitted that the "TRNC" authorities operated a system of military courts which had jurisdiction to try cases against civilians in respect of matters categorised as military offences. In their view it followed from the Court's Incal v. Turkey judgment of 9 June 1998 (*Reports* 1998-IV) that a civilian tried before a military court was denied a fair hearing before an independent and impartial tribunal. The jurisdiction of the military courts in this respect was laid down in "Article 156 of the TRNC Constitution", with the result that their composition could not be challenged. [...]

357. The Court considers that it does not have to be satisfied on the evidence that there was an administrative practice of trying civilians before military courts in the "TRNC". [...]

358. For the Court, examination *in abstracto* of the impugned "constitutional provision" and the "Prohibited Military Areas Decree" leads it to conclude that these texts clearly introduced and authorised the trial of civilians by military courts. It considers that there is no reason to doubt that these courts suffer from the same defects of independence and impartiality which were highlighted in its Incal v. Turkey judgment in respect of the system of National Security Courts established in Turkey by the respondent State [...], in particular the close structural links between the executive power and the military officers serving on the "TRNC" military courts. In the Court's view, civilians in the "TRNC" accused of acts characterised as military offences before such courts could legitimately fear that they lacked independence and impartiality.

359. For the above reasons the Court finds that there has been a violation of Article 6 of the Convention on account of the legislative practice of authorising the trial of civilians by military courts. [...]

PARTLY DISSENTING OPINION OF JUDGE FUAD

[...]

10. The nettle must be grasped. The Court's majority judgment must mean that unless every Cypriot who wishes to recover possession of his or her property is allowed to do so, crossing the UN-controlled buffer-zone as may be necessary, immediately and before a solution to the Cyprus problem has been found, there will be a violation of Convention rights in respect of the person whose wish is denied. As matters stand today (and sadly, have stood for over a quarter of a century) could anyone, armed with his title deed, go up to a unit of the UN peace-keeping force and demand the right to cross the buffer-zone to resume possession of his or her property? Who would police the operation? What might be the attitude of any present occupier of the property in question? Would not serious breaches of the peace inevitably occur? Who would enforce any eviction which was necessary to allow the registered owner to retake possession?

11. If considerations of this kind are relevant (and I do not see how they can be brushed aside) then, it seems to me, it must be acknowledged that in present-day Cyprus it is simply not realistic to allow every dispossessed property owner to demand the immediate right to resume possession of his or her property wherever it lies. In my opinion, these problems are not overcome by giving such persons the solace of an award of compensation and/or damages because their property rights cannot, for practical reasons, be restored to them. [...]

12. Events over the past thirty years or so have shown that despite the devoted and unremitting efforts of the United Nations (through successive holders of the office of Secretary-General and members of their staff), other organisations and friendly governments, a solution acceptable to both sides has not been found. This is surely an indication of the complexity and difficulty of the Cyprus problem. These efforts continue: talks were in progress in New York as the Court was sitting.

13. Sadly, it may be that when a solution is ultimately found it will be one that fails to satisfy the understandable desire of every Cypriot to return to his or her home and fields, etc. [...]

19. [...] The UN General Assembly called for the establishment of an investigatory body to resolve the cases of missing persons from both communities. The General Assembly requested the Secretary-General to support the establishment of such a body with the participation of the International Committee of the Red Cross ("ICRC") "which would be in a position to function impartially, effectively and speedily so as to resolve the problem without undue delay".

20. Eventually it was decided that the CMP should comprise three members: representatives from the Greek and the Turkish side and a representative of the Secretary-General nominated by the ICRC. What seems clear is that the United Nations, for obvious reasons, envisaged a body that would perform its sad and difficult task objectively and without bias. The UN's call was met by the composition of the CMP. Very wisely, if I may say so, the ICRC was to be involved so that its resources and wide experience in the often heartbreaking task involved could be called upon. [...]

22. Turkey's stand on the whole issue of the missing persons is well known. I have seen no evidence that Turkey has refused to cooperate with the CMP or obstructed its work. If the Terms of Reference, the Rules or the Guidelines that govern the way that the CMP operates are unsatisfactory these can be amended with good will and the help of the Secretary-General. I am not able to agree with my colleagues that the CMP procedures are not of themselves sufficient to meet the standard of an effective investigation required by Article 2. As the applicable Rules and Guidelines, read with the Terms of Reference, have developed, provided both sides give their ungrudging cooperation to the CMP, an effective investigating team has been created. That the CMP was the appropriate body to make the necessary investigations was acknowledged by the UN Working Group on Enforced and Involuntary Disappearances. [...]

DISCUSSION

[N.B.: The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") is available at http://conventions.coe.int]

1. Is the Court applying International Humanitarian Law (IHL)? Could it do so?

   (Art. 15 of the ECHR provides that: "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation [...], except in respect of deaths resulting from lawful acts of war, [...] shall be made under this provision [protecting the right to life]. [...].")

2. Is northern Cyprus an occupied territory within the meaning of IHL? Would it be, even if Turkey's invasion of northern Cyprus in 1974 had been lawful? Even if the "Turkish Republic of Northern Cyprus" (TRNC) were an independent State? Even if Turkey had no more troops in northern Cyprus? (*Cf.* Art. 2 of Convention IV and paragraph 5 of the Preamble to Protocol I.)

3. a. For each problem considered by the Court, determine whether there was any violation of IHL. (*Cf.* Arts. 25, 26, 49 (1), 50 (3), 53, 58, 64, 66, 136, 137 and 140 of Convention IV, Arts. 43 and 46 of the Hague Regulations.)

   b. When a practice in an occupied territory is a violation of IHL, is it also necessarily a violation of the ECHR (*Cf.* Art. 15 of the latter, quoted under question 1)? If a practice of an occupying power is allowed under IHL but not under the ECHR, is it a violation of international law?

4. a. Are the following people under the jurisdiction of Turkey?
      a) missing Greek Cypriots
      b) families of missing Greek Cypriots living in southern Cyprus
      c) inhabitants of southern Cyprus denied access to northern Cyprus
      d) Greek Cypriots living in northern Cyprus
      e) Turkish Cypriots living in northern Cyprus

   b. Does IHL protect the people listed above? Which of these are "protected persons"? (*Cf.* Arts. 4, 13, 25 and 26 of Convention IV.)

5. Is Turkey responsible for the acts of its armed forces in northern Cyprus? Is it responsible for the acts of the TRNC? Because it occupies the territory of the TRNC? Because it established the TRNC? Because it gives instructions to the organs of the TRNC? Does Turkey have a responsibility only from the point of view of the ECHR or also from that of IHL? (*Cf.* Arts. 29 and 47 of Convention IV.)

6. Must the TRNC authorities comply with the rules of the Fourth Geneva Convention applicable to occupied territories? With respect to the Greek Cypriots? With respect to the Turkish Cypriots? With respect to the Turkish settlers? (*Cf.* Arts. 4, 13, 25, 26, 29 and 47 of Convention IV.)

7. Under IHL, is Turkey responsible for the acts of Turkish settlers in northern Cyprus? On what grounds could it be responsible? By virtue of the ECHR? By

virtue of IHL? Why does the Court not recognize such a responsibility in this particular case? On grounds of fact or of law? (*Cf.* Arts. 1, 4, 29 and 49 (6) of Convention IV; Art. 43 of the Hague Regulations.)

8. Does the Court recognize the legal system of the TRNC? On what grounds? According to IHL, could Turkey have allowed the TRNC to set up such a legal system? (*Cf.* Arts. 47, 54, 64 and 66 of Convention IV; Art. 43 of the Hague Regulations.)

9. a. How did Turkey violate the right to life and liberty of the missing Greek Cypriots? By killing them? Are their deaths attributable to Turkey? By detaining them? Were they ever detained by Turkey? Is Turkey responsible for these missing people under the ECHR? What are Turkey's obligations with respect to the families of these missing people?

   b. What would have been Turkey's obligations towards missing people under IHL? Did it fulfil these obligations? (*Cf.* Arts. 25, 26, 136, 137 and 140 of Convention IV; Arts. 32-34 of Protocol I.)

   c. Can Turkey investigate the fate of the missing people on its own?

   d. Doesn't the existence of an international investigative body (the CMP) release Turkey from its obligation to investigate the fate of the missing people? Do these two "types" of investigation have the same objectives?

   e. Does the fact that the ICRC, or a body in which the ICRC participates, is handling the problem of missing people prevent another body from establishing responsibilities for the disappearances? In what areas could the activity of each reduce the other's chances of success? Should the two bodies exchange the information obtained?

10. Discuss the dissenting opinion of Judge Fuad. Can you imagine that the Court's decision will be respected? What would be the consequence of a mass movement of Greek Cypriots to their properties in the north? Are there situations in which respect for human rights is better achieved through political negotiations than by the decision of a court of law recognizing individual rights? Can a similar result be achieved by the work of humanitarian organizations on the ground?

11. a. Is IHL more suitable than the ECHR for dealing with the problems of humanitarian concern identified in this case? What are the advantages and disadvantages of the two branches of international law in such a situation?

   b. What problems of humanitarian concern identified in this case is the ICRC best able to resolve? For which of them is the Court best placed? Are there drawbacks to pooling the efforts of both organizations?

XVI. CHILE

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena

THE CASE

[**Source:** Appeal Court of Santiago, Case Lumi Videla, Role No. 13.597-94, 26 September 1994; original in Spanish, unofficial translation.]

Appeal Court of Santiago [de Chile]
(Third Criminal Chamber)
September 26, 1994

[...]

6. It should moreover be determined whether in this case the Geneva Conventions of 1949 are applicable, for pursuant thereto the illegal acts now under investigation should be declared imprescriptible and unamenable to amnesty.

7. The Geneva Conventions form part of our legislation since they were approved by the National Congress, promulgated by Decree 752, published in the Official Gazette on April 17, 18, 19 and 20, 1951 and have been in force for internal purposes from the latter date to the present.

8. Since the Geneva Conventions apply only in the event of war, it must be determined whether a state of war existed in Chile at the time when Lumi Videla was kidnapped on September 21, 1974 and during her captivity, torture and eventual death on November 3, 1974; her body being subsequently dumped at the Italian Embassy in Santiago on November 4, 1974 [...].

   For the above purposes the following should be borne in mind:

   a) War is an exceptional state and entails the application of exceptional rules. In wartime the law of war which governs relations between enemies holds sway.

   b) Minimum humanitarian principles which protect the intangible rights of the adversaries apply in the event of war and outlaw inhuman acts such as killing, torture and cruel treatment.

   c) Article 418 of the Military Code of Justice was in force in Chile in 1974 and provides that for the purposes of the code a state of war shall be deemed to exist and wartime to prevail not only when war or a state of siege has officially been declared pursuant to the relevant laws but also when war is effectively taking place or mobilization therefore has been decreed even if war has not been officially declared.

d) A state of siege prevailed in Chile in 1974, having been applied since September 18, 1973 and regulated by Decree Law 640 of September 10, 1974, it being pointed out that war prevails in the country when the situations referred to in Article 418 of the Military Code of Justice arise and a state of siege takes place in the event of internal or external war; since there was no external war, an internal war situation clearly existed [...].

e) A state of siege for internal defence purposes existed between September 11, 1974 and 10 September 1975, which means that internal disturbances were being caused by organized rebel or seditious forces operating openly or clandestinely (Decree Law 640, Article 6 (b)). [...]

h) In those circumstances the Geneva Conventions protecting the human rights of the organized enemy forces and the affected civilian population are fully applicable and punish war crimes, which are a form of abuse of the force produced within a substantive situation created by an internal or international armed conflict.

9. It is necessary to determine the meaning and scope of the international treaties under Chilean legislation: the Political Constitution of the Republic contains no express rule assigning them a given category among the sources of law, which means that the matter must be determined by interpretation.

To the above ends the following must be taken into account:

a) Our point of departure must be that since among Chilean legislation only the Political Constitution is empowered to determine the existence of other rules, the rules of international law would be valid in so far as the Constitution so decides. But as a basic rule the Fundamental Charter may also refer to international rules that are unavailable to it in its own validity, which would be applicable together with those produced through the internal procedures provided and regulated by the Constitution.

b) The Political Constitution of the Republic regulates the procedure for incorporating and integrating international rules in Chilean legislation; thus, once the procedure provided in the Fundamental Charter has been completed, an internationally valid rule becomes internally applicable.

c) Chile's Fundamental Charter contains only rules for incorporating international treaty law; indeed, Article 32 No. 17 empowers the President of the Republic to conclude, sign and ratify international treaties and Article 50 No. 1 of the Constitution stipulates that only the Congress is authorized to approve or reject any international treaty submitted to it by the President of the Republic prior to ratification, the approval of a treaty being subject to the enactment of a law.

This means that the treaty forms part of internal law once it has been approved by Congress; it must then be ratified by the President of the Republic and published in the Official Gazette. Moreover, Article 82 No. 2 of the Constitution grants the Constitutional Court the power to settle any issues of constitutionality that may arise during the negotiation of treaties submitted for approval to Congress, which verifies compliance with the principle of constitutional supremacy. Once the treaty has been validly incorporated in national legislation, it will cease to be a part of it only if it is denounced [...].

d) [...] It is for approval by parliament that a treaty must be subject to the enactment of a law, which is very different from maintaining that treaties are subject to the passage of a law [...].

e) National doctrine necessarily places international treaties and conventions in a hierarchy above the law in so far as, on incorporating a treaty in its internal legislation in accordance with the procedure provided in the Fundamental Charter, the State wants its organs to comply with that treaty for so long as there is no will to denounce it [...]

[...]

h) The Political Constitution of the Republic lays the foundations of not the validity but the applicability of international rules. Once validly incorporated in internal law, it is the international convention itself which decides how its rules should be applied once the Constitution has made them applicable and invalidated those laws which deal with the same subject as the treaty incorporated in national legislation; this is suggested by the fact that it is the Congress itself which approves laws and must approve an international treaty prior to its ratification. In relation to subsequent laws, the rules of international conventions must be applied preferentially in accordance with the principle of applicability [...].

i) According to Article 27 of the Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for [not] complying with a treaty.

j) In accordance with the general *pacta sunt servanda* or *bona fide* principle of international law, *bona fide* States Parties must comply with treaties until such time as they are internationally declared inapplicable.

k) This implies that, once a treaty is incorporated in Chilean legislation, no internal rule may decide its inapplicability or loss of validity.

l) That does not mean that the national legislator is perpetually disempowered from dealing with the subject contained in the treaty but that, if he is to recover competence in the matter regulated by the treaty, the State must denounce the treaty in accordance with the procedures established in the treaty in question or in the rules of international law.

m) As a result, given a contradiction between the law and a treaty, the problem lies not in the scope of validity of such rules but in their field of applicability, within which an ordinary judge must rule and preferentially apply the treaty.

n) Any failure to comply with the content of an international treaty not only constitutes an infringement of international law which casts doubt on the honour or trustworthiness of the Chilean State but, in addition, is a clear infringement of its own national legislation.

10. [...]

l) Any clash or conflict between the principles of legal soundness and justice and the binding force of human rights necessarily forces the judiciary to declare invalid, or inapplicable, acts or rules handed down by political authorities who fail to recognize them or which reflect procedures in which such essential rights have been ignored.

11. The Geneva Conventions have been binding upon the Chilean State since April 1951 and their provisions protect the human rights of the contestants in the event of external war or a conflict between organized armed forces within the State, which latter situation effectively prevailed in the country in 1974 [...].

12. The 1949 Geneva Conventions are fully applicable and Article 3 common thereto lays down that, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party shall be bound to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place violence to life and person, mutilation, cruel treatment and torture, humiliating and degrading treatment and the passing of summary sentences. Article 146 (of the Fourth Convention relative to the Protection of Civilian Persons in Time of War) states that each High Contracting Party shall be under obligation "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts". Then again, Article 147 thereof stipulates that "grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health ...", which is reinforced in Protocol II relating to the Protection of Victims of Non-International Armed Conflicts. Article 158 [*sic*][148] of the same Convention stipulates that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article" [...]. Accordingly, such offences as constitute grave breaches of the Convention are imprescriptable and unamenable to

amnesty; the ten-year prescription of legal action in respect of the crimes provided for in Article 94 of the Penal Code cannot apply, nor is it appropriate to apply amnesty as a way of extinguishing criminal liability. Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law. Such an attempt would be more serious still if it sought to cover up not only individual liability but also that of agents of the State or public officials, since that would be tantamount to self-absolution which is repugnant to every basic notion of justice for respecting human rights and international common and treaty human rights law; it would also infringe the basic values and principles of our own constitutional legislation, as maintained in the third preambular paragraph of this resolution. [...]

16. The American Human Rights Convention or Pact of San José (Costa Rica) forms part of our legislation [...] and places on all the organs of State and particularly the courts of justice a duty to apply Article 1 (1) thereof, which states that "the States Parties to the Convention thereby undertake to respect the rights and freedoms recognized therein and to guarantee the free and full exercise thereof to every person subject to their jurisdiction, with no discrimination whatever". That rule establishes that the rights enshrined in the Convention are self-executing as determined by the Inter-American Court of Human Rights, except for a few provisions which require legislative development, which the States Parties undertake to ensure since failure to do so would be a breach of the Convention punishable at supranational jurisdictional headquarters by the Inter-American Court of Human Rights. Pursuant to the provision mentioned, the States Parties are under obligation to investigate human rights violations and punish those responsible, as did the Inter-American Court of Human Rights when sentencing in the Velázquez Rodríguez case, stating that "an amnesty law which prohibits investigation and the establishment of liability and competence by responsible agents of the State would violate the obligation established under Article 1(1) of the Convention. If declared valid, amnesty laws of such scope would make national laws legal impediments to compliance with the American Convention and other international instruments". This court shares that reasoning and, in maintaining the hierarchical supremacy and preferential application of human rights treaties over internal laws, it considers fundamental human rights to be part of the substantive Constitution pursuant to Article 5 of the Fundamental Charter which places a limit on State sovereignty by express provision [...],.

17. The right to justice for criminal violations of human rights rules out any stay in accordance with Article 15 (2) of the International Covenant of Civil and Political Rights, which states that "nothing provided therein shall oppose the trial and sentencing of any person for acts or omissions which at the time they were committed were criminal according to the general principles of

law recognized by the international community". That rule admits no stay whatever, not even in a state of internal or external war. The principle of legality or non-retroactivity of the law cannot be upheld against that rule because justice must be exercised in accordance with the general principles of law recognized by the international community, which do and must take precedence over internal law wherever they conflict with it and even in the event of a threat to the very life of the nation, as established in Article 4, para. 6 of the United Nations International Covenant on Civil and Political Rights. [...]

20. The antecedents listed in charge sheet 503 and those produced subsequent to the above-mentioned resolution provide sound reasons for presuming that Osvaldo Enrique Romo Mena participated as a perpetrator in the offences of kidnapping and illegal association established in Articles 141, 292 and 293 of the Penal Code, respectively. [...]

Given those reasons, constitutional provisions, international conventions and the legal provisions mentioned and, further, in view [...] of the Code of Criminal Procedure, [...] for the record this case is hereby restored to charge status so that the appropriate court may fully carry out the formalities indicated in [...] this resolution [...]; and, having regard to the formalities mentioned in preambular para. 20, the charge [...] against Osvaldo Enrique Romo Mena, against whom a prison order must be issued in this case, is hereby upheld.

DISCUSSION

1. How does the Court qualify the situation in Chile in 1974? Is this qualification derived from IHL or from Chilean legislation? Did the killing and the torture allegedly committed by the accused violate Art. 3 common to the Conventions even if the victim did not belong to the other party of the non-international armed conflict?

2. How were the Geneva Conventions incorporated into Chilean laws? Are all provisions of the Conventions directly applicable now in Chile? Must a Chilean court apply them even if they are not self-executing?

3. Do the Geneva Conventions take precedence over Chilean laws? Even if the latter have been adopted subsequently? Why?

4. Are Arts. 146, 147 and 148 of Convention IV applicable to violations of Art. 3 of Convention IV?

5. a. If the Conventions had been denounced by Chile during the events of 1974, would they be inapplicable to this case? (*Cf.* Art. 158 of Convention IV.)

   b. Is Art. 158 of Convention IV applicable to Art. 3 of Convention IV?

6. a. Do Arts. 146 and 147 of Convention IV imply that grave breaches are imprescriptible? Do national laws providing for statutory limitations for grave breaches violate IHL?

b. Do the mentioned Convention articles imply that amnesty may not cover such crimes? Is that compatible with Art. 6 (5) of Protocol II? (*See also* **Case No. 141**, South Africa, AZAPO v. Republic of South Africa. p. 1522 and **Case No. 207**, Colombia, Constitutional Conformity of Protocol II. p. 2266.)

c. Is the reasoning of the Inter-American Court referred to in para. 16 of the decision equally valid for IHL? Does it exclude amnesty for Human Rights violations?

7. Does the subsequent non-application of statutory limitations covering grave breaches violate the prohibition of retroactive penal laws? At least if one considers, unlike the Court, that IHL does not prohibit such statutory limitations?

XVII. CONFLICTS IN CENTRAL AMERICA

Case No. 129, Nicaragua, Helicopter Marked with the Emblem

THE CASE

[**Source:** Vichniac, I., *Le Monde*, June 19, 1987; original in French, unofficial translation.]

Violation of the Rules of Humanitarian Law?
Red Cross Warns Against Contras' Use
of its Emblem for Military Purposes

In its June 1st issue, the American weekly magazine *Newsweek* published an article entitled "The new Contras?", concerning the counter-revolutionary forces in Nicaragua. The article was accompanied by a photograph showing a group of soldiers disembarking from a helicopter bearing the emblem of the Red Cross. A caption stated that the helicopter was carrying military supplies.

The International Committee of the Red Cross (ICRC) views this as an extremely serious matter. Unless the photo is a fake, the Contras appear to be guilty of a grave breach of the rules of international humanitarian law, according to which the transportation of soldiers, weapons or other military equipment under the red cross emblem is strictly prohibited, as is any other misuse of that emblem.

On 17 June the ICRC stated that its emblem may be used only by the medical services of belligerent forces to provide protection for the wounded and sick and for all persons caring for them. Violation of this principle effectively jeopardizes any humanitarian activity and, consequently, deprives the wounded and sick of assistance. Only medical personnel, hospitals or other medical establishments, mobile medical units, medical vehicles, hospital ships and medical aircraft are authorized to use this distinctive sign.

In a letter to all the National Red Cross and Red Crescent Societies, the ICRC reiterates that the red cross emblem should automatically inspire respect. It fulfils a crucial function in the implementation of international humanitarian law and is one of the essential elements of the 1949 Geneva Conventions and their Additional Protocols adopted in 1977.

DISCUSSION

1. Who may use the emblems protected by IHL? For which purposes? (*Cf.* Art. 23 (f) of the Hague Regulations, Arts. 38-44 and 53 of Convention I, Arts. 41-43 of Convention II, Art. 18 of Convention IV, Arts. 8 (l) and 18 of Protocol I, Arts. 4-5 of Annex I of Protocol I and Art. 12 of Protocol II.)

2. For what purpose was the emblem used in this situation? Does such use of the emblem constitute misuse? Abuse? If so, does such a violation of IHL constitute a war crime? (*Cf.* Art. 34 of the Hague Regulations, Art. 53 of Convention I, and Arts. 37 (1) (d), 38 and 85 (3) (f) of Protocol I.)

3. a. Who has the responsibility to punish misuse and abuse of the emblem? International Red Cross and Red Crescent organizations? The National Societies? The States Parties? (*Cf.* Art. 54 of Convention I, Art. 45 of Convention II, and Art. 18 of Protocol I.)

   b. Which obligations have States Parties to the Conventions and Additional Protocols regarding the emblem? Must each State Party not adopt implementing legislation? Which issues should this legislation encompass? If Nicaragua had not adopted such legislation, was the use described in this case lawful? Could it have been punished? (*Cf.* Art. 54 of Convention I, Art. 45 of Convention II, and Art. 18 of Protocol I.)

   c. How can misuse or abuse of the emblem be prevented?

4. What dangers to the emblem's authority arise with such misuse of the emblem? Is it mainly dangerous for the essential neutrality and impartiality of the Red Cross? or for the respect of wounded and sick and medical personnel and units? How does such use ultimately undermine the protection it provides?

5. Are your answers affected by the fact that the conflict in Nicaragua was a non-international armed conflict? Would your answers differ if the law of international armed conflicts applied?

1. International Decisions

Case No. 130, ICJ, Nicaragua v. US

THE CASE

[**Source:** ICJ, Nicaragua v. United States of America, Military and Paramilitary Activities, Judgment of 27 June 1986, Merits; online: http://www.icj-cij.org.]

INTERNATIONAL COURT OF JUSTICE,
Judgment of 27 June 1986,
CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES
IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA),
MERITS

[...]

80. On this basis, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States

government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines [...]

[...]

99. The Court finds at all events that from 1981 until September 30, 1984 the United States Government was providing funds for military and paramilitary activities by the *contras* [the armed opposition to the government of Nicaragua] in Nicaragua, and thereafter for "humanitarian assistance". [...]

[...]

115. The [...] United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras,* but for its own conduct vis-vis Nicaragua, including conduct related to the acts of the *contras*. What the court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras.* The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is

for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the *contras* in 1983. The first of these, in Spanish, is entitled *"Operaciones sicolgicas en guerra de guerrillas"* (Psychologic Operations in Guerrilla Warfare), by "Tayacan", the certified copy supplied to the Court carries no publisher's name or date. In its Preface, the publication is described as

> "a manual for training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos". [...]

122. The Court concludes that in 1983 an agency of the United States Government supplied to the FDN a manual on psychological guerrilla warfare which, while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town; and advised the "neutralization" for propaganda purposes of local judges, officials or notables after the semblance of trial in the presence of the population. The text supplied to the *contras* also advised the use of professional criminals to perform unspecified "jobs", and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make "martyrs". [...]

[Because of a reservation made by the US in accepting the jurisdiction of the ICJ, the Court could not apply multilateral treaties to the facts of the case.].

174. [...] The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been "subsumed" and "supervened" by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.

175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a

number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty law rule which had caused the reservation to become effective.

176. [...] The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. [...]

177. [...] The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court [...] considered it to be clear that certain other articles of the treaty in question "were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (I.C.J. *Reports 1969,* p. 39, para. 63). [...]

178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty. [...] Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs

competent to verify their implementation, depending on whether they are customary rules or treaty rules. The present dispute illustrates this point. [...]

181. [...] Far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. [...]

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law [...].

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" - the expression used by the Court in its 1969 Judgement in the *North Sea Continental Shelf* cases (I.C.J. *Reports 1969,* p. 44) - that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of States conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. [...]

207. [...] The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by

reference to a new right of intervention or a new exception to the principle of its prohibition. [...]

[...]

215. The Court has noted above (paragraph 77 *in fine*) that the United States did not issue any warning or notification of the presence of the mines which had been laid in or near the ports of Nicaragua. Yet even in time of war, the Convention relative to the laying of automatic submarine contact mines of October 18, 1907 (the Hague Convention No. VIII) provides that "every possible precaution must be taken for the security of peaceful shipping" and belligerents are bound

> "to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel" (Art. 3).

Neutral Powers which lay mines off their own coasts must issue a similar notification, in advance (Art. 4). It has already been made clear above that in peacetime for one State to lay mines in the internal or territorial water of another is an unlawful act; but in addition, if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907. Those principles were expressed by the Court in the *Corfu Channel* case as follows:

> "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war" (I.C.J. *Reports 1949,* p. 22).

216. This last consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Clearly, use of force may in some circumstances raise questions of such law. [...]

218. [...] The conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles. It is significant in this respect that, according to the terms of the Conventions, the denunciation of one of them

> "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience" (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).

Article 3 which is common to all four Geneva Conventions of August 12, 1949 defines certain rules to be applied in the armed conflicts of a non-

international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (*Corfu Channel, Merits, I.C.J. Reports 1949,* p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.

[In his separate opinion, ICJ Reports 1986, p. 183, Roberto Ago writes on this point: "6. [...] I am bound to express serious reservations with regard to the seeming facility with which the Court - while expressly denying that all the customary rules are identical in content to the rule in the treaties (para. 175) - has nevertheless concluded in respect of certain key matters that there is a virtual identity of content as between customary international law and the law enshrined in certain major multilateral treaties concluded on a universal or regional plane. [...] I am moreover most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain 'fundamental general principles of humanitarian law', which, according to the Court, were pre-existent in customary law, to which the Conventions 'merely give expression' (para. 220) or of which they are at most 'in some respects a development' (para. 218). Fortunately, after pointing out that the Applicant has not relied on the four Geneva Conventions of 12 August 1949, the Court has shown caution in regard to the consequences of applying this idea, which in itself is debatable."]

219. The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of August 12, 1949, the text of which, identical in each Convention, expressly refers to conflict not having an international character.

220. The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the

conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions, which reads as follows:

[Here the full text of this Article is quoted] [...]

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the *contras* to "humanitarian assistance" [...]. There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

> "The Red Cross, born of desire to bring assistance without discrimination to the wounded on the battlefield, endeavours - in its international and national capacity - to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples"

and that

> "It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress."

243. The United States legislation which limited aid to the *contras* to humanitarian assistance however also defined what was meant by such assistance, namely:

> "the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death" [...].

It is also to be noted that, while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be "shared" with the *contras*. Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the *contras*, it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In view of the Court,

if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being"; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependants.

[...]

254. The Court now turns to the question of the application of humanitarian law to the activities of the United States complained of in this case. Mention has already been made (paragraph 215 above) of the violations of customary international law by reason of the failure to give notice of the mining of the Nicaraguan ports, for which the Court has found the United States directly responsible. Except as regards the mines, Nicaragua has not however attributed any breach of humanitarian law to either United States personnel or the "UCLAs" ["Unilaterally Controlled Latino Assets" acronym used by the CIA for Latin American citizens, paid by, and acting under the direct instructions of, United States military or intelligence personnel], as distinct from the *contras.* The Applicant has claimed that acts perpetrated by the *contras* constitute breaches of the "fundamental norms protecting human rights"; it has not raised the question of the law applicable in the event of conflict such as that between the *contras* and the established Government. In effect, Nicaragua is accusing the *contras* of violations both of the law of human rights and humanitarian law, and is attributing responsibility for these acts to the United States. The Court has however found (paragraphs 115, 216) that this submission of Nicaragua cannot be upheld; but it has also found the United States responsible for the publication and dissemination of the manual on "Psychological Operations in Guerrilla Warfare" referred to in paragraphs 118 to 122 above.

255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of August 12, 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to "neutralize" certain "carefully selected and planned targets", including judges, police officers, State Security officials, etc., after the local population have been gathered in order to "take part in the act and formulate accusations against the oppressor". In view of the Court, this must be regarded as contrary to the

prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants, of

> "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples"

and probably also of the prohibition of "violence to life and person, in particular murder to all kinds, ..."

256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found [...] that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to "moderate" such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties. [...]

292. For these reasons,

THE COURT

[...]

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph (6) hereof, has acted in breach of its obligations under customary international law in this respect; [...]

(9) By fourteen votes to one,

Finds that the United States of America, by producing in 1983 a manual entitled *Operaciones sicolgicas en guerra de guerillas,* and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law: but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America; [...]

DISCUSSION

1. *paras. 174 - 178, 181*: Does a rule of customary international law continue to be in force between States Parties of a multilateral treaty codifying that rule? Even if the two rules are identical? Why? May the contents of the customary rule be influenced by the treaty rule? By the practice of States bound by the treaty?

2. *paras. 185, 186, 207*: Does a treaty commitment "count" as practice for customary international law? Can a rule belong to customary international law even if States' behaviour frequently fails to conform with that alleged rule? What is the importance of the Court's ruling on these points for IHL?

3. *para. 219*: How does the Court qualify the conflict in Nicaragua?

4. *paras. 80, 215, 254*: Was the laying of mines in or near the ports of Nicaragua a violation of international law? Of IHL? What violated IHL? Was IHL at all applicable? (*Cf.* Arts. 3-4 of Hague Convention VIII.)

5. *paras. 218, 219*: Does Art. 3 common to the Conventions apply to international armed conflicts? As customary law? Does the Martens clause prove that Art. 3 common to the Conventions is customary? That the whole of IHL is customary?

6. *para. 220:* Is Art. 1 common to the Conventions applicable in non-international armed conflicts? As a treaty rule? As a customary rule? Or both?

7. *paras. 115 - 122, 254 - 256, 292 (9)*:
   a. Is the US responsible for all acts of the *contras*? For their violations of IHL? For some of the IHL violations? Why? Under which conditions would the US be responsible for all acts of the *contras*? Would that modify the Court's qualification of the conflict?
   b. Is the US violating IHL by providing the Manual "Operaciones sicolgicas en guerra de guerrillas"? Regardless of whether the *contras* actually committed the recommended acts? Which rules of IHL are violated?

8. *paras. 242, 243*:
   a. Can providing humanitarian assistance violate international law? Are the rules violated those of IHL or those of *ius ad bellum*?
   b. Are the conditions for lawful humanitarian assistance prescribed by IHL? (*Cf., e.g.,* Arts. 23 and 59 of Convention IV, Art. 70 of Protocol I and Art. 18 of Protocol II.) Are the fundamental principles of the Red Cross part of IHL? To whom are they addressed? Must States comply with the fundamental principles of the Red Cross?
   c. Which aspect of the US humanitarian assistance to the *contras* violated international law? (*Cf.* Art. 70 of Protocol I and Art. 18 of Protocol II.)
   d. Does a State providing strictly humanitarian assistance to only one side in an international armed conflict violate international law? Has the adverse side of the conflict an obligation to let such assistance through? (*Cf.* Art. 70 of Protocol I; *cf. also* Arts. 23 and 59 of Convention IV.)

2. Positions of Third Countries

Case No. 131, Canada, Ramirez v. Canada

THE CASE

[**Source:** *Ramirez v. Canada (Minister of Employment and Immigration)* [1992] Federal Court of Appeal No 109, footnotes are not reproduced; to facilitate comprehension, the order of paragraphs has been modified.]

Federal Court of Canada - Court of Appeal
Stone, MacGuigan and Linden JJ. [...]

1. This is an appeal [...] of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board [...], dated March 14, 1990, in which the Refugee Division determined that the appellant was not a Convention refugee.

35. [...] Initially motivated by revenge for the murder of one sister and her husband by the guerrillas, and the rape of another [...], the appellant enlisted voluntarily in the Salvadoran Army for two years as of February 1, 1985, and was such an effective soldier that he was promoted to corporal and then to sub-sergeant. During this period he was involved in between 130 and 160 instances of combat [...]. Two months before his term was up he was wounded in an ambush in foot, leg, and head. During his recuperation he signed up for two more years of service so that his hospitalization and convalescence would be paid for and his salary would continue [...].

2. [...] [T]he Refugee Division found that the claimant had established that he had a well-founded fear of persecution by reason of his political opinion, but nevertheless excluded him from protection by virtue of section F of Article 1 of the United Nations Convention Relating to the Status of Refugees (the "Convention") [...].

[N.B.: This provision reads as follows: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes" (The text of the Convention is available on http://www.unhcr.org.ch.]

In the case at bar the crime in question is either a war crime or a crime against humanity. It is certainly not a crime against peace, and would normally be included in crimes against humanity [...]. However, since we are, on the facts under consideration, concerned with crimes committed in the course of what is either a civil war or a civil insurrection, and nothing hangs on whether one category or the other is the more relevant, I have chosen to employ the term "international crimes" to refer indifferently to both classes of crime. [...]

4. There is a dearth of authority with respect to the interpretation of the Convention. The introductory clause contains the ambiguous phrase "serious reasons for considering"[...].

5. The words "serious reasons for considering" also, I believe, must be taken, as was contended by the respondent, to establish a lower standard of proof than the balance of probabilities. [...]

7. Therefore, although the appellant relied on several international authorities which emphasize that the interpretation of the exclusion clause must be restrictive [...], it would nevertheless appear that, in the aftermath of Second World War atrocities, the signatory states to this 1951 Convention intended to preserve for themselves a wide power of exclusion from refugee status where perpetrators of international crimes are concerned. [...]

11. In the case at bar the most controversial legal issue has to do with the extent to which accomplices [...], as well as principal actors, in international crimes should be subject to exclusion, since the Refugee Division held in part that the appellant was guilty "in aiding and abetting in the commission of such crimes" [...], and it is on this finding that, as will become apparent, the respondent's case must rest.

12. The Convention provision refers to "the international instruments drawn up to make provisions in respect of such crimes One of these instruments is the London Charter of the International Military Tribunal, Article 6 of which provides in part [...]:

> "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

I believe this evidence is decisive of the inclusion of accomplices as well as principal actors, but leaves to be answered the very large question as to the extent of participation required for inclusion as an "accomplice". [...]

15. [...] From the premise that a *mens rea* interpretation is required, I find that the standard of "some personal activity involving persecution," understood as implying a mental element or knowledge, is a useful specification of *mens rea* in this context. Clearly no one can "commit" international crimes without personal and knowing participation.

16. What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. Indeed, this is in accord with the intention of the signatory states, as is apparent from the post-war International Military Tribunal already referred to. [...]

It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere

membership may by necessity involve personal and knowing participation in persecutorial acts.

17. Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation [...], though, again, presence coupled with additional facts may well lead to a conclusion of such involvement. In my view, mere on-looking, such as occurs at public executions, where the on-lookers are simply by-standers with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanly repugnant it might be. However, someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts.

18. At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law [...], and I believe is the best interpretation of international law. [...]

20. In my view, [a precedent referred to by the court] was correctly decided on its facts, but it relied in good part on the definition of parties to an offence contained in section 21 of the Canadian Criminal Code, [Article 21 of the Canadian Criminal Code provides: "(1) Every one is a party to an offence who: (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; (c) abets any person in committing it. (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."] an approach which is not sufficient in the case at bar where what has to be interpreted is an international document of essentially a non-criminal character. [...]

21. [...] In fact, in my view there is no liability on those who watch unless they can themselves be said to be knowing participants.

22. One must be particularly careful not to condemn automatically everyone engaged in conflict under conditions of war. Probably most combatants in most wars in human history have seen acts performed by their own side which they would normally find reprehensible but which they felt utterly powerless to stop, at least without serious risk to themselves. While the law may require a choice on the part of those ordered actually to perform international crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present at the site. Usually, law does not function at the level of heroism.

23. In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts. [...]

24. [...] This reservation as to his credibility in respect to the torture and killing of civilians is subsequently explained [by the Refugee Division] as follows [...]:

> "By his own admission, the claimant participated in what the panel would term "atrocities" against the civilian population. That such atrocities by the military against non-combatants occur is well documented throughout the exhibits filed in evidence in this matter. [...]"

25. [...] Throughout his testimony, the claimant described his personal participation in combat. In the first instance, claimant stated the following:

> "Q: Okay now, tell us about your term of service.
>
> A: Once I got there they started training me as a soldier. In the beginning I liked this. It was attractive to me. It sort of matured me from another lesson to man and I also knew that the army needed young people, [...] because otherwise they would lack soldiers, they would have no soldiers and who was going to fight for the fatherland (sic).
>
> Then I started doing more and more training and progressing in the military ranks. That is how I was doing my service for almost two years. I fought, I did a lot of things that maybe people would think are bad things. I had to kill and the time went on, but these things went on too.
>
> Q: Are you talking about ordinary combat?
>
> A: Yes, I'm talking about ordinary combat. I'm also talking about getting people unarmed, torturing them and killing them. [...] "

26. The key phrase in this passage, the word which led the Refugee Division to disbelieve his subsequent denials of not being a principal actor in torture scenes, was obviously "I did a lot of things that maybe people would think are bad things".

27. With the advantage of a better translation of the original Spanish, we now know that what the appellant actually said in this passage was not "I did," but "I saw." [...]

30. The first finding of the Refugee Division, relating to the appellant's participation as a principal actor, cannot therefore be upheld, since there is no evidence that could sustain it.

31. Hence it is necessary to proceed to their second finding, relating to his participation as an accomplice [...].

32. From this passage it is unclear what legal test was applied by the Refugee Division in determining that the appellant was an accomplice. It has recourse to the common-law phrase "aiding and abetting," which is a term of art in that tradition, and therefore an insufficient approach by itself to the interpretation of the international Convention. But the reference is so general and the standard actually applied so elusive, that I believe it must be said that the Refugee Division has erred in law, and its decision must be set aside and the matter remitted to it for redetermination unless, on the basis of the

correct approach, no properly instructed tribunal could have come to a different conclusion [...].

33. The Refugee Division rested its finding on the appellant's "being present and serving as a guard." It would also have been open to it on the evidence to find that his activities in rounding up suspected guerillas constituted personal involvement in the commission of the offences against them which followed, but the Refugee Division must have accepted his explanation, that on the two occasions on which he admitted that his role in rounding up had led to mistreatment he had thought the prisoners were to be handed over to the Red Cross [...].

34. With respect to the appellant's serving as a guard, I find it impossible to say that no properly instructed tribunal could fail to draw a conclusion as to personal participation. The appellant testified: [...]

"We would just take watch, we'd make watch in the area or then we would just witness what was going on, but we never did the actual killing."

The words "in the area" may merely imply a "making" or "taking watch" in the usual military sense of serving as a guard for the encampment, without any particular reference to what was happening to the prisoners. The Refugee Division interpreted it as in the sense of guarding the prisoners or protecting the malefactors. Given the ambiguity, I cannot see this as the only interpretation possible for a properly instructed tribunal.

35. What remains is, therefore, the appellant's admitted presence at many instances of torture and killings committed by other soldiers, under orders from their common superiors. In speaking in a summary way of his experiences the appellant testified as to what he saw [...]:

"Yes, I'm talking about ordinary combat. I'm also talking about getting people unarmed, torturing them and then killing them." [...]

36. At that time he testified that his conscience was bothering him because of what he had been part of [...].

37. [...] I find it clear from these and other passages in the appellant's testimony, as well as from the documentary evidence, that the torture and killing of captives had become a military way of life in El Salvador. It is to the appellant's credit that his conscience was greatly troubled by this, so much so that during his second term of enlistment, after three times unsuccessfully requesting a discharge [...], he eventually deserted in November, 1987 [...], in considerable part at least because of his bad conscience. I have also to say, however, that I think it is not to his credit that he continued to participate in military operations leading to such results over such a lengthy period of time. He was an active part of the military forces committing such atrocities, he was fully aware of what was happening, and he could not succeed in disengaging himself merely by ensuring that he was never the one to inflict the pain or pull the trigger.

38. On a standard of "serious reasons for considering that [...] he has committed a crime against peace, a war crime, or a crime against humanity," I cannot

see the appellant's case as even a borderline one. He was aware of a very large number of interrogations carried out by the military, on what may have been as much as a twice-weekly basis (following some 130-160 military engagements) during his 20 months of active service. He could never be classed as a simple on-looker, but was on all occasions a participating and knowing member of a military force, one of whose common objectives was the torture of prisoners to extract information. This was one of the things his army did, regularly and repeatedly, as he admitted. He was a part of the operation, even if he personally was in no sense a "cheering section." In other words, his presence at this number of incidents of persecution, coupled with his sharing in the common purpose of the military forces, clearly constitutes complicity. We need not define, for purposes of this case, the moment at which complicity may be said to have been established, because this case is not to my mind near the borderline. The appellant was no innocent by-stander: he was an integral, albeit reluctant, part of the military enterprise that produced those terrible moments of collectively deliberate inhumanity.

39. To convict the appellant of criminal liability for his actions would, of course, require an entirely different level of proof, but on the basis of the lower-than-civil-law standard established by the nations of the world, and by Canadian law for the admission of refugees, where there is a question of international crimes, I have no doubt that no properly instructed tribunal could fail to come to the conclusion that the appellant had been personally and knowingly involved in persecutorial acts.

40. The appellant did not argue the defence of superior orders, and his arguments as to duress and remorse are insufficient for exoneration. [...]

I could find that the duress under which the appellant found himself might be sufficient to justify participation in lesser offences, but I would have to conclude that the harm to which he would have exposed himself by some form of dissent or non-participation was clearly less than the harm actually inflicted on the victims. The appellant himself testified as follows as to the punishment for desertion [...]:

"A: Well, the punishment is starting with very, very hard training exercises and then after that they will throw you in jail for five to ten years."

This is admittedly harsh enough punishment, but much less than the torture and death facing the victims of the military forces to which he adhered.

41. As for the remorse he no doubt now genuinely feels, it cannot undo his persistent and participatory presence.

42. The appeal must therefore be dismissed.

DISCUSSION

1. a. Should the Court have determined the type of conflict prevailing in El Salvador? What effect would this determination have had on the decision rendered? Was the Court right not to specify the legal classification of the "crime in question"?

   b. How would you have characterized the situation in El Salvador? (*Cf.* Art. 3 (1) common to the Conventions; Art. 1 (1) of Protocol II.)

   c. Are the acts the appellant is charged with crimes against humanity, war crimes or both? Does the difference between these two categories of crime lie in the classification of the conflict? Can there be a war crime in a non-international armed conflict? (*Cf.* Art. 3 (1) common to the Conventions and Arts. 50/51/130/147 respectively of the four Conventions, Art. 4 (2) of Protocol II and Arts. 7 and 8 of the ICC Statute; **Case No. 15**, p. 608.)

2. Did the Salvadoran armed forces violate international humanitarian law (IHL)? (*Cf.* Art. 3 (1) common to the Conventions and Art. 4 (2) (a) of Protocol II.)

3. Are there serious reasons to think that the appellant committed international crimes? By the simple fact that he belonged to the Salvadoran armed forces? By the fact that he took prisoners that were subsequently tortured? What ought he to have done so as not to make himself criminally responsible? (*Cf.* Art. 25 (3) (d) of the ICC Statute.)

4. a. For the appellant to be found criminally responsible for acts of torture and executions, would the prosecutor's burden of proof concerning the same facts have been greater or would it have been necessary to provide evidence of a major implication in the crimes? According to the Court? According to you?

   b. For what reasons was the appellant an accomplice in the offences of which the Salvadoran armed forces were accused? Was the fact that he knew about them and nevertheless remained a member of these forces sufficient to find him to be an accomplice? (*Cf.* Arts. 8 (2) (c) (i) and 25 (3) (d) of the ICC Statute.)

   c. How could mere membership in an armed force result in criminal responsibility for acts committed by the group? Is a soldier who commits hostile acts that are not violations of IHL, but who knows that his comrades are violating IHL, criminally responsible for the latter?

   d. Is it appropriate to apply a provision such as Art. 21 (2) of Canada's Criminal Code to members of the armed forces of a country?

5. Do you agree with the following statement of the Court: "no one can 'commit' international crimes without personal and knowing participation." (*Cf.* Art. 86 (2) of Protocol I and Art. 28 of the ICC Statute.)

6. What grounds for excluding criminal responsibility did the appellant rely on? Why was he unsuccessful? (*Cf.* Art. 31 (1) (d) of the ICC Statute.)

7. Should Canada have prosecuted the appellant rather than denying him refugee status? What grounds could justify not prosecuting but nevertheless denying refugee status? (*Cf.* Arts. 49/50/129/146, respectively, of the four Conventions.)

8. a. Does Canada have the right to deny the appellant refugee status on the grounds that he may have committed war crimes or crimes against humanity? Even if he risks persecution in El Salvador?

   b. Since the appellant committed war crimes or crimes against humanity, can he be sent back to El Salvador, even if he risks persecution there?

Case No. 132, Switzerland, Qualification of the Conflict in El Salvador

THE CASE

[**Source:** *Annuaire Suisse de Droit International*, 1987, pp. 185-187; original in French, unofficial translation.]

Law of Armed Conflicts: Conditions Governing the Application of Protocol II Additional to the 1949 Geneva Conventions (case of El Salvador)

Below we reproduce a note which was drawn up by the Directorate for Public International Law and which relates to the applicability to El Salvador of the Protocol II additional to the Geneva Conventions of August 12, 1949 concerning the protection of victims of war, of June 8, 1977, and that relating to the protection of victims of non-international armed conflicts.

[Translation:]

1. El Salvador ratified the four 1949 Geneva Conventions on June 17, 1953. It did likewise with respect to the two Additional Protocols on November 23, 1978.

2. The question of whether Additional Protocol II relating to the protection of victims of non-international armed conflicts applies to the conflict between regular Salvadorian troops and the *Frente Farabundo Martí Liberación Nacional* (FMLN) must be answered in the affirmative. That answer is based on the following factors:

   a) Article 1 of Additional Protocol II defines the field of application of the Protocol as follows:

   [1.] This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

[2.] This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Thus, the material field of application of the Protocol is defined by using purely objective criteria. As is the case with the Geneva Conventions, both with regard to international armed conflicts and non-international armed conflicts such as those referred to in Article 3 common to the four Conventions, where the objective conditions laid down are satisfied application of the Protocol is triggered automatically - the parties to the conflict do not have to carry out an assessment of the situation as it is in the territory of the State in which they are in conflict. A type of criterion of effectiveness applicable to the dissidents - a criterion which will be dealt with below - in particular features among those objective conditions in question.

First, the guerilla movement in El Salvador has a military wing which is composed essentially of five groups (Frente Popular de Liberación Farabundo Martí (FPL), Ejercito Revolucionario Popular (ERP), Fuerzas Armadas de la Resistencia Nacional (FARN), and Partido Revolucionario de Trabajadores Centro-Americanos (PRTC)) which are joined together in a grouping known as Frente Farabundo Martí Liberación Nacional (FMLN). It also has a political wing (Frente Democràtico Revolucionario, FDR). [...] The various groups are coordinated by bodies of military and political management which ensure collaboration between them. However, it is not possible to talk of the concerted conduct of operations in the sense of the joint preparation and execution of military actions. Nonetheless, it is not necessary to attain such an advanced degree of integration in terms of organisation. The term control exercised over a part of a territory is not easy to apply. In general, it will be noted that the hold of the Salvadorian guerilla movement has weakened over recent years, first because the Salvadorian army has been able to increase its mobility and effectiveness [...], and second on account of political changes. At present the FMLN exercises, over the inhabited rural parts [...] a degree of control which enables it to successfully counter the operations launched by government forces. On the other hand, its own operations carried out with forces equivalent to a company and launched outside those regions, as was still the case a few years ago, have become fewer in number on account of the increased effectiveness of the government forces. Furthermore, in certain regions the FMLN maintains a level of civil control comparable to that exercised by a State administration (police, schools, the collection of taxes). In conclusion, it may be stated that although the FMLN has been weakened, it continues to control, more or less permanently, just under one quarter of the territory of the country and that control prevents the Salvadorian army entering it without running the risk of being attacked. From a military point of view, it is now possible to talk of a balanced situation.

Furthermore, Article 1 of Protocol II requires that the insurgents be able to implement this Protocol. Therefore, it is necessary to establish, having regard to the actual situation, whether the dissidents are able to implement that instrument. The question of whether or not they do so effectively is of little importance. In the

light of the circumstances described above and having regard to the particular characteristics of a war waged by means of guerilla warfare, that question must also be answered in the affirmative because the guerilla movement exercises a level of control over certain parts of the territory which enable it to take care of the sick and wounded, treat prisoners humanely and also comply with the other provisions contained in Article 4 of the Protocol (such as the prohibition on torture, collective punishments, the taking of hostages, acts of terrorism against third parties, and rape). Finally, the parties to that non-international conflict are, on the one hand, the armed forces of El Salvador and, on the other, organised armed forces which have never belonged to the army.

It follows from the foregoing that at present the conditions set out in Article 1 are objectively satisfied. Thus, the FMLN meets the abovementioned criterion of effectiveness with the result that Additional Protocol II is applicable. That conclusion is borne out by the following factors:

b) The General Assembly, the Economic and Social Council and the United Nations Commission on Human Rights have, on several occasions, been concerned at the situation in El Salvador and specifically called for compliance with the Geneva Conventions and the two Additional Protocols [...].

c) In 1978 El Salvador was among the first countries to ratify the Additional Protocols at a time when the armed conflict was already under way in its territory. That demonstrates that the Salvadorian Government, for its part, envisaged the application of Protocol II to that conflict.

d) It is known that in 1984 two meetings took place between the Government and the FMLN in the presence of representatives of other States (including Switzerland) who were to guarantee the security of those meetings. The involvement of representatives of third countries is further evidence in support of the applicability to the conflict of Article 1.

e) Finally, mention should be made of the activities of the International Committee of the Red Cross (ICRC). Unlike the situation in other States of Central America, the Committee has easy access to the two parties and can work without any great hindrance.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs of January 20, 1986.

Unpublished document.

DISCUSSION

1. Would you qualify the situation in El Salvador as falling within the ambit of Protocol II?

2. a. Which criteria need to be fulfilled in order to qualify a conflict as *non-international*? Which additional criteria must be met for a non-international armed conflict to fall within the ambit of Protocol II?

b. What are the objective criteria mentioned in Art. 1 of Protocol II, and do they apply to the situation of El Salvador?

c. Does the note correctly state that for Protocol II to be applicable it is sufficient that the insurgents could apply it but need not necessarily actually respect it?

3. Do you accept the conclusion drawn above that the objective criteria have been met?

4. Do you agree that ratification by El Salvador of Protocol II in 1978, international presence at meetings between the parties, and the possibility for the ICRC to work freely in El Salvador indicate that Protocol II is applicable? What are the risks of referring to such criteria?

5. Does Switzerland interfere into the internal affairs of El Salvador by qualifying the conflict in that country? Has Switzerland a legitimate interest to do so?

XVIII. GRENADA

Case No. 133, Inter-American Commission on Human Rights, Coard v. US

THE CASE

[**Source:** IACHR, *Coard et al. V. United States*, Report No. 109/99 Case 10.951 September 29, 1999, *Annual Report 1999*; available on http://www.cidh.org. Footnotes are only partially reproduced.]

I. SUMMARY

A. The Petition

1. The petition on behalf of the seventeen claimants was filed before the Commission on July 25, 1991, and processed in accordance with its Regulations. As a general matter, the petitioners alleged that the military action led by the armed forces of the United States of America (hereinafter "United States" or "State") in Grenada in October of 1983 violated a series of international norms regulating the use of force by states. With regard to their specific situation, they alleged having been detained by United States forces in the first days of the military operation, held incommunicado for many days, and mistreated. They contended that the United States corrupted the Grenadian judicial system by influencing the selection of judicial personnel prior to their trial, financing the judiciary during their trial, and turning over testimonial and documentary evidence to Grenadian authorities, thereby depriving them of their right to a fair trial by an independent and impartial tribunal previously established by law. The petitioners claimed that the United States violated its obligations under the American Declaration of the Rights and Duties of Man, specifically: Article I, the right to life, liberty and personal security; Article II, the right to equality before the law; Article XXV, the right to protection from arbitrary arrest; Article XVII, the right to recognition of juridical personality and civil rights; Article XVIII, the right to a fair trial; and Article XXVI, the right to due process of law.

B. Background

2. On October 19, 1983, the Prime Minister of Grenada, Maurice Bishop, and a number of associates were murdered pursuant to a power struggle within the New Jewel Movement, the ruling political party since 1979. Following the violent overthrow of the Bishop administration, the rival faction within the New Jewel Movement established a Revolutionary Military Council. On October 25, 1983, United States and Caribbean armed forces invaded Grenada, deposing the revolutionary government.

3. During the first days of the military operation, a number of individuals, including the seventeen petitioners [...] were arrested and detained by United States forces. [...]

C. Overview of Proceedings

5. The State contested the admissibility of the case before the Commission, asserting that the petitioners' factual allegations were incorrect and/or unsupported, that it was not the proper respondent, and that the Commission lacked the competence to examine the legal validity of its military actions in Grenada as this fell beyond the scope of its mandate, particularly with regard to a non-party to the American Convention.

6. The Commission adopted admissibility Report 14/94 on February 7, 1994, finding the claims concerning the arrest and detention of the petitioners admissible, and the other claims inadmissible. [...]

III. POSITION OF THE PARTIES

A. The Position of the Petitioners

17. In their initial complaint, the petitioners claimed that: United States forces arrested them during the period in which it consolidated control over Grenada; that they were held incommunicado for many days; and that months passed before they were taken before a magistrate, or allowed to consult with counsel. "During this period petitioners were threatened, interrogated, beaten, deprived of sleep and food and constantly harassed."

18. The petitioners alleged that their whereabouts were kept secret, and that requests by lawyers and others to meet with them were rejected. They alleged that, more than a week after the invasion, the commanding officer for United States armed forces in Grenada, Admiral Joseph Metcalf, III, denied knowledge of the whereabouts of petitioners Hudson Austin and Bernard Coard to a group of United States Congressmen, when in fact the two men were confined aboard a ship under his command.

19. The petitioners alleged that United States forces subjected them to threats and physical abuse. The supplemental petition of August 4, 1991 indicated that petitioner Leon Cornwall had attested at trial, before the High Court of Grenada, that United States officials had attempted to obtain his testimony through the use of threats and physical coercion. [...] The petitioners alleged that, even after they were turned over to the custody of Grenadian and Caribbean Peacekeeping Force (hereinafter "CPF") authorities at Richmond Hill Prison, on or about November 5, 1983, United States forces continued to play a role in their detention, interrogation and mistreatment.

20. The petition alleged that the United States had no legal justification for the actions taken against the petitioners, and is thus responsible for violations of their "human rights to liberty, freedom from arbitrary arrest, notification of charges, physical and mental integrity, freedom from cruel, inhuman and

degrading punishment and punishment only after conviction in violation of Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration.

B. The Position of the State

21. In its initial response, the State indicated that "[t]he treatment by US armed forces of all Grenadian or other nationals who were either temporarily detained or arrested for security or other lawful reasons" accorded fully with "applicable international rules concerning the law of armed conflict, including the rules governing the treatment of civilian detainees and military prisoners." In view of its position that the case was inadmissible, it declined at that time to address the international legal validity of claims concerning United States military actions in Grenada.

22. Pursuant to the Commission's adoption of Report 14/94, the State submitted information with respect to the arrest and detention of the petitioners. It fully acknowledged "that during the initial stage of the US military operation in Grenada, the petitioners and other Grenadian nationals were arrested, detained by US military forces for several days and interrogated while the United States suppressed further armed resistance to its military operation." Citing contemporaneous records, the State asserted that all of the petitioners were detained in United States custody for a period of less than three weeks. The State maintained that the period of the petitioners' detention "coincided with ... the 'hostilities phase' of the operation (i.e., from 25 October to 2 November) when the US military was engaged in putting down armed resistance from enemy forces." Although the petitioners were not prisoners of war, they were "detained and accorded protection equivalent to that given prisoners of war," and were "thus were accorded the highest protections [available] under the laws of armed conflict." [...]

24. The United States reported that by November 5, 1983, all of the petitioners had been transferred from United States custody to the CPF and Grenadian authorities. The State asserted that "in view of their relatively brief periods of detention in US military custody from on/about October 25 to November 5, at the latest, petitioners' claim that the United States subjected them to prolonged detention is patently exaggerated and unconvincing." [...]

26. The State denied allegations that, during their detention at the hands of its forces, the petitioners were "threatened, interrogated, beaten, deprived of sleep and food and constantly harassed." [...] Citing another document, the State reported that "personnel were interrogated for the purpose of securing tactical information essential to the effective conduct of ongoing military operations and the security of US forces' personnel." The State asserted that interrogation "of POW's for tactical and security purposes during hostilities is a right clearly recognized and provided for in Article 17" of the Geneva Convention Relative to the Treatment of Prisoners of War.

27. The United States submitted that the treatment accorded to petitioners accorded fully with the standards of the American Declaration and applicable International Humanitarian Law. [...]

IV. PROCESSING OF REPORT NO. 13/95 PREPARED PURSUANT TO ARTICLE [43] OF THE REGULATIONS OF THE COMMISSION

28. On September 21, 1995, the Commission adopted Report 13/95 pursuant to Article 53 [sic, read 43] of its Regulations, setting forth its analysis of the record, findings, and recommendations to the State designed to repair violations of Articles I, XVII and XXV the American Declaration related to the deprivation of the petitioners' liberty by United States forces. The Commission found that the detention of the petitioners had been carried out under conditions which did not ensure the full observance of the minimum safeguards required under the American Declaration. Most pertinently, the Commission found that the petitioners had no access to any form of review of the legality of their detention at the hands of United States forces. [...]

    The Commission recommended that the State conduct a further investigation to attribute responsibility for the violations, and take the measures necessary to repair the consequences thereof. [...]

29. By means of a note dated December 27, 1995, the United States submitted a response to Report 13/95, in which it requested that the Commission reconsider and rescind that report pursuant to the procedure [...] [wich] provides that, where either party "invokes new facts or legal arguments" within the deadline established in a report, the Commission shall decide during its next session whether to maintain or modify its decision. This procedure may only be invoked once.

30. [...] [T]he Commission decided to review the information presented during its next period of sessions. The Commission determined that the State had raised two issues that required additional clarification. The first issue concerned the legal status of the petitioners. In the December 27, 1995 submission, the State indicated that: "the petitioners' detention and treatment were justified under the 1949 Geneva Convention III, Relative to the Treatment of Prisoners of War ... as in furtherance of lawful military objectives." At the same time, the State contended that the "[p]etitioners could also be considered civilian detainees whose detention and treatment were fully in accord with governing standards under the Fourth Geneva Convention" [Relative to the Protection of Civilians in Time of War]. In its October 19, 1994 response, the State had indicated that the petitioners were accorded protections equivalent to those given to POW's "even though they were not themselves POWs." The second issue concerned the claim that the petitioners had been held incommunicado, the State having reported for the first time in its December 27, 1995 submission that the petitioners had enjoyed a right of access to the International Committee of the Red Cross.

31. Because the classifications of civilian and prisoner of war are mutually exclusive and carry legal consequences, the Commission found it necessary to request that the State clarify its position on this issue. [...] [T]he Commission asked the State to provide information as to which of the petitioners had been accorded status as prisoners of war, and which had

been deemed civilians, as well as the basis for those determinations. The Commission also requested information as to whether, and if so, on what dates, ICRC representatives had been present in the locations where the petitioners were held. [...]

32. The State's response, [...] indicated that the petitioners "were civilian detainees held briefly for reasons of military necessity," and "were treated de facto to the highest legally available standard of protection." The information provided as to the presence of the ICRC indicated only that, at the time of the military operation, the United States had supplied that organization with a list of names of those detained, and that ICRC representatives "had the normal rights of access to those individuals in detention." The Government indicated that it had been unable to locate any reports of such ICRC visits, although it had confirmed by telephone that visits to detainees - whom the ICRC did not identify - had been carried out during the period in question. The Government further affirmed that the petitioners had been permitted to communicate with their next-of-kin, in writing, within seven days of their detention, as required by Article 70 of the Fourth [sic, read Third] Geneva Convention.

33. Having received the request for reconsideration, and having attempted to clarify certain inconsistencies in the position of the State with respect to the status of the petitioners at the time they were detained, the Commission reviewed the findings and recommendations issued in Report 13/95 and made certain modifications. The Commission adopted final Report 82/99 on May 7, 1999.

V. ANALYSIS

34. In its decision to admit Case 10.951, the Commission determined that a sufficient causal nexus through which to assess possible violations had been established only as to the claims concerning the petitioners' arrest, and presumed detention incommunicado. Such claims were found, at the threshold level, to implicate Article I, the right to life, liberty and personal security; Article XVII, the right to recognition of juridical personality and civil rights; and Article XXV, the right of protection from arbitrary arrest.

35. The factual predicate before the Commission, which is undisputed, is that on or about October 25, 1983, members of the armed forces of the United States arrested the 17 petitioners while participating in the military operation then being conducted in Grenada. The petitioners were detained for periods of 9 to 12 days, and were then turned over to Grenadian authorities. What is in dispute is the legal characterization of the treatment accorded to the petitioners once arrested and detained. The petitioners alleged that their arrest and detention violated, *inter alia*, Articles I, XVIII [*sic* read XVII] and XXV of the American Declaration. The State maintained that the matter was wholly and exclusively governed by the law of international armed conflict, which the Commission has no mandate to apply, and that the conduct in question was, in any case, fully justified as a matter of law and fact.

A. Jurisdictional Considerations and Applicable Law [...]

38. In terms of the law applicable to the present case, the petitioners invoked the provisions of the American Declaration as governing their claims. The United States argued that the situation denounced was governed wholly by International Humanitarian Law, a body of law which the Commission lacks the jurisdiction or specialized expertise to apply. In accordance with the normative framework of the system, when examining individual cases concerning non-parties to the American Convention, the Commission looks to the American Declaration as the primary source of international obligation and applicable law. This does not mean, as the United States argued, that the Commission may not make reference to other sources of law in effectuating its mandate, including International Humanitarian Law.

39. First, while International Humanitarian Law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," [footnote 10: [...] [*see* **Case No. 163**, Inter-American Commission on Human Rights, Tablada [*Cf.* para. 158.] p. 1670].], and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission. Both normative systems may be thus be applicable to the situation under study.

40. Second, it would be inconsistent with general principles of law for the Commission to construe and exercise its Charter-based mandate without taking into account other international obligations of member states which may be relevant. [...]

41. Third, the State's assertion that the application of humanitarian law would wholly displace the application of the Declaration is also inconsistent with the doctrine and practice of the system. The Commission has encountered situations requiring reference to Article XXVIII of the Declaration, which specifies that "[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy" since the inception of its case system. The Declaration was not designed to apply in absolute terms or in a vacuum, and the Commission has necessarily monitored the observance of its terms with reference to its doctrine on permissible and non-permissible limitations, and to other relevant obligations which bear on that question, including humanitarian law.

42. Fourth, in a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*. The American Declaration is drawn in general terms, and does not include specific provisions relating to its applicability in conflict situations. As will be seen in the analysis which follows, the Commission determined that the analysis of the petitioners' claims under the Declaration within their factual and legal context requires reference to International Humanitarian Law, which is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations. In the present case, the standards of humanitarian law help to define whether the detention of the petitioners was "arbitrary" or not under the terms of Articles I and XXV of the American Declaration. As a general matter, while the Commission may find it necessary to look to the applicable rules of International Humanitarian Law when interpreting and applying the norms of the inter-American human rights system, where those bodies of law provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual. [...]

44. The parties do not dispute that the situation under study originated in the context of an international armed conflict as defined in common Article 2 of the Geneva Conventions. The information in the case file and the public record is consistent with that conclusion.

B. The Legality of the Arrest and Detention of the Petitioners

45. Article I of the American Declaration sets forth that every human being has the right to liberty. Article XXV provides that no person may be deprived of that right, except in accordance with the norms and procedures established by pre-existing law. This Article specifies, in pertinent part, that any person deprived of liberty "has the right to have the legality of his detention ascertained without delay by a court [and] the right to humane treatment during the time he is in custody." The text of Article XXV thus specifies three fundamental requirements: first, preventive detention, for any reason of public security, must be based on the grounds and procedures set forth in law; second, it may not be arbitrary; and third, supervisory judicial control must be available without delay. Consequently, in the present case the Commission must establish the basis in law for the detentions, ascertain that they were neither illegal nor arbitrary, and assess the safeguards and verify the existence of judicial control without delay.

46. The United States has invoked several legal bases for the detention of the petitioners. In its October 19, 1994 submission, the State indicated that the petitioners had been detained for security and tactical reasons, and so that they could be turned over to Grenadian authorities to stand trial for the murder of Maurice Bishop and others. Although the United States did not consider the petitioners prisoners of war, the State indicated they had been

accorded the protections corresponding to that status. Pursuant to receipt of Commission Report 13/95, the State indicated that, [...] the detention of the petitioners had been justified under the Third Geneva Convention Relative to the Treatment of Prisoners of War. They could "also be considered civilian detainees" under the terms of the Fourth Geneva Convention. [...] "Whether as POWs or civilian detainees" the United States invoked the Geneva Conventions of 1949 as the legal basis for detaining the petitioners.

47. The State is party to the Geneva Conventions of 1949, which are, as one of its submissions indicates, "part of the supreme law of the land." The Geneva Conventions - which provide a wider range of justifications for the deprivation of liberty than does the American Declaration - do authorize deprivation of liberty under certain circumstances. Determining which provisions apply requires determining the status of the petitioners under that body of law.

48. The parties' submissions are equivocal with respect to whether the petitioners were civilians entitled to protection under the Third [sic read Fourth] Geneva Convention, or prisoners of war entitled to status under the Fourth Geneva Convention. The petitioners identified some of their number as "civilians," although without further identification or explanation. As noted, having referred to the petitioners as both civilians and POW's, the State indicated as its final position that the petitioners "were civilian detainees held briefly for reasons of military necessity," and were "accorded the rights and privileges of those who might have held the status of prisoners of war because that standard ensures a higher degree of protection." The State asserted that, "as a technical matter, whether they were being held as civilian detainees or as prisoners of war does not matter for purposes of deciding this petition. They were treated de facto to the highest legally available standard of protection that can be accorded to persons in such status."

49. As a factual matter, reports issued at the time of the events under study indicate that certain petitioners were then members of an entity known as the Revolutionary Military Council (hereinafter "RMC"), and had previously been officers in the People's Revolutionary Army. [...]

50. [...] However, neither party briefed whether that armed force met the requisites to fall within the coverage of the Third Geneva Convention or not. As neither party has provided information on this point, the Commission decided to proceed with its analysis based primarily on the situation of the petitioners who were definitively not members of any armed force and fell under the terms of the Fourth Geneva Convention in any case. (While most or all of these held political positions, there is no information on record indicating that they took part in hostilities.) The analysis is based only secondarily on the extent to which the others had the status of civilians, as the United States has sustained and the petitioners have not contested. [...]

52. Under exceptional circumstances, International Humanitarian Law provides for the internment of civilians as a protective measure. It may only be

undertaken pursuant to specific provisions, and may be authorized when: security concerns require it; less restrictive measure could not accomplish the objective sought; and the action is taken in compliance with the grounds and procedures established in pre-existing law. [...]

53. The applicable provisions of the Fourth Geneva Convention provide the authorities substantial discretion in making the initial determination, on a case by case basis, that a protected person poses a threat to its security, and the record provides no basis to controvert the security rationale asserted in this case. However, the record does not disclose to what extent the decision to detain each petitioner was made pursuant to a "regular procedure." Government submissions have indicated that the petitioners were detained for security reasons, but have provided little information as to the specific procedures followed by the United States forces who initiated and maintained custody.

54. As set forth, the applicable rules of International Humanitarian Law relative to the detention of civilians provide that the "regular procedure" by which such decisions are taken shall include the right of the detainee to be heard and to appeal the decision. [...]

55. The requirement that detention not be left to the sole discretion of the state agent(s) responsible for carrying it out is so fundamental that it cannot be overlooked in any context. The terms of the American Declaration and of applicable humanitarian law are largely in accord in this regard. [...] This is an essential rationale of the right to *habeas corpus*, a protection which is not susceptible to abrogation.

56. In the instant case, on the basis of the record before it, the Commission is unable to identify the existence of safeguards in effect to ensure that the detention of the petitioners was not left to the sole discretion of the United States forces responsible for carrying it out. [...]

57. [...]The petitioners were held in United States custody for a total of nine to twelve days prior to being transferred to Grenadian and CPF custody, which means they were held for six to nine days after the cessation of hostilities without access to any review of the legality of their detention. This delay, which is not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention.

58. The United States has argued that it would have been impracticable to present the petitioners before the Grenadian courts. Regardless of whether it was practicable or not (the United States offered no evidence to sustain its argument), the review at issue need not have required access to the Grenadian court system. Rather, pursuant to the terms of the Fourth Geneva Convention and the American Declaration, it could have been accomplished through the establishment of an expeditious judicial or board (quasi-judicial) review process carried out by United States agents with the power to order

the production of the person concerned, and release in the event the detention contravened applicable norms or was otherwise unjustified. [...]

59. [...] While international human rights and humanitarian law allow for some balancing between public security and individual liberty interests, this equilibrium does not permit that control over a detention rests exclusively with the agents charged with carrying it out.

VI. CONCLUSIONS

60. Internment of civilians for imperative reasons of security may be permissible where the required basis is established in the particular case, and the Commission has found nothing in the record to refute the security justification presented by the United States. However, the same rules which authorize this as an exceptional security measure require that it be implemented pursuant to a regular procedure which enables the detainee to be heard and to appeal the decision "with the least possible delay." That regular procedure ensures that the decision to maintain a person in detention does not rest with the agents who effectuated the deprivation of liberty, and ensures a minimal level of oversight by an entity with the authority to order release if warranted. This is a fundamental safeguard against arbitrary or abusive detention, and the relevant provisions of the American Declaration and Fourth Geneva Convention analyzed above establish that this protection is to be afforded with the least possible delay. Taking into account that the petitioners were, according to the foregoing analysis, civilians detained for security reasons, and that they were held in the custody of United States forces for approximately nine to twelve days, including six to nine days after the effective cessation of fighting, the Commission observes that the petitioners were not afforded access to a review of the legality of their detention with the least possible delay.

61. Accordingly, the Commission finds that the deprivation of the petitioners' liberty effectuated by United States forces did not comply with the terms of Articles I, XVII and XXV of the American Declaration of the Rights and Duties of Man. [...]

DISCUSSION

1. a. Was there an international armed conflict between the United States and Grenada? Even if the Revolutionary Military Council took power in violation of Grenada's constitutional law? If the United States were called upon to intervene by representatives of the former government after the Revolutionary Military Council gained control of Grenada? (*Cf.* Art. 2 common to the Conventions.)

   b. Was Grenada a State occupied by the United States? What does the Commission think? What do you think?

2. What elements are you missing to be able to determine if the petitioners were prisoners of war or protected civilians? Can a person in the hands of the enemy during an international armed conflict be neither a prisoner of war nor a protected civilian? Is there presumption in favour of one or the other of the statuses? (*Cf.* Arts. 4 and 5 of Convention III; Art. 4 of Convention IV.)

3. a. Were the petitioners who were part of the "People's Revolutionary Army" prisoners of war? Even if they represented a government of Grenada that the United States did not recognise? What requirements of IHL could make the Commission doubt whether they were prisoners of war? (*Cf.* Art. 4 of Convention III.)

   b. If the petitioners had been prisoners of war, would their detention have been in accordance with IHL? With the American Declaration on the Rights and Duties of Man [available on http://www.cidh.org]? More specifically, what about their detention in the absence of judicial control? Is IHL a sufficient legal base to justify the detention of a prisoner of war? For how long? Without judicial review? Does IHL not foresee judicial guarantees in favour of prisoners of war? Can a prisoner of war not claim the right of *habeas corpus*? (*Cf.* Arts. 13, 17, 21, 85, 99-108 and 118 of Convention III.)

   c. May a prisoner of war be questioned for tactical and security purposes? (*Cf.* Art. 17 of Convention III.)

4. a. Under what circumstances may a civilian be held by the enemy during an international armed conflict? (*Cf.* Arts. 64, 66, 67, 76 and 78 of Convention IV.)

   b. Were there reasons that could justify the detention of the petitioners? Who decides if the reasons are sufficient? (*Cf.* Art. 78 of Convention IV.)

   c. Does a civilian detained for imperative reasons of security have "the right to have the legality of his detention ascertained" without delay by a court? According to IHL? According to International Human Rights Law? (*Cf.* Art. 78 of Convention IV.)

   d. Must the procedure described by Article 78 of Convention IV be deferred to an independent and impartial tribunal and respect the judicial guarantees foreseen by human rights law? May the authorities ruling on the detention following a possible appeal be established by the United States? (*Cf.* Art. 78 of Convention IV.)

   e. Does Convention IV constitute a sufficient legal basis that may, under international human rights law, justify the detention of an interned civilian, if the procedural guarantees of Article 78 are respected? (*Cf.* Art. 78 of Convention IV.)

   f. Which provisions of Convention IV does the Commission believe were breached in regard to the petitioners?

5. a. What are the rights held by a prisoner of war and a detained civilian to inform his family of his situation? Are there other provisions that allow him or her to communicate with his or her family? (*Cf.* Arts. 70, 71, 122 (2), (4) and (7) and 123 of Convention III, Arts. 106, 107, 136 (2), 138 and 140 of Convention IV.)

b. Can an individual notified to the ICRC be considered as an *incommunicado* detainee? If he is visited by the ICRC? If he cannot communicate with his family? (*Cf.* Arts. 122 (4) and 123 of Convention III, Arts. 138 and 140 of Convention IV.)

6. a. Why does the Inter-American Commission apply IHL? Does it have jurisdiction to do so? May it find and condemn a violation of IHL? (*See also* **Case No. 163**, Inter-American Commission on Human Rights, Tablada, p. 1670 and **Case No. 208**, Inter-American Court of Human Rights, The Las Palmeras Case, p. 2281.)

b. Are the American Declaration on the Rights and Duties of Man and more generally human rights law, applicable in times of armed conflict? In the same way as in times of peace? Does human rights law also protect combatants? Prisoners of war?

c. In times of conflict, do the rights to life, to protection against arbitrary arrest and the judicial guarantees foreseen by human rights have to be read in the light of IHL? What are the consequences for the right to individual liberty? In what areas must IHL be read in the light of these human rights?

d. In this case, which of the violations of IHL committed against the petitioners is also a breach of the American Declaration? Which right provided for by the Declaration was violated in each case?

XIX. US Operation in Panama

Case No. 134, US, US v. Noriega

THE CASE

A. Jurisdiction

[**Source:** United States District Court for the Southern District of Florida, 746 F. Supp. 1506 (1990); footnotes omitted.]

UNITED STATES OF AMERICA, Plaintiff
v.
MANUEL ANTONIO NORIEGA, *et al.*
OPINION: OMNIBUS ORDER, WILLIAM M. HOEVELER, UNITED STATES DISTRICT JUDGE
No. 88-79-CR
June 8, 1990

THIS CAUSE comes before the Court on the several motions of Defendants General Manuel Antonio Noriega and Lt. Col. Luis Del Cid to dismiss for lack of jurisdiction the indictment which charges them with various narcotics-related offenses.

The case at bar presents the Court with a drama of international proportions, considering the status of the principal defendant and the difficult circumstances under which he was brought before this Court. The pertinent facts are as follows:

On February 14, 1988, a federal grand jury sitting in Miami, Florida returned a twelve-count indictment charging General Manuel Antonio Noriega with participating in an international conspiracy to import cocaine and materials used in producing cocaine into and out of the United States. Noriega is alleged to have exploited his official position as head of the intelligence branch of the Panamanian National Guard, and then as Commander-in-Chief of the Panamanian Defense Forces, to receive payoffs in return for assisting and protecting international drug traffickers [...] Defendant Del Cid, in addition to being an officer in the Panamanian Defense Forces, was General Noriega's personal secretary. He is charged with acting as liaison, courier, and emissary for Noriega in his transactions with Cartel members and other drug traffickers.

[...] Subsequent to the indictment, the Court granted General Noriega's motion to allow special appearance of counsel, despite the fact that Noriega was a fugitive and not before the Court at that time. Noriega's counsel then moved to dismiss the indictment on the ground that United States laws could not be applied to a foreign leader whose alleged illegal activities all occurred outside the territorial bounds of the United States. Counsel further argued that Noriega was immune

from prosecution as a head of state and diplomat, and that his alleged narcotics offenses constituted acts of state not properly reviewable by this Court.

Upon hearing arguments of counsel, and after due consideration of the memoranda filed, the Court denied Defendant's motion, for reasons fully set forth below. At that time, the Court noted that this case was fraught with political overtones, but that it was nonetheless unlikely that General Noriega would ever be brought to the United States to answer the charges against him. [...] In the interval between the time the indictment was issued and Defendants were arrested, relations between the United States and General Noriega deteriorated considerably. Shortly after charges against Noriega were brought, the General delivered a widely publicized speech in which he brought a machete crashing down on a podium while denouncing the United States. On December 15, 1989, Noriega declared that a "state of war" existed between Panama and the United States. Tensions between the two countries further increased the next day, when U.S. military forces in Panama were put on alert after Panamanian troops shot and killed an American soldier, wounded another, and beat a Navy couple. Three days later, on December 20, 1989, President Bush ordered U.S. troops into combat in Panama City on a mission whose stated goals were to safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face federal drug charges in the United States. Before U.S. troops were engaged, American officials arranged a ceremony in which Guillermo Endara was sworn in as president and recognized by the United States as the legitimate head of the government of Panama. Endara was reported to have won the Panamanian presidential election held several months earlier, the results of which were nullified and disregarded by General Noriega.

Not long after the invasion commenced, Defendant Del Cid, the commander of about two thousand Panamanian troops located in the Chiriqui Province, surrendered to American forces. He was then transferred into the custody of agents from the United States Drug Enforcement Agency, who thereupon arrested Del Cid for the offenses for which he is under indictment in this Court. The apprehension of General Noriega was not quite so easy. He successfully eluded American forces for several days, prompting the United States government to offer a one million dollar bounty for his capture. Eventually, the General took sanctuary in the Papal Nunciature in Panama City, where he apparently hoped to be granted political asylum. Noriega's presence in the Papal Nunciature touched off a diplomatic impasse [...] After an eleven-day standoff, Noriega finally surrendered to American forces, apparently under pressure from the papal nuncio and influenced by a threatening crowd of about 15,000 angry Panamanian citizens who had gathered outside the residence. On January 3, 1990, two weeks after the invasion began, Noriega walked out of the Papal Nunciature and surrendered himself to U.S. military officials waiting outside. He was flown by helicopter to Howard Air Force Base, where he was ushered into a plane bound for Florida and formally arrested by agents of the Drug Enforcement Agency. [...] As is evident from the unusual factual background underlying this case, the Court is presented with several issues of first impression. This is the first time that a leader or de facto leader of a sovereign nation has been forcibly brought to the United States to face criminal

charges. The fact that General Noriega's apprehension occurred in the course of a military action only further underscores the complexity of the issues involved. In addition to Defendant Noriega's motion to dismiss based on lack of jurisdiction over the offense and sovereign immunity, Defendants Noriega and Del Cid argue that they are prisoners of war pursuant to the Geneva Convention. This status, Defendants maintain, deprives the Court of jurisdiction to proceed with the case. Additionally, Noriega contends that the military action which brought about his arrest is "shocking to the conscience", and that due process considerations require the Court to divest itself of jurisdiction over his person. Noriega also asserts that the invasion occurred in violation of international law. Finally, Noriega argues that, even in the absence of constitutional or treaty violations, the Court should dismiss the indictment pursuant to its supervisory powers so as to prevent the judicial system from being party to and tainted by the government's alleged misconduct in arresting Noriega. [...] The Court examines each of these issues, in turn, below.

I. JURISDICTION OVER THE OFFENSE

The first issue confronting the Court is whether the United States may exercise jurisdiction over Noriega's alleged criminal activities. [...] In sum, because Noriega's conduct in Panama is alleged to have resulted in a direct effect within the United States, the Court concludes that extraterritorial jurisdiction is appropriate as a matter of international law. [...] Jurisdiction over Defendant's extraterritorial conduct is therefore appropriate both as a matter of international law and statutory construction.

II. SOVEREIGN IMMUNITY

The Court next turns to Noriega's assertion that he is immune from prosecution based on head of state immunity, the act of state doctrine, and diplomatic immunity. [...]

III. DEFENDANTS' PRISONER OF WAR STATUS

Defendants Noriega and Del Cid contend that they are prisoners of war ("POW") within the meaning of the Geneva Convention Relative to the Treatment of Prisoners of War, (Geneva III), a status, Defendants maintain, which divests this Court of jurisdiction to proceed with this case. For the purposes of the motion at bar, the Government does not maintain that Defendants are not prisoners of war, but rather argues that even were Defendants POWs, the Geneva Convention would not divest this Court of jurisdiction. Thus, the Court is not presented with the task of determining whether or not Defendants are POWs under Geneva III, but proceeds with the motion at bar as if Defendants were entitled to the full protection afforded by the Convention. Defendants' arguments under the Geneva Convention are grounded in Articles 82, 84, 85, 87, and 99, and 22, each of which is examined, in turn, below.

Article 82 "A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offense

committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed. If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only."

As is evident from its face, Article 82 pertains to disciplinary and penal procedures against POWs for offenses committed after becoming POWs, allowing for prosecutions against POWs only for acts which would be prosecutable against a member of the detaining forces. Thus, Article 82 is clearly inapplicable to the instant case because Noriega and Del Cid are being prosecuted not for offenses committed after their capture but for offenses committed well before they became prisoners of war.

Article 84 "A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect to the particular offence alleged to have been committed by the prisoner of war.

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

Under 18 U.S.C. at 3231, federal district courts have concurrent jurisdiction with military courts over all violations of the laws of the United States committed by military personnel. The indictment charges Defendants with various violations of federal law, including narcotics trafficking [...] These are allegations of criminal misconduct for which any member of the United States Armed Forces could be prosecuted. Consequently, the prohibition embodied in Article 84, paragraph 1 does not divest this Court of jurisdiction. It has not been argued by Defense Counsel that the district court does not offer the essential guarantees of independence and impartiality "as generally recognized... ." Neither do Defendants contend that they will not be afforded the full measure of rights provided for in Article 105. Those rights include representation of counsel and prior notification of charges. [...] Indeed, Defendants will enjoy the benefit of all constitutional guarantees afforded any person accused of a federal crime.

Article 85 "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

Rather than supporting Defendants' overall position pressed under the Geneva Convention, this Article appears to recognize the right to prosecute asserted by the Government. The Article refers to "prisoners ... prosecuted under the laws of the Detaining Power" (*i.e.*, the United States) and for acts "committed prior to capture." Further, the benefits of the Convention shall be afforded the POW "even if convicted." The indictment charges the Defendants with violations of the laws of the United States allegedly committed between December 1982 and March 1986 - well before the military action and apprehension by surrender.

Article 87 "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of said Power who have committed the same acts... ."

Article 82 reflects the principle of "equivalency" embodied in other Articles of the Convention. That principle provides that, in general, prisoners of war may be prosecuted for criminal violations only if a member of the armed forces of the detaining country would be subject to like prosecution for the same conduct. The specific application of the 'equivalency principle' in Article 87 prevents prisoners of war from being subject to penalties not imposed on the detaining power's soldiers for the same acts. Assuming Defendants are convicted of one or more of the crimes with which they are charged, they face criminal sentences no greater nor less than would apply to an American soldier convicted of the same crime. The instant prosecution is therefore consistent with the provisions of Article 87.

Article 99 "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at time the said act was committed. No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel."

Article 99 proscribes the prosecution of prisoners of war under ex post facto laws, and prohibits coerced confessions. This Article further codifies other fundamental rights secured to any criminal defendant under the Constitution of the United States of America. All accused defendants, "prisoner of war" status notwithstanding, are guaranteed these basic protections.

The Defense has not contended, and of course cannot contend, that the narcotics offenses with which Defendants are charged were permitted under U.S. law at the time the acts were allegedly committed. Neither has there been any assertion that Defendants were coerced into admitting guilt or that any effort was made in that direction. Defendants are represented by competent counsel and are being afforded all rights to which they are entitled under the law. Article 99 thus does not operate to divest the Court of jurisdiction.

Article 22 "Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries. [...] The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent."

Defendants maintain that Article 22 deprives the Court of personal jurisdiction by requiring that they be returned to Panama and detained along with other Panamanian prisoners of the armed conflict. The Court perceives no such requirement in Article 22, which relates to the general conditions, and not the location, of internment. The provision upon which Defendants rely states that

prisoners shall not be interned with persons of different nationality, language, and customs, and "shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture." [...] According to Defendants' interpretation, Article 22 would require that all prisoners of war from the same armed forces be interned together in a single prisoner of war facility. Yet this clearly cannot be Article 22's intent, since internment under those conditions would likely violate its overall concern for healthy and comfortable conditions of internment. Indeed, Defendant Noriega undercuts his own argument by suggesting that he be detained in an agreeable third country, an action which would certainly separate him from members of Panama's armed forces being detained in Panama. The more obvious interpretation of the provision that it prevents prisoners belonging to the armed forces of one nation from being forcibly interned with prisoners from the armed forces of another nation. Such is not the case here.

Moreover, nothing in Article 22 or elsewhere prohibits the detaining power from temporarily transferring a prisoner to a facility other than an internment camp in connection with legal proceedings. Because the Convention contemplates that prisoners of war may be prosecuted in civilian courts, it necessarily permits them to be transferred to a location that is consistent with the orderly conduct of those proceedings. It is inconceivable that the Convention would permit criminal prosecutions of prisoners of war and yet require that they be confined to internment camps thousands of miles from the courthouse and, quite possibly, defense counsel.

The remaining provisions of the Convention cited by Defendant Noriega lend little, if any, support to his argument regarding jurisdiction. Article 12 of the Convention, which Noriega contends mandates his removal to a third country, in fact limits the ability of the United States to effect such a transfer: Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in custody. [...]

Finally, Noriega cites Article 118 of the Convention, which requires prisoners of war to be released and repatriated "without delay after the cessation of active hostilities." [...] That provision is, however, limited by Article 119, which provides that prisoners of war "against whom criminal proceedings for an indictable offense are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment." [...] Since criminal proceedings are pending against Noriega, Article 119 permits his detainment in the United States notwithstanding the cessation of hostilities.

Extradition Treaty Between Panama and the United States

Defendants argue that Geneva III operates to divest this Court of jurisdiction over Defendants because they could not have been extradited from Panama to the United States for the crimes with which they are charged. The genesis of

Defendants argument is not in the language of the Convention, but rather is found in the Red Cross Commentary on Geneva III (the "Commentary") which, in discussing Article 85, states that: In general, acts not connected with the state of war may give rise to penal proceedings only if they are punishable under the laws of both the Detaining Power and the Power of origin. As a parallel, reference may be had to extradition agreements or to the customary rules concerning extradition. An act in respect of which there could be no extradition should not be punished by the Detaining Power. One may also examine whether prosecution would have been possible in the country of origin. If the answer is in the negative, the prisoner of war should not be tried by the Detaining Power. III International Committee of the Red Cross, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War, 419, J. Pictet (Ed. 1960).

First, it must be underscored that the Red Cross Commentary is merely a discussion suggesting what the author believes should or should not be done as a matter of policy; the Commentary is not part of the treaty. Nowhere does the text of Geneva III purport to limit the jurisdiction of domestic courts to extraditable offenses. Defendants would infer this limitation from Commentary on the Geneva Convention. The Supreme Court has, however, held that in order for an international treaty to divest domestic courts of jurisdiction, the treaty must expressly provide for such limitation [...]

Moreover, the Commentary itself does not support Defendants' position. The Commentary suggests that extradition treaties in existence may serve as a guiding "reference" in determining what acts should be punishable by the Detaining Party. Defendants entire argument is premised on the observation that the act of narcotics trafficking is not one of the thirteen crimes listed in the extradition treaty between Panama and the United States. Defendants overlook, however, the fact that the narcotics offenses with which Defendants are charged not only constitute the kinds of offenses which could be the subject of extradition under customary international law, but are specifically contemplated by subsequent treaties between the United States and Panama. [...] As is evident from its text and construed as a whole, the essential purpose of the Geneva Convention Relative to the Treatment of Prisoners of War is to protect prisoners of war from prosecution for conduct which is customary in armed conflict. The Geneva Convention was never intended, and should not be construed, to provide immunity against prosecution for common crimes committed against the detaining power before the outbreak of military hostilities. It therefore has no application to the prosecution of Defendants for alleged violations of this country's narcotics laws. Indeed, the Court has not been presented with any provision of the Convention which suggests or directs that this proceeding is one which, in deference to the Convention, should be terminated.

The humanitarian character of the Geneva Convention cannot be overemphasized, and weighs heavily against Defendants' applications to the Court. The Third Geneva Convention was enacted for the express purpose of protecting prisoners of war from abuse after capture by a detaining power. The essential principle of tendance liberale, pervasive throughout the Convention, promotes lenient treatment of prisoners of war on the basis that, not being a national of the detaining power, they are not bound to it by any duty of allegiance. Hence, the

"honorable motives" which may have prompted his offending act must be recognized. That such motives are consistent with the conduct and laws of war is implicit in the principle. Here, the Government seeks to prosecute Defendants for alleged narcotics trafficking and other drug-related offenses - activities which have no bearing on the conduct of battle or the defense of country. The fact that such alleged conduct is by nature wholly devoid of "honorable motives" renders tendance liberale inapposite to the case at bar.

IV. ILLEGAL ARREST

Noriega also moves to dismiss the indictment on the ground that the manner in which he was brought before this Court - as a result of the United States government's invasion of Panama - is "shocking to the conscience and in violation of the laws and norms of humanity." He argues that the Court should therefore divest itself of jurisdiction over his person. In support of this claim, Noriega alleges that the invasion of Panama violated the Due Process Clause of the Fifth Amendment of the United States Constitution, as well as international law. Alternatively, he argues that even in the absence of constitutional or treaty violations, this Court should nevertheless exercise its supervisory authority and dismiss the indictment so as to prevent the Court from becoming a party to the government's alleged misconduct in bringing Noriega to trial. [...]

B. Violations of International Law

In addition to his due process claim, Noriega asserts that the invasion of Panama violated international treaties and principles of customary international law - specifically, Article 2(4) of the United Nations Charter, Article 20[17] of the Organization of American States Charter, Articles 23(b) and 25 of the Hague Convention, Article 3 of Geneva Convention I, and Article 6 of the Nuremberg Charter.

Initially, it is important to note that individuals lack standing to assert violations of international treaties in the absence of a protest from the offended government. [...] violations of international law alone do not deprive a court of jurisdiction over a defendant in the absence of specific treaty language to that effect. [...] To defeat the Court's personal jurisdiction, Noriega must therefore establish that the treaty in question is self-executing in the sense that it confers individual rights upon citizens of the signatory nations, and that it by its terms expresses "a self-imposed limitation on the jurisdiction of the United States and hence on its courts." [...] No such rights are created in the sections of the U.N. Charter, O.A.S. Charter, and Hague Convention cited by Noriega. Rather, those provisions set forth broad general principles governing the conduct of nations toward each other and do not by their terms speak to individual or private rights. [...] It can perhaps be argued that reliance on the above body of law, under the unusual circumstances of this case, is a form of legal bootstrapping. Noriega, it can be asserted, is the government of Panama or at least its de facto head of state, and as such he is the appropriate person to protest alleged treaty violations; to permit removal of him and his associates from power and reject his complaint because a new and friendly government is installed, he can further urge, turns the doctrine

of sovereign standing on its head. This argument is not without force, yet there are more persuasive answers in response. First, as stated earlier, the United States has consistently refused to recognize the Noriega regime as Panama's legitimate government, a fact which considerably undermines Noriega's position. Second, Noriega nullified the results of the Panamanian presidential election held shortly before the alleged treaty violations occurred. The suggestion that his removal from power somehow robs the true government of the opportunity to object under the applicable treaties is therefore weak indeed. Finally, there is no provision or suggestion in the treaties cited which would permit the Court to ignore the absence of complaint or demand from the present duly constituted government of Panama. The current government of the Republic of Panama led by Guillermo Endara is therefore the appropriate entity to object to treaty violations. In light of Noriega's lack of standing to object, this Court therefore does not reach the question of whether these treaties were violated by the United States military action in Panama.

Article 3 of Geneva Convention I, which provides for the humane treatment of civilians and other non-participants of war, applies to armed conflicts "not of an international character," *i.e.*, internal or civil wars of a purely domestic nature. [...] Accordingly, Article 3 does not apply to the United States' military invasion of Panama.

Finally, Defendant cites Article 6 of the Nuremberg Charter, which proscribes war crimes, crimes against peace, and crimes against humanity. The Nuremberg Charter sets forth the procedures by which the Nuremberg Tribunal, established by the Allied powers after the Second World War, conducted the trials and punishment of major war criminals of the European Axis. The Government maintains that the principles laid down at Nuremberg were developed solely for the prosecution of World War II war criminals, and have no application to the conduct of U. S. military forces in Panama. The Court cannot agree. As Justice Robert H. Jackson, the United States Chief of Counsel at Nuremberg, stated: "If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." Nonetheless, Defendant fails to establish how the Nuremberg Charter or its possible violation, assuming any, has any application to the instant prosecution. [...] Defendant has not cited any language in the Nuremberg Charter, nor in any of the above treaties, which limits the authority of the United States to arrest foreign nationals or to assume jurisdiction over their crimes. The reason is apparent; the Nuremberg Charter, as is the case with the other treaties, is addressed to the conduct of war and international aggression. It has no effect on the ability of sovereign states to enforce their laws, and thus has no application to the prosecution of Defendant for alleged narcotics violations. "The violation of international law, if any, may be redressed by other remedies, and does not depend upon the granting of what amounts to an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct." [...] The Court therefore refrains from reaching the merits of Defendant's claim under the Nuremberg Charter.

C. Supervisory Authority

Noriega does not, and legally cannot, allege that President Bush exceeded his powers as Commander-in-Chief in ordering the invasion of Panama. Rather, he asks this Court to find that the deaths of innocent civilians and destruction of private property is "shocking to the conscience and in violation of the laws and norms of humanity." At bottom, then, Noriega's complaint is a challenge to the very morality of war itself. This is a political question in its most paradigmatic and pristine form. It raises the specter of judicial management and control of foreign policy and challenges in a most sweeping fashion the wisdom, propriety, and morality of sending armed forces into combat - a decision which is constitutionally committed to the executive and legislative branches and hence beyond judicial review. [...]

Defense counsel condemn the military action and the "atrocities" which followed and, having established this argumentative premise, then suggest that such conduct should not be sanctioned by the Court nor should the fruits, i.e., the arrests, of such conduct be permitted. It is further urged that to permit this case to proceed is to give judicial approval to the military action defense counsel condemn. [...]

Finally, it is worth noting that even if we assume the Court has any authority to declare the invasion of Panama shocking to the conscience, its use of supervisory powers in this context would have no application to the instant prosecution for the reasons stated. Since the Court would in effect be condemning a military invasion rather than a law enforcement effort, any 'remedy' would necessarily be directed at the consequences and effects of armed conflict rather than at the prosecution of Defendant Noriega for alleged narcotics violations. The Defendant's assumption that judicial condemnation of the invasion must result in dismissal of drug charges pending against him is therefore misplaced.

In view of the above findings and observations, it is the Order of this Court that the several motions presented by Defendants relating to this Court's jurisdiction as well as that suggesting dismissal under supervisory authority be and each is DENIED. [...]

B. Place of Detention

[**Source:** United States District Court for the Southern District of Florida, 808 F. Supp. 791 (1992); footnotes partially omitted.]

UNITED STATES OF AMERICA, Plaintiff,
v.
MANUEL ANTONIO NORIEGA, Defendant,
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
OPINION BY: WILLIAM M. HOEVELER:
RECOMMENDATION
December 8, 1992

THIS CAUSE comes before the Court again with another unique question, this time incident to sentencing. Ordinarily, the Court can do no more than

recommend the place and/or institutional level of confinement for convicted defendants. At sentencing, the question of General Noriega's prisoner of war status as that status relates to confinement was raised, and the parties were afforded time to submit memoranda, which they did. [...] Defendant contends that the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III") [...] is applicable law that the Court must recognize. Defendant urges further that whether or not the U.S. government classifies General Noriega as a prisoner of war ("POW"), he is one, in fact, and must be afforded all the benefits of that status. Before the Court are several questions, but the ultimate one appears to be whether or not the Geneva Convention prohibits incarceration in a federal penitentiary for a prisoner of war convicted of common crimes against the United States. To resolve this issue the Court must consider three interrelated questions: 1) what authority, if any, does the Court have in this matter; 2) is Geneva III applicable to this case; 3) if so, which of its provisions apply to General Noriega's confinement and what do they require?

I. AUTHORITY OF THE COURT

[...] the Court has concluded that it lacks the authority to order the Bureau of Prisons ("BOP") to place General Noriega in any particular facility. However, as with all sentencing proceedings, it is clearly the right - and perhaps the duty - of this Court to make a recommendation that the BOP place Noriega in a facility or type of facility the Court finds most appropriate given the circumstances of the case. The Court takes this responsibility quite seriously, especially in the novel situation presented here where the defendant is both a convicted felon and a prisoner of war. This dual status implicates important and previously unaddressed questions of international law that the Court must explore if it hopes to make a fair and reasoned recommendation on the type of facility in which the General should serve his sentence.

II. APPLICABILITY OF GENEVA III

Before examining in detail the various provisions of Geneva III, the Court must address whether the treaty has any application to the case at bar. Geneva III is an international treaty designed to protect prisoners of war from inhumane treatment at the hands of their captors. Regardless of whether it is legally enforceable under the present circumstances, the treaty is undoubtedly a valid international agreement and "the law of the land" in the United States. As such, Geneva III applies to any POW captured and detained by the United States, and the U.S. government has - at minimum - an international obligation to uphold the treaty. In addition, this Court believes Geneva III is self-executing and provides General Noriega with a right of action in a U.S. court for violation of its provisions.

A. Noriega's Prisoner of War Status

The government has thus far obviated the need for a formal determination of General Noriega's status. On a number of occasions as the case developed, counsel for the government advised that General Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention. At no time

was it agreed that he was, in fact, a prisoner of war. The government's position provides no assurances that the government will not at some point in the future decide that Noriega is not a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. Because of the issues presented in connection with the General's further confinement and treatment, it seems appropriate - even necessary - to address the issue of Defendant's status. Articles 2, 4, and 5 of Geneva III establish the standard for determining who is a POW. Must this determination await some kind of formal complaint by Defendant or a lawsuit presented on his behalf? In view of the issues presently raised by Defendant, the Court thinks not.

Article 2

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

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party [...]. [...]

The Convention applies to an incredibly broad spectrum of events. The government has characterized the deployment of U.S. Armed Forces to Panama on December 20, 1989 as the "hostilities" in Panama. Letter from the State Dep't to the Attorney General of the United States, Jan. 31, 1990 at 1. However the government wishes to label it, what occurred in late 1989-early 1990 was clearly an "armed conflict" within the meaning of Article 2. Armed troops intervened in a conflict between two parties to the treaty. While the text of Article 2 itself does not define "armed conflict," the Red Cross Commentary to the Geneva Conventions of 1949

> [footnote 6 reads: 3 International Committee of the Red Cross, Commentary on the Geneva Conventions, (J. Pictet, ed., 1960) (hereinafter "Commentary"). [...] For all of its efforts to downplay the persuasive value of the Commentary when invoked by Noriega, the government itself has cited to the Commentary when favorable to its position.]

states that: Any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 [...]. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Commentary at 2 [...]. In addition, the government has professed a policy of liberally interpreting Article 2: The United States is a firm supporter of the four Geneva Conventions of 1949 [...]. As a nation, we have a strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. Armed Forces. Consequently, the United States has a policy of applying the Geneva Conventions of 1949 whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold standards for the applicability of the Conventions contained in common Article 2 are not met. In this respect, we share the views of the International Committee of the Red Cross

that Article 2 of the Conventions should be construed liberally. Letter from the State Dept. to the Attorney General of the United States, Jan. 31, 1990 at 1-2.

Article 4 A.

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict...

Geneva III's definition of a POW is easily broad enough to encompass General Noriega. It is not disputed that he was the head of the PDF, and that he has "fallen into the power of the enemy." Subsection 3 of Article 4 states that captured military personnel are POWs even if they "profess allegiance to a government or an authority not recognized by the Detaining Power."

Article 5

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

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

An important issue raised by the last two words of Article 5 is, of course, what is a "competent tribunal"? Counsel for the government has suggested that, while he does not know what a competent tribunal as called for in Article 5 is, perhaps the answer lies in Article 8, which states in relevant part that "the present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers

[footnote 7 reads: Protecting Powers are neutral third parties whose job it is to ensure that a POW's rights under the Convention are respected by the Detaining Power, especially in the absence of appropriate action by the POW's Power of Origin (his home state)]

whose duty it is to safeguard the interests of the Parties to the conflict." Nowhere in this language is there any indication that one of the rights or duties of the Protecting Powers is to make POW status determinations. Rather, it seems clear that their purpose is to facilitate and monitor appropriate treatment of POWs. During the Geneva III drafting process, the phrase "military tribunal" was considered in place of "competent tribunal." The drafters rejected this suggestion, however, feeling that "to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention." Commentary at 77 (citing II-B Final Record of the Diplomatic Conference of Geneva of 1949, at 270). Clearly, there was concern on the part of the drafters that whatever entity was to make determinations about POW status would be fair, competent, and impartial.

The Court acknowledges that conducting foreign policy is generally the province of the Executive branch. Whether or not the determination of an individual's status as a prisoner of war is a political question is a sub-issue which probably calls for an equivocal answer. While the Court believes that the question of

prisoner of war status properly presented can be decided by the Court, this conclusion, in the present setting does beg the question of whether the issue is "properly presented" here. Passing for the moment the facts that an appeal has been taken and that to this point, at least, no violation of Geneva III is evident, the Court feels and so determines it has the authority to decide the status issue presented. This is not to say that the Executive branch cannot determine this issue under other circumstances. The Court does suggest that where the Court is properly presented with the problem it is, under the law, a "competent tribunal" which can decide the issue. With that in mind, the Court finds that General Noriega is in fact a prisoner of war as defined by Geneva III, and as such must be afforded the protections established by the treaty, regardless of the type of facility in which the Bureau of Prisons chooses to incarcerate him.

B. "Law of the Land"

The Geneva Convention applies to this case because it has been incorporated into the domestic law of the United States. A treaty becomes the "supreme law of the land" upon ratification by the United States Senate. U.S. Const. art. VI, cl. 2. Geneva III was ratified by a unanimous Senate vote on July 6, 1955. [...] The government acknowledges that Geneva III is "the law of the land," but questions whether that law is binding and enforceable in U.S. courts.

C. Enforcement

If the BOP fails to treat Noriega according to the standard established for prisoners of war in Geneva III, what can he do to force the government to comply with the mandates of the treaty?

1. Article 78 Right of Protest

There are potentially two enforcement avenues available to a POW who feels his rights under the Geneva Convention have been violated. The first is the right to complain about the conditions of confinement to the military authorities of the Detaining Power or to representatives of the Protecting Power or humanitarian organizations. This right is established in Article 78 of Geneva III, and cannot be renounced by the POW or revoked or unnecessarily limited by the Detaining Power. See Articles 5, 7, 78, 85.

Article 78

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

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

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted

immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

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

In theory, by calling attention to violations of the Convention the prisoner of war will embarrass the government into rectifying any unacceptable conditions to which he is being subjected. However, the obvious weakness of this complaint procedure is that it has no real teeth. Incentive for the government to comply with the treaty stems from its eagerness to be looked upon favorably by others, and, it is hoped, from its desire simply to do what is proper under the circumstances. However, if we truly believe in the goals of the Convention, a more substantial and dependable method must also be available, if necessary, to protect the POW's rights. Recourse to the courts of the Detaining Power seems an appropriate measure, where available.

2. Legal Action a in U.S. Court

A second method of enforcing the Convention would be a legal action in federal court. The government has maintained that if General Noriega feels that the conditions in any facility in which BOP imprisons him do not meet the Geneva III requirements, he can file a habeas corpus action [...]. However, the government also argues that Geneva III is not self-executing, and thus does not provide an individual the right to bring an action in a U.S. court. Considered together, these two arguments lead to the conclusion that what the government is offering General Noriega is a hollow right. According to the government's position, Noriega could file a [...] claim, but any attempt to base it on violations of the Geneva Convention would be rejected because the General would not have standing to invoke the treaty.

The doctrine of self-execution has been called "one of the most confounding" issues in treaty law. [...] It is complex and not particularly well understood. A thorough discussion of the doctrine and its application to Geneva III would be both premature and unworkable in the context of this opinion. However, the Court wishes to dispel the notion that it already decided that Geneva III is not self-executing, and would add that given the opportunity to address this issue in the context of a live controversy, the Court would almost certainly hold that the majority of provisions of Geneva III are, in fact, self-executing.

[footnote 8 reads: "Some provisions of an international agreement may be self-executing and others non-self-executing." Restatement (Third) Foreign Relations Law of the United States at 111 cmt. h (1986). Article 129 of Geneva III is clearly non-self-executing, as it calls for implementing legislation; however, the remainder of the provisions do not expressly or impliedly require any action by Congress, other than ratification by the Senate, to take effect. Article 129 states that "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention." The "grave breaches" of the Convention are defined in Article 130, and are clearly not relevant to the issue at bar.]

Essentially, a self-executing treaty is one that becomes domestic law of the signatory nation without implementing legislation, and provides a private right of action to individuals alleging a breach of its provisions. [...] Thus, even though Geneva III is undoubtedly "the law of the land," is not necessarily binding on

domestic courts if the treaty requires implementing legislation or does not provide an individual right of action. The most difficult situations arise in relation to treaties like Geneva III which have no U.S. implementing legislation, leaving it for the courts to decide whether the treaty is the type that may function without it.

While the courts have generally presumed treaties to be non-self-executing in the absence of express language to the contrary, the Restatement would find treaties to be self-executing unless the agreement itself explicitly requires special implementing legislation, the Senate requires implementing legislation as a condition to ratification, or implementing legislation is constitutionally required. Restatement (Third) of Foreign Relations Law of the United States at 111(4) (1986). Most of the scholarly commentators agree, and make a compelling argument for finding treaties designed to protect individual rights, like Geneva III, to be self-executing. Whether Geneva III is self-executing is a question that has never been squarely confronted by any U.S. court in a case factually similar to this one. [...]

In the case of Geneva III, however, it is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs - not to create some amorphous, unenforceable code of honor among the signatory nations. "It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests." Commentary at 23.

The Court can envision numerous situations in which the Article 78 right of protest may not adequately protect a POW who is not being afforded all of the applicable safeguards of Geneva III. If in fact the United States holds Geneva III in the high regard that it claims, it must ensure that its provisions are enforceable by the POW entitled to its protections. Were this Court in a position to decide the matter, it would almost certainly find that Geneva III is self-executing and that General Noriega could invoke its provisions in a federal court action challenging the conditions of his confinement. Even if Geneva III is not self-executing, though, the United States is still obligated to honor its international commitment.

III. CONTROLLING PROVISIONS OF GENEVA III

The Court's final task is to determine which provisions of Geneva III are relevant to an individual who is both a prisoner of war and a convicted felon. While these characteristics are not mutually exclusive, the combination of the two in one person creates a novel and somewhat complicated situation with respect to the application of Geneva III.

The essential dispute between Noriega and the government is whether to rely on Articles 21 and 22 or on Article 108 in determining where to place the General. The defense argues that Articles 21 and 22, which explicitly prohibit placing POWs in penitentiaries, apply to General Noriega. The government contends that Article 108 controls, and allows the BOP to incarcerate a POW serving a criminal sentence anywhere U.S. military personnel convicted of similar offenses could be confined, including penitentiaries.

Some concern has been expressed about the potential inconsistency between these provisions. However, a careful reading of the various Articles in their proper context proves that no inconsistency exists. Simply stated, Articles 21 and 22 do not apply to POWs convicted of common crimes against the Detaining Power. The Convention clearly sets POWs convicted of crimes apart from other prisoners of war, making special provision for them in Articles 82-108 on "penal and disciplinary sanctions."

A. Articles 21 and 22

Article 21 [para. 1:]

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

Article 22 [para. 1:]

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

Articles 21 and 22 appear at the beginning of Chapter I - "General Observations" - of Section II - "Internment of Prisoners of War." This chapter of Geneva III deals with the internment of POWs who have not been convicted of crimes, and is thus inapplicable to General Noriega. Defendant's reliance on these Articles is misplaced; if anything, they make clear that POWs convicted of crimes are subject to a different set of rules than other prisoners of war. Article 22's general prohibition against internment of POWs in penitentiaries is limited by Article 21's acknowledgement that all general requirements regarding the treatment of POWs are "subject to the provisions of the present Convention relative to penal and disciplinary sanctions." This reference to Articles 82-108 shows that the Articles in Section II, Chapter I do not apply to POWs serving judicial sentences.

Further support for this argument is the use of the term "internment" throughout Section II, Chapter I, as opposed to the terms "detention," "confinement," or "imprisonment" used in the penal sanctions Articles. The Commentary elaborates on this point: The concept of internment should not be confused with that of detention. Internment involves the obligation not to leave the town, village, or piece of land, whether or not fenced in, on which the camp installations are situated, but it does not necessarily mean that a prisoner of war may be confined to a cell or room. Such confinement may only be imposed in execution of penal or disciplinary sanctions, for which express provision is made in Section VI, Chapter III. Commentary at 178. Thus, Article 22 prohibits internment - but not imprisonment - of POWs in penitentiaries.

For these reasons, it is the opinion of this Court that Articles 21 and 22 do not apply to General Noriega.

B. Article 108

The government has argued that the Geneva Convention "explicitly and unambiguously" authorizes the BOP to incarcerate Noriega in a penitentiary, so long as he is not treated more harshly than would be a member of the U.S. armed forces convicted of a similar offense.

Pursuant to 18 U.S.C. at 3231, federal district courts have concurrent jurisdiction with military courts over all violations of the laws of the United States committed by military personnel. [...] U.S.C. at 814 and 32 CFR at 503:2(a) instruct the military authorities to deliver the alleged offender to the civil authorities for trial just like any other individual accused of a crime. Once that individual is convicted and sentenced by a civil court, he or she is also incarcerated in a civil facility, including a federal penitentiary, just like any other convicted criminal.

Paragraph one of Article 1108 [sic] reads:

Sentences announced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

Pursuant, then, to paragraph one it appears that General Noriega could technically be incarcerated in a federal penitentiary without violating the Geneva Convention. However, this should not be the end of the inquiry. The real issue is whether federal penitentiaries in general or any particular federal penitentiary can afford a prisoner of war the various protections due him under the Geneva Convention. Article 108 requires that the conditions in any facility in which a POW serves his sentence "shall in all cases conform to the requirements of health and humanity." Interpreting the language of these provisions is not always easy. The Commentary to Article 108 says reference should be made to Articles 25 and 29, which lay down minimum standards of accommodation for POWs. Commentary at 502.

In addition, Article 108 dictates that the POW must be allowed to "receive and despatch [sic - British spelling] correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by [his] state of health, and the spiritual assistance [he] may desire." Many of these terms are vague. For example, what is "regular" exercise? Reasonable people may differ on what these provisions require. However, given the United States' asserted commitment to protecting POWs and promoting respect for the laws of armed conflict through liberal interpretation of the Geneva Conventions, vague or ambiguous terms should always be construed in the light most favorable to the prisoner of war.

C. Other Applicable Articles

Paragraph three of Article 108 states:

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. ... Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph. [...] Again, some of these terms are vague, but because of the U.S. commitment to construing the Geneva Conventions liberally, and because it is imperative that the United States set a good example in its treatment of POWs, ambiguous terms must be construed in the light most favorable to the POW.

Article 126 creates an almost unrestricted grant of authority for representatives of the Protecting Power and international humanitarian organizations to supervise the treatment of POWs wherever and in whatever type of facility they may be held.

The government argues that Article 108's reference to Articles 78, 87, and 126 is an express limitation on Noriega's rights - that these are the only Articles that apply to POWs incarcerated for common crimes. Defendant counters that 108 is just a floor, so while POWs may not be treated worse than U.S. soldiers convicted of similar crimes, frequently they must be treated better. Noriega asserts that Article 108 must be read in conjunction with Article 85 which states that "prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention" [...]

The Commentary supports Noriega's position that he continues to be entitled to the Convention's general protections: The Convention affords important safeguards to prisoners of war confined following a judicial sentence. Some of these safeguards result from general provisions applicable to all the conditions relating to internment, such as Article 13 (humane treatment), Article 14 (respect for the person of prisoners [...]), Article 16 (equality of treatment). Other provisions refer expressly to the execution of penalties and specifically prohibit cruelty, any attack on a prisoner's honour (Article 87), and discriminatory treatment (Article 88)... . Confinement does not involve any suppression of the principal safeguards afforded to prisoners of war by the present Convention, and the number of provisions rendered inapplicable by the fact of [...] confinement is therefore small... . In fact, these articles [78, 87, 126) are among the provisions which are not rendered inapplicable by confinement. Because of their greater importance, however, [...] special reference was made to them. Commentary at 501-03 (emphasis added). It thus appears that a convicted POW is entitled to the basic protections of Geneva III for as long as he remains in the custody of the Detaining Power. Throughout the Commentary to Article 108, reference is made to Articles other than the three specifically named in the text. Commentary at 500-08. The logical conclusion is that judicial confinement serves to abrogate only those protections fundamentally inconsistent with incarceration.

This Court finds that, at a minimum, all of the Articles contained in Section I, General Provisions, should apply to General Noriega, as well as any provisions

relating to health. By their own terms, Articles 82-88 (the General Provisions section of the Penal and Disciplinary Sanctions chapter) and 99-108 (Judicial Proceedings subsection) apply.

In addition, the Court would once again note that the stated U.S. Policy is to err to the benefit of the POW. In order to set the proper example and avoid diminishing the trust and respect of other nations, the U.S. government must honor its policy by placing General Noriega in a facility that can provide the full panoply of protections to which he is entitled under the Convention.

IV. CONCLUSION

Considerable space has been taken to set forth conclusions which could have been stated in one or two pages. That is because of the potential importance of the question to so many and the precedentially uncharted course it spawned. The Defendant Noriega is plainly a prisoner of war under the Geneva Convention III. He is, and will be, entitled to the full range of rights under the treaty, which has been incorporated into U.S. law. Nonetheless, he can serve his sentence in a civilian prison to be designated by the Attorney General or the Bureau of Prisons (this is a pre-guidelines case) so long as he is afforded the full benefits of the Convention.

Whether or not those rights can be fully provided in a maximum security penitentiary setting is open to serious question. For the time being, however, that question must be answered by those who will determine Defendant's place and type of confinement. In this determination, those charged with that responsibility must keep in mind the importance to our own troops of faithful and, indeed, liberal adherence to the mandates of Geneva III. Regardless of how the government views the Defendant as a person, the implications of a failure to adhere to the Convention are too great to justify departures.

In the turbulent course of international events - the violence, deceit, and tragedies which capture the news, the relatively obscure issues in this case may seem unimportant. They are not. The implications of a less-than-strict adherence to Geneva III are serious and must temper any consideration of the questions presented.

DONE and ORDERED in chambers in Miami,

Florida this 8th day of December, 1992.

WILLIAM M. HOEVELER

UNITED STATES DISTRICT JUDGE

DISCUSSION

1. a. Was the US intervention in Panama an international armed conflict? Even if Noriega was not, according to the Panamanian Constitution, the lawful leader of Panama? Even if the freely elected leader of Panama, Endara, called for the intervention of US troops? (*Cf.* Art. 2 of Convention III.)

b. Is Noriega a prisoner of war? Although he belongs to armed forces not depending on (and not accepting orders from) the freely elected leader of Panama, Endara? (*Cf.* Arts. 1-3 of the Hague Regulations, Art. 4 (A) (3) of Convention III and Arts. 43-44 of Protocol I.)

c. Has the Court sentencing Noriega necessarily the competence to determine his POW status? Has it an obligation to determine that status? (*Cf.* Arts. 5, 82, 84, 85, 87 and 99 of Convention III.)

d. Does Noriega remain a POW even if he is sentenced in the US for drug related offences? (*Cf.* Art. 85 of Convention III and Art. 44 (2) of Protocol I.)

e. Was the deportation of Noriega to and his internment in the US lawful under IHL? Even if the US invasion in Panama violated international law? (*Cf.* Art. 22 of Convention III.)

2. a. Is a POW subject to the penal legislation of the detaining power for acts committed prior to capture? Even for acts committed in his own country? Even for acts unrelated to the armed conflict? (*Cf.* Arts. 82, 85, 87 and 99 of Convention III.)

b. What limits would you suggest from the point of view of IHL to the application of extraterritorial legislation of the Detaining Power to acts a POW committed prior to capture? May a Detaining Power apply legislation protecting its security and territorial integrity to POWs for acts committed in the service of their own country before capture? (*Cf.* Arts. 82, 85, 87 and 99 (1) of Convention III and Art. 75 (4) (c) of Protocol I.)

3. May civil courts of the Detaining Power sentence a POW? (*Cf.* Arts. 84 and 102 of Convention III.)

4. May a POW be detained in a penitentiary? While in pre-trial detention? Once sentenced? Must a POW, once sentenced and held in a penitentiary, be treated in conformity with the prison regulations or with Convention III? (*Cf.* Arts. 22 (1), 95, 97, 98 (1), 103 (3) and 108 of Convention III.)

5. Are the provisions of Convention III on the conditions of confinement self-executing? If not, what enforcement methods exist regarding violations of the Conventions, *e.g.*, conditions of captivity? Do such methods suggest anything about the strength or weakness of IHL?

6. Does IHL state whether it is lawful to wage a war to capture a drug trafficker who could not be extradited? Does IHL apply to such a war? Is it the purpose of Convention III to protect drug traffickers? Why was it important for IHL and for the US that the Court qualified Noriega as a POW?

XX. East Africa

[*See* also *infra* Chapter XXVII. Somalia, p. 1692.]

Case No. 135, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict

THE CASE

[**Source:** *ICRC Annual Report,* 1988, pp. 25-26.]

ETHIOPIA/SOMALIA

Activities in connection with the consequences of the Ogaden conflict

Almost 4,000 people, most of whom had been detained in Ethiopia and Somalia for almost 11 years, were released and repatriated in 1988. On 3 April Ethiopia and Somalia signed an agreement normalizing their relations and providing for the repatriation of all prisoners of war and civilian internees.

The ICRC had been trying for years to persuade the two governments to repatriate all prisoners of war, with priority being given to the seriously wounded and sick, in accordance with Articles 109, 110 and 118 of the Third Convention. In a note verbale dated 14 March 1988 and addressed to both governments the ICRC again requested them to do so. After hearing that an agreement had been signed on 3 April, the ICRC renewed its offer of services to organize the repatriation operation. The offer was accepted by both parties and the ICRC was authorized to visit the places of detention to interview each of the detainees, register them and check that they wanted to be repatriated. The actual repatriation took place in August.

Visit to Somali prisoners of war

Since the series of visits to 238 Somali prisoners of war carried out between 28 October and 4 November 1987 the ICRC had not been allowed to see these prisoners again in accordance with its customary criteria as defined in Article 126 of the Third Convention. On the other hand, it was able to continue providing them with food and material assistance. Between January and August 1988 ICRC delegates visited the three places of detention on several occasions [...] to hand over a total of 66 tonnes of relief supplies.

On 18 August the Ethiopian authorities agreed to allow the ICRC to arrange for the repatriation of these prisoners of war and at the same time authorized the ICRC to interview them individually to check that they wanted to be repatriated. During the last visit, which was to Dire Dawa two days before the actual repatriation operation began, a further 16 prisoners of war who had never previously been visited were registered.

Visits to Ethiopian prisoners of war and civilian internees

Despite repeated representations since 1984, the ICRC was unable to visit Ethiopian prisoners of war in accordance with the criteria set out in the Geneva

Conventions; it could only make visits every two months to provide aid. The delegates regularly went to three places of detention [...], bringing fresh fruit and vegetables, and at times recreational items and toiletries, for a total of 266 Ethiopian prisoners of war and one Cuban; they were however unable to interview the prisoners without witnesses. When the Somali/Ethiopian agreement of 3 April was announced, the Somali authorities accepted the ICRC's offer to arrange for the repatriation and allowed its delegates to go to all the places of detention. There they registered all the people being detained, both civilian and military, and interviewed them without witnesses to ensure that they wished to return to Ethiopia.

Once the arrangements had been finalized, an ICRC team went to Somalia at the end of June and visits to four places of detention took place throughout the month of July; more than 3,500 people were visited. In Laanta Bur, the delegates once again saw the Cuban prisoner of war, who had been known to the ICRC since 1982 [...] In Hawa, at a camp with hitherto had never been visited, the ICRC delegates visited and registered 2,659 internees; for most of these people the visit was their first contact with the outside world for eleven years. The visits were supplemented by a medical and food aid programme: the ICRC doctor examined and began treating the sick, medicines were distributed and a food programme was set up. During July, 23 tonnes of food were distributed at the four places of detention, together with soap and other articles of hygiene.

Thanks to the registrations 300 families, whose members had been separated on capture and placed in different camps, were reunited in July.

These ICRC visits were also the subject of written reports and talks with the authorities, quite apart from the preparations for repatriation.

Repatriation of prisoners of war and civilian internees

Between August 23, and September 1, an aircraft chartered by the ICRC made 20 flights between Mogadishu and Dire Sawa, in Ethiopia, to transport a total of 3,543 Ethiopian prisoners of war and civilian internees (including 530 children and adolescents) and one Cuban prisoner of war from Somalia to Ethiopia and 246 Somali prisoners of war from Ethiopia to Somalia.

Because of the large number of people to be repatriated from Somalia to Ethiopia, a transit camp had to be set up near Merka, to the south of Mogadishu; groups of 150 to 180 people were taken there as the operation progressed. This camp was run in conjunction with the authorities and the Somali Red Crescent Society.

In Ethiopia, the repatriated people were received and given shelter by the Ethiopian Red Cross in hospitals and their premises in Harar until their return home.

In both countries, the National Societies helped to trace the families of repatriated people, just as they had helped to distribute family messages until the end of June [...]

In October, the Somali authorities decided to amnesty Ethiopian prisoners who had not benefited from prisoner-of-war status, and the ICRC arranged for their repatriation. After delegates had visited and registered them, an ICRC chartered aircraft took [...] 24 people back to Ethiopia.

DISCUSSION

1. a. What is the distinction between a POW and a civilian internee? How does the status alter the protection each receives under IHL? May a civilian internee be treated like a POW? (*Cf.* Art. 4 of Convention III, Arts. 43, 78 and 79 of Convention IV.)

   b. When do POWs have to be repatriated according to IHL? When must civilian internees be released? (*Cf.* Art. 118 of Convention III and Arts. 43, 78 and 132-134 of Convention IV.)

   c. Was it lawful under IHL that some POWs and civil internees had been detained up to eleven years? Did the POWs have to be repatriated only once Ethiopia and Somalia "normalized their relations"? Or only once they signed an agreement to repatriate POWs? (*Cf.* Art. 118 of Convention III and Arts. 43, 78 and 123-134 of Convention IV.)

   d. How could the Cuban national in Somalia be a POW? If he was a member of the Cuban armed forces? If he was a member of the Ethiopian armed forces? Where does he have to be repatriated? (*Cf.* Arts. 1, 4 and 118 of Convention III.)

2. Upon which authority does the ICRC offer its services to assist the repatriation of POWs and civilian internees? (*Cf.* Arts. 9, 118 and 126 of Convention III; Arts. 10, 132-134 and 143 of Convention IV.)

3. Does Art. 118 of Convention III oblige a Detaining Power to repatriate POWs who refuse to be repatriated? What arguments could a Detaining Power invoke to justify the non-repatriation of POWs who oppose their repatriation? Why do ICRC delegates check with each POW whether she/he wants to be repatriated?

4. a. Does the ICRC have a right to visit prisoners of war? Why are ICRC visits important? Are they even more important when the POWs are about to be repatriated? (*Cf.* Art. 126 of Convention III.)

   b. Can you imagine why Ethiopia and Somalia at times impeded ICRC visits to prisoners of war?

   c. Why does the ICRC insist on visiting prisoners and interviewing them without witnesses? Does the ICRC have a right to insist on that modality? (*Cf.* Art. 126 of Convention III.)

5. a. By which means does IHL ensure that a family is informed about the capture and detention of a prisoner of war? May a prisoner of war renounce some or all of those means used to inform his family? What reasons could he have for such renunciation? (*Cf.* Arts. 70, 122 and 123 of Convention III.)

   b. Who must enable prisoners of war to fill out capture cards? Can capture cards be filled out even when the ICRC is impeded from visiting prisoners of war? Does the ICRC have a right to register prisoners of war? Why is the registration of prisoners of war important to the ICRC? (*Cf.* Arts. 70, 122, 123 and 126 of Convention III.)

6. Why is the ICRC providing aid to the POWs? Is it not the State's responsibility to care for the POWs? (*Cf.* Arts. 9, 73 and 125 (3) of Convention III.) What if the State is really incapable of adequately caring for the POWs? Should the ICRC step in or must the State release and repatriate the POWs as it cannot detain them in conformity with Convention III (*Cf.* Art. 41 (3) of Protocol I.)

7. The article mentions that the ICRC visits were the subject of written reports and talks with the authorities. What do you believe was mentioned in these reports? What was the purpose of these reports?

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs

THE CASE

A. Prisoners of War, Ethiopia's Claim 4

[**Source:** Eritrea Ethiopia Claims Commission, Partial Award Prisoners of War Ethiopia's Claim 4, between the Federal Democratic Republic of Ethiopia and the State of Eritrea. The Hague, July 1, 2003. The Permanent Court of Arbitration, the Hague. Footnotes are partially reproduced. Full Awards Available on http://www.pca-cpa.org/ENGLISH/RPC/]

PARTIAL AWARD
Prisoners of War
Ethiopia's Claim 4
Between The Federal Democratic Republic of Ethiopia and the State of Eritrea

I. INTRODUCTION

A. Summary of the Positions of the Parties

1. This Claim ("Ethiopia's Claim 4," "ET04") has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia ("Ethiopia"), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 ("the Agreement"). The Claim seeks a finding of the liability of the Respondent, the State of Eritrea ("Eritrea"), for loss, damage and injury suffered by the Claimant as a result of the Respondent's alleged unlawful treatment of its Prisoners of War ("POWs") who were nationals of the Claimant. In its Statement of Claim, the Claimant requested monetary compensation, and in its Memorial, it proposed that compensation be determined by a mass claims process based upon the five permanent camps in which those POWs were held.

2. The Respondent asserts that it fully complied with international law in its treatment of POWs.

B. The Eritrean POW Camps

3. Eritrea interned a total of approximately 1,100 Ethiopian POWs, virtually all male, between the start of the conflict in May 1998 and August 2002, when the remaining Ethiopian POWs registered by the International Committee of the Red Cross ("ICRC") were released.

4. Eritrea utilized five permanent camps, some only briefly: Barentu, Embakala, Digdigta, Afabet and Nafka (also known as Sahel). Eritrea utilized these camps one after the other and, with the exception of Barentu, closed each camp upon transfer of the POWs to the next camp.

5. Eritrea used facilities at Badme, Asmara, Tesseney and Barentu as transit camps during evacuation of the Ethiopian POWs from the various fronts. POWs were typically held in the transit camps for several days or weeks. [...]

C. General Comment

12. As the findings in this Award and in the related Award in Eritrea's Claim 17 describe, there were significant difficulties in both Parties' performance of important legal obligations for the protection of prisoners of war. Nevertheless, the Commission must record an important preliminary point that provides essential context for what follows. Based on the extensive evidence adduced during these proceedings, the Commission believes that both Parties had a commitment to the most fundamental principles bearing on prisoners of war. Both parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel who were *hors de combat* were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.

13. There were deficiencies of performance on both sides, sometimes significant occasionally grave. Nevertheless, the evidence in these cases shows that both Eritrea and Ethiopia endeavored to observe their fundamental humanitarian obligations to collect and protect enemy soldiers unable to resist on the battlefield. The Awards in these cases, and the difficulties that they identify, must be read against this background. [...]

IV. THE MERITS

A. Applicable law

22. Article 5, paragraph 13, of the Agreement provides that "in considering claims, the Commission shall apply relevant rules of international law." Article 19 of the Commission's Rules of Procedure is modelled on the familiar language of Article 38, paragraph 1, of the Statute of the International Court of Justice. It directs the Commission to look to:
    1. International conventions, whether general or particular, establishing rules expressly recognized by the parties;
    2. International custom, as evidence of a general practice accepted as law;
    3. The general principles of law recognized by civilized nations;
    4. Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

23. The most obviously relevant source of law for the present Award is Geneva Convention III. Both Parties refer extensively to that Convention in their pleadings, and the evidence demonstrates that both Parties relied upon it for the instruction of their armed forces and for the rules of the camps in which they held POWs. The Parties agree that the Convention was applicable from August 14, 2000, the date of Eritrea's accession, but they disagree as to its applicability prior to that date.

24. Ethiopia signed the four Geneva Conventions in 1949 and ratified them in 1969. Consequently, they were in force in Ethiopia in 1993 when Eritrea became an independent State. Successor States often seek to maintain stability of treaty relationships after emerging from within the borders of another State by announcing their succession to some or all of the treaties applicable prior to their independence. Indeed, treaty succession [...] may happen automatically for certain types of treaties. However, the Commission has not been shown evidence that would permit it to find that such circumstances here, desirable though such succession would be as a general matter. From the time of its independence from Ethiopia in 1993, senior Eritrean officials made clear that Eritrea did not consider itself bound by the Geneva Conventions.

25. During the period of the armed conflict and prior to these proceedings, Ethiopia likewise consistently maintained that Eritrea was not a party to the Geneva Conventions. The ICRC, which has a special interest and responsibility for promoting compliance with the Geneva Conventions, likewise did not at that time regard Eritrea as a party to the Conventions.

26. Thus, it is evident that when Eritrea separated from Ethiopia in 1993 it has a clear opportunity to make a statement of its succession to the Conventions, but in evidence shows that it refused to do so. It consistently refused to do so subsequently, and in 2000, when it decided to become a party to the

Conventions, it did so by accession, not by succession. While it may be that continuity of treaty relationships often can be presumed, absent facts to the contrary, no such presumption could properly be made in the present case in view of these facts. These unusual circumstances render the present situation very different from that addressed in the Judgement by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Celebici Case* [footnote 6: *Celebici Case* (The Prosecutor v. Delalic *et al.*), 2001 ICTY Appeals Chamber Judgement Case No. IT-96-21-A (Feb. 20).] It is clear here that neither Eritrea, Ethiopia nor the depository of the Conventions, the Swiss Federal Council, considered Eritrea party to the Conventions until it acceded to them on August 14, 2000. Thus, from the outbreak of the conflict in May 1998 until August 14, 2000, Eritrea was not a party to Geneva Convention III. Ethiopia's argument to the contrary, in reliance upon Article 34 of the Vienna Convention on Succession of States in Respect of Treaties, cannot prevail over these facts.

27. Although Eritrea was not a party to the Geneva Conventions prior to its accession to them, the Conventions might still have been applicable during the armed conflict with Ethiopia, pursuant to the final provision of Article 2 common to all four Conventions, which states:

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

28. However, the evidence referred to above clearly demonstrates that, prior to its accession, Eritrea had not accepted the Conventions. This non-acceptance was also demonstrated by Eritrea's refusal to allow the representatives of the ICRC to visit the POWs it held until after its accession to the Conventions.

29. Consequently, the Commission holds that, with respect to matters prior to August 14, 2000, the law applicable to the armed conflict between Eritrea and Ethiopia is customary international law. In its pleadings, Eritrea recognizes that, for most purposes, "the distinction between customary law regarding POWs and the Geneva Convention III is not significant." It does, however, offer as examples of the more technical and detailed provisions of the Convention that it considers not applicable as customary law the right of the ICRC to visit POWs, the permission of the use of tobacco in Article 26, and the requirement of canteens in Article 28. It also suggests that payment of POWs for labor and certain burial requirements for deceased POWs should not be considered part of customary international law. Eritrea cites the *von Leeb* decision of the Allied Military Tribunal in 1949 as supportive of its position on this question [footnote 10: U.S. v. Wilhelm von Leeb *et al*, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW, No 10, Volume XI, p. 462 (United States Government Printing Office, Washington D.C. 1950).]

30. Given the nearly universal acceptance of the four Geneva Conventions of 1949, the question of the extent to which their provisions have become part of customary international law arises today only rarely. The Commission notes that the *von Leeb* case (which found that numerous provisions at the core of the 1929 Convention had acquired customary status) addressed the extent to which the Provisions of a convention concluded in 1929 had become part of the customary international law during the Second World War, that is, a conflict that occurred ten to sixteen years later. In the present case, the Commission faces the question of the extent to which the provisions of a convention concluded in 1949 and since adhered to by almost all States had become part of customary international law during a conflict that occurred fifty years later. Moreover, treaties, like the Geneva Conventions of 1949, that develop international humanitarian law are, by their nature, legal documents that build upon the foundation laid by earlier treaties and by customary international law. These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes.

31. Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion. There are also similar authorities for the proposition that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules found in treaties. The Commission agrees.

32. Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949. The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defenses is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party. [...]

B. Evidentiary Issues

1. Quantum of Proof Required [...]

38. The Commission does not accept any suggestion that, because some claims may involve allegations of potentially criminal individual conduct, it should apply an even higher standard of proof corresponding to that in individual criminal proceedings. The Commission is not a criminal tribunal assessing individual criminal responsibility. It must instead decide whether

there have been breaches of international law based on normal principles of state responsibility. [...]

2. Proof of Facts

39. Ethiopia presented a large volume of documentation in support of its claims. [...] Ethiopia also presented three types of documents recording in differing ways information regarding the experiences of individual prisoners. It submitted thirty formal written declarations from former POWs signed by the declarants and containing affirmations of the accuracy of the translation and solemn representations that the declaration was truthful. During the hearing, counsel for Ethiopia indicated that it relied primarily on these declarations. Similar signed declarations also provided the heart of the evidence for Eritrea's claims.

40. Ethiopia also submitted multiple volumes of what were in fact forms for collecting claims. These were lengthy documents filled in by a former POW or a person writing for him, responding at varying length to detailed questions regarding conditions and experiences in each of Eritrea's POW camps. Ethiopia also filed four volumes containing typewritten distillations of the very brief answers some former prisoners gave to the claims questionnaires (generally involving pages containing only "yes" or "no" answers).

41. Eritrea objected to the second and third types of documents, arguing that the phrasing of the questions, the collection methodology and other factors inevitably resulted in inflated, inaccurate and unreliable responses. The Commission agrees that these documents are of uncertain probative value. It has not used them in arriving at the factual judgments that follow: instead it has relied on the formal signed declarations submitted by each Party, as supplemented by the testimony at the hearing and other documents in the record. [...]

3. Evidence under the Control of the ICRC

45. Throughout the conflict, representatives of the ICRC visited Ethiopia's camps. Beginning late in August 2000, the ICRC also began visiting Eritrea's Nakfa camp. Both Parties indicated that they possess ICRC reports regarding these camp visits, as well as other relevant ICRC communications.

46. The Commission hoped to benefit from the ICRC's experienced and objective assessment of conditions in both Parties'camps. It asked the Parties to include the ICRC reports on camp visits in their written submissions or to explain their inability to do so. Both responded that they wished to do so but that the ICRC opposed allowing the Commission access to these materials. The ICRC maintained that they could not be provided without ICRC consent, which would not be given. [...]

48. The ICRC made available to the Commission and the Parties copies of all relevant public documents, but it concluded that it could not permit access to other information. That decision reflected the ICRCs deeply held belief

that its ability to perform its mission requires strong assurances of confidentiality. The Commission has great respect for the ICRC and understands the concerns underlying its general policies of confidentiality and non-disclosure. Nevertheless, the Commission believes that, in the unique situation here, where both parties to the armed conflict agreed that these documents should be provided to the Commission, the ICRC should not have forbidden them from doing so. Both the Commission and the ICRC share an interest in the proper and informed application of international humanitarian law. Accordingly, the Commission must record its disappointment that the ICRC was not prepared to allow it access to these materials.

C. Violations of the Law

1. Organizational Comment

49. Ethiopia alleged extensive violations of applicable legal obligations in Eritrea's POW camps. Its legal claims were arranged in eleven separate categories, several with multiple subsidiary elements. Ethiopia alleged violations of all or almost all of the following eleven categories with respect to each of Eritrea's five camps:
    - Capture of POWs and their evacuation to the camps;
    - Physical and mental abuse in the camps;
    - Lack of adequate medical care;
    - Unhealthy camp conditions;
    - Failure to maintain POWs well being;
    - Impermissible forced labor;
    - Improper handling of deaths;
    - Lack of complaint procedures;
    - Prohibiting communication with the exterior;
    - Failure to post camp regulations; and
    - Inhumane conditions during transfer from the camps.

50. In its written and oral presentations, Ethiopia clearly explained the factors leading it to structure its claims this way. However, the result is a matrix of over fifty issues, many with several subsidiary elements, for assessment and decision. Of greater concern, the Commission found that this complex and fragmented structure served to conflate very serious matters with others of much less gravity. Moreover, given the level of evidence presented and the limited time available for the Commission to complete its work on all claims, it is clear that the Commission must focus its attention on the substantive core of the claims.

51. Accordingly, the Commission has grouped several of Ethiopia's claims together or has otherwise re-aligned their elements in order to give greater

weight to and clearer focus on those matters it sees as being of greatest concern.

52. As commentators frequently have observed, Geneva Convention III, with its 143 Articles and five Annexes, is an extremely detailed and comprehensive code for the treatment of POWs. Given its length and complexity, the Convention mixes together, sometimes in a single paragraph, obligations of very different character and importance. Some obligations, such as Article 13's requirement of humane treatment, are absolutely fundamental to the protection of POWs' life and health. Other provisions address matters of procedure or detail that may help ease their burdens, but are not necessary to ensure their life and health.

53. Under customary international law, as reflected in Geneva Convention III, the requirement of treatment of POWs as human beings is the bedrock upon which all other obligations of the Detaining Power rest. At the core of the Convention regime are the legal obligations to keep POWs alive and in good health. The holdings made in this section are organized to emphasize these core legal obligations.

54. It should also be stated at the outset that the Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims. These parameters are dictated by the limit of what is feasible for the two Parties to brief and argue and for the Commission to determine in ligh of the time and resources made available by the Parties.

2. Eritrea's Refusal to Permit the ICRC to Visit POWs

55. From the outset of the armed conflict in 1998, the ICRC was permitted by Ethiopia to visit the Eritrean POWs and the camps in which they were held. It was also permitted to provide relief to them and to assist them in corresponding with their families in Eritrea, although there is evidence that Eritrea refused to permit communications from those POWs to be passed on to their families. In Eritrea, the ICRC had a limited role in the 1998 repatriation of seventy sick or wounded POWs, but all efforts by the ICRC to visit the Ethiopian POWs held by Eritrea were refused by Eritrea until August 2000, just after Eritrea acceded to the 1949 Geneva Conventions. The Commission must decide whether, as alleged by Ethiopia, such refusal by Eritrea constituted a violation of its legal obligations under the applicable law.

56. Eritrea argues that the right of access by the ICRC to POWs is a treaty-based right and that the provision of Geneva Convention III granting such access to the ICRC should not be considered provisions that express customary international law. While recognizing that most of the provisions of the Conventions have become customary law, Eritrea asserts that the

provisions dealing with the access of the ICRC are among the detailed or procedural provisions that have not attained such status.

57. That the ICRC did not agree with Eritrea is demonstrated by a press statement it issued on May 7, 1999, in which it recounted its visits to POWs and interned civilians held by Ethiopia and said: "In Eritrea, meanwhile, the ICRC is pursuing its efforts to gain access as required by the Third Geneva Convention, to Ethiopian POWs captured since the conflict erupted last year".

58. The ICRC is assigned significant responsibilities in a number of articles of the Convention. These provisions make clear that the ICRC may function in at least two different capacities - as a humanitarian organization providing relief and as an organization providing necessary and vital external scrutiny of the treatment of POWs, either supplementary to a Protecting Power or as a substitute when there is no Protecting Power. There is not evidence before the Commission that Protecting Powers were proposed by either Ethiopia or Eritrea, and it seems evident that none was appointed. Nevertheless, the Convention clearly requires external scrutiny of the treatment of POWs and, in article 10, where there is no Protecting Power or other functioning oversight body, it requires Detaining Powers to "accept the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention." In that event, Article 10 also provides that all mention of Protecting Powers in the Convention applies to such substitute organizations.

59. The right of the ICRC to have access to POWs is not limited to a situation covered by Article 10 in which it serves as a substitute for a Protecting Power. Article 126 specifies clear and critical rights of Protecting Powers with respect to access to camps and to POWs, including the right to interview POWs without witnesses, and it states that the delegates of the ICRC "shall enjoy the same prerogatives." Ethiopia relies primarily on Article 126 in its allegation that Eritrea violated its legal obligations by refusing the ICRC access to its POWs.

60. Professor Levie points out in his monumental study of the treatment of POWs in international armed conflicts that the ICRC "has played an indispensable humanitarian role in every armed conflict for more than a century." [...]

61. The Commission cannot agree with Eritrea's argument that provisions of the Convention requiring external scrutiny of the treatment of POWs and access to POWs by the ICRC are mere details or simply implementing procedural provisions that have not, in half a century, become part of customary international law. These provisions are in essential part of the regime for protecting POWs that has developed in international practise, as reflected in Geneva Convention III. These requirements are, indeed, "treaty-based" in the sense that they are articulated in the Convention; but, as such, they incorporate past practices that had standing of their own in customary law, and they are of such importance for the prospects of

compliance with the law that it would be irresponsible for the Commission to consider them inapplicable as customary international law. As the International Court of Justice said in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. [...] [See **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion, p. 896, para. 79.]

62. For the above reasons, the Commission holds that Eritrea violated customary international law from May 1998 until August 2000 by refusing to permit the ICRC to send its delegates to visit all places where Ethiopian POWs were detained, to register these POWs, to interview them without witnesses, and to provide them with the customary relief and services. Consequently, Eritrea is liable for the suffering caused by that refusal.

3. Mistreatment of POWs at Capture and its Immediate Aftermath

63. Of the thirty Ethiopian POW declarants, at least twenty were already wounded at capture and nearly all testified to treatment of the sick or wounded by Eritrean forces upon capture at the front and during evacuation. Consequently, in addition to the customary international law standards reflected in Geneva Convention III, the Commission also applies the standards reflected in the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field on August 12, 1949 ("Geneva Convention I"). For a wounded or sick POW, the provisions of Geneva Convention I apply along with Geneva Convention III. Among other provisions, Article 12 of Geneva Convention I demands respect and protection of wounded or sick members of the armed forces in "all circumstances".

64. A State's obligation to ensure humane treatment of enemy soldiers can be severely tested in the heated and confused moments immediately following capture or surrender and during evacuation from the battlefront to the rear. Nevertheless, customary international law as reflected in Geneva Conventions I and III absolutely prohibits the killing of POWs, requires the wounded and sick to be collected and cared for, the dead to be collected, and demands prompt and humane evacuation of POWs.

a. Abusive Treatment

65. Ethiopia alleged that Eritrean troops regularly beat and frequently killed Ethiopians upon capture and its immediate aftermath. Ethiopia presented a *prima facie* case, through clear and convincing evidence, to support this allegation.

66. One-third of the Ethiopian POW declarations contain accounts of Eritrean soldiers deliberately killing Ethiopian POWs, most wounded, at capture or evacuation. Particularly troubling are accounts in three declarations of Eritrean officers ordering troops to kill Ethiopian POWs or beating them for not doing so. More than half of the Ethiopian POW declarants described repeated and brutal beatings, both at the front and during evacuation, including blows purposefully inflicted on wounds. Fortunately, these

accounts were countered to a degree by several other accounts from Ethiopian declarants of Eritrean officers and soldiers intervening to curtail physical abuse and prevent killings.

67. In rebuttal, Eritrea offered detailed and persuasive evidence that Eritrean troops and officers had received extensive instruction during their basic training, both on the basic requirements of the Geneva Conventions on the taking of POWs and on the policies and practices of the Eritrean People's Liberation Front ("EPLF") in the war against the prior Ethiopian government, the Derg, for independence, which had emphasized the importance of humane treatment of prisoners. What is lacking in the record, however, is evidence of what steps Eritrea took, if any, to ensure that its forces actually put this extensive training to use in the field. There is no evidence that Eritrea conducted inquiries into incidents of physical abuse or pursued disciplinary measures under Article 121 of Geneva Convention III.

68. The Commission concludes that Eritrea has not rebutted the *prima facie* case presented by Ethiopia and, consequently, holds that Eritrea failed to comply with the fundamental obligation of customary international law that POWs, even when wounded, must be protected and may not, under any circumstances, be killed. Consequently, Eritrea is liable for failing to protect Ethiopian POWs from being killed at capture or its immediate aftermath, and for permitting beatings and other physical abuse of Ethiopian POWs at capture or its immediate aftermath.

b. Medical care Immediately Following Capture

69. Ethiopia alleges that Eritrea failed to provide necessary medical attention to Ethiopian POWs after capture and during evacuation, as required under customary international law reflected in Geneva Conventions I (Article 12) and III (Articles 20 and 15). Many Ethiopian declarants testified that their wounds were not cleaned and bandaged at or shortly after capture, leading to infection and other complications. Eritrea presented rebuttal evidence that its troops provided rudimentary first aid as soon as possible, including in transit camps.

70. The Commission believes that the requirement to provide POWs with medical care during the initial period after capture must be assessed in light of the harsh conditions on the battlefield and the limited extent of medical training and equipment available to front line troops. On balance, and recognizing the logistical and resource limitations faced by both Parties to the conflict, the Commission finds that Eritrea is not liable for failing to provide medical care to Ethiopian POWs at the front and during evacuation.

c. Evacuation Conditions

71. Ethiopia also alleges that, in addition to poor medical care, Eritrea failed to ensure humane evacuation conditions. As reflected in Articles 19 and 20 of Geneva Convention III, the Detaining Power is obliged to evacuate prisoners humanely, safely and as soon as possible from combat zones; only if there is

a greater risk in evacuation may the wounded or sick be temporarily kept in the combat zone, and they must not be unnecessarily exposed to danger. The measure of a humane evacuation is that, as set out in Article 20, POWs should be evacuated "in conditions similar to those for the forces of the Detaining Power."

72. Turning first to the timing of evacuation, Eritrea submitted clear and convincing evidence that, given the reality of battle, the great majority of Ethiopians POWs were evacuated from the various fronts in a timely manner. Despite one disquieting incident in which a wounded Ethiopian POW allegedly was forced to spend a night on top of a trench while artillery exchanges occurred and his Eritrean captors took refuge in the trench, the Commission concludes that Eritrea generally took the necessary measures to evacuate its prisoners promptly.

73. Timing aside, the Ethiopian POW declarants described extremely onerous conditions of evacuation. The POWs were forced to walk from the front for hours or days over rough terrain, often in pain from their own wounds, often carrying wounded comrades and Eritrean supplies, often in harsh weather, and often with little or no food and water. Eritrea offered rebuttal evidence that its soldiers faced nearly the same unavoidably difficult conditions, particularly given the lack of paved roads in Eritrea.

74. Subject to the holding above concerning unlawful physical abuse during evacuation and with one exception, the Commission finds that Eritrean troops satisfied the legal requirements for evacuations from the battlefield under the harsh geographic, military and logistical circumstances. The exception is the Eritrean practice of seizing the footwear of all Ethiopian POWs, testified to by many declarants. Although the harshness of the terrain and weather on the marches to the camps may have been out of Eritrea's control, to force the POWs to walk barefoot in such conditions unnecessarily compounded their misery. The Commission finds Eritrea liable for inhumane treatment during evacuations from the battlefield as a result of its forcing Ethiopian POWs to go without footwear during evacuation marches.

d. Coercive Interrogation

75. Ethiopia alleges frequent abuse in Eritrea's interrogation of POWs, commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."

76. Ethiopia presented clear and convincing evidence, unrebutted by Eritrea, that Eritrean interrogators frequently threatened or beat POWs during interrogation, particularly when they were dissatisfied with the prisoner's answers. The Commission must conclude that Eritrea either failed to train its interrogators in the relevant legal restraints or to make it clear that they are

imperative. Consequently, Eritrea is liable for permitting such coercive interrogation.

e. Confiscation of Personal Property

77. Ethiopia alleges widespread and systematic confiscation by Eritrean soldiers of the personal property of Ethiopian POWs. The declarations of Ethiopian POWs submitted into evidence clearly and convincingly support this claim. Not only were all captured Ethiopian soldiers deprived of their shoes (presumably, to make escape more difficult), but almost all declarants assert that they were searched upon capture and that all of their personal possessions were taken by their captors. The items allegedly taken included cash, watches, family photos, radios, rings and cigarettes, as well as the POWs' identity cards and, occasionally, items of clothing. The declarants also assert that no receipts were given and that none of the confiscated property was returned.

78. Article 18 of Geneva Convention III requires that POWs be allowed to retain their personal property. Cash and valuables may be impounded on order of an officer, subject to detailes registration and other safeguards. If prisoners' property is taken, it must be receipted and safely held for later return. Under Article 17, identity documents can be consulted by the Detaining Power but must be returned to the prisoner. The Commission believes that these obligations reflect customary international law.

79. No rebuttal evidence was submitted by Eritrea with respect to this claim, and the Commission notes that Eritrea's camp procedures for POWs state that "every POW has the duty to hand over property which he had with him when he was captured to the concerned authority". The Commission concludes that Eritrea failed to take the necessary measures to prevent the confiscation of prisoners' personal property. Consequently, given the unrebutted evidence of widespread takings of property and Eritrea's camp procedures, Eritrea failed to comply with the obligations of Articles 17 and 18 of Geneva Convention III and is liable to Ethiopia for the consequent losses suffered by Ethiopian POWs.

80. Taking of prisoners' valuables and other property is a regrettable but recurring feature of their vulnerable state. The loss of photographs and other similar personal items is an indignity that weighs on prisoners' morale, but the loss of property otherwise seems to have rarely affected the basic requirements for prisoners' survival and well being. Accordingly, while the Commission does not wish to minimize the importance of these violations, they loom less large than other matters considered elsewhere in this Award.

4. Physical and Mental Abuse in POW Camps [...]

82. The testimony at the hearing of a former POW and the declarations of the other POWs are consistent and persuasive that the Eritrean guards at the various POW camps relied often upon brutal force for the enforcement of

rules and as means of punishment. All thirty POW declarations described frequent beatings of POWs by camp guards. Several guards accused of regularly abusing POWs were identified by name in numerous declarations. The evidence indicates that many of the same guards remained in charge as the numbers of POWs increased and as they were moved from one camp to another, and the conclusion is unavoidable that guards who regularly beat POWs were not replaced as a result. Beatings with wooden sticks were common and, on occasion, resulted in broken bones and lack of consciousness. There were multiple, consistent accounts that, at Digdigta, several POWs who had attempted to escape were beaten senseless, with one losing an eye, prior to their disappearance. Being forced to hold heavy objects over one's head for long periods of time, being punched or kicked, being required to roll on stony or thorny ground, to look at the sun, and to undergo periods of confinement in hot metal containers were notable among the other abuses, all of which violated customary international law, as exemplified by Articles 13, 42, 87 and 89 of Geneva Convention III. Regrettably, the evidence also indicates that the camp commanders did little to restrain these abuses and, in some cases, even threatened POWs by telling them that, as there was (prior to the first ICRC visits in August 2000) no list of prisoners, they could do anything they wanted to the POWs and could not be held accountable.

83. In addition to the fear and mental anguish that accompanied these physical abuses, there is clear evidence that some POWs particularly Tigrayans, were treated worse than others and that several POWs were treated as deserters and given favoured treatment. (Those given favoured treatment were not among those who signed the thirty declarations relied on by Ethiopia on this issue.) Such discrimination is, of course, prohibited by Article 16 of Geneva Convention III.

84. The evidence is persuasive that beatings were common at all camps: Barentu, Embakala, Digdigta, Afabet and Nakfa. Solitary confinement of three months or more occurred at least at Digdigta and Afabet. At Nakfa, much of the evidence of beatings and other brutal punishments relates to POWs away from camp working on labor projects and occurred at least at Digdigta and Afabet. At Nakfa, much of the evidence of beatings and other brutal punishments relates to POWs away from camp working on labor projects and occurred when fatigue slowed their work. After ICRC visits began, there is some evidence that POWs were threatened with physical punishment if they reporter abuses to the ICRC. [...]

5. Unhealthy Conditions in Camps

a. The Issue

87. A fundamental principle of Geneva Convention III is that detention of POWs must not seriously endanger the health of those POWs. This principle, which is also a principle of customary international law, is implemented by rules that mandate camp locations where the climate is not injurious; shelter that is

adequate, with conditions as favourable as those for the forces of the Detaining Power who are billeted in the area, including protection from dampness and adequate heat and light, bedding and blankets; and sanitary facilities which are hygienic and are properly maintained. Food must be provided in a quantity and quality adequate to keep POWs in good health, and safe drinking water must be adequate. Soap and water must also be sufficient for the personal toilet and laundry of the POWs. [...]

b. Analysis of Health-Related Conditions at each of Eritrea's POW Camps

92. While there certainly is evidence that the camp at Barentu was in violation of standards prescribed by Geneva Convention III, it is insufficient to prove that the health of prisoners there was seriously endangered. This camp was in operation for no more than six weeks, and the period of internment of most of the relatively few prisoners there was for lesser periods.

93. [...] From the evidence, it appears that all the prisoners at Embakala were housed in one small building composed of corrugated metal sheets which was divided into two rooms and became dangerously overcrowded soon after the camp went into operation. The floor of these quarters consisted of dirt, which was over time converted to filthy dust as a result of the crowded living conditions and problems of hygiene. The roof was so low that the inmates could not stand erect. The prisoners were often confined in these quarters during the day with little opportunity to go outside, except when allowed to relieve themselves in an adjacent field (only once each day) and to bathe (no more than once a week). Confined in very close quarters, enduring stifling heat, often stripped to their underwear, the prisoners were also often enjoined to keep silent for long periods of time. Throughout their stay, they were provided with a meagre diet consisting of bread and lentil stew. There were no latrines in the field used for toileting (once a day). Prisoners who suffered from diarrhoea were forced to relieve themselves in the overcrowded quarters. The Commission finds this detailed evidence to be clear and convincing and to constitute a *prima facie* case of serious violations at Embakala of required health-related conditions, *i.e.*, the provision of healthy accommodation, which seriously endangered the health of prisoners.

94. There is more abundant evidence to justify similar conclusions regarding conditions at Digdigta (nineteen POW declarations), Afabet (twenty POW declarations), and Nakfa (thirty POW declarations). [...]

96. Indeed, provision of adequate water for both drinking and bathing was a serious problem at all three camps. In each, water was brought in by tanker trucks. At Digdigta, the drinking water provided during the day (when housing conditions were stifling) was often too hot to drink in amounts adequate to relieve thirst, as well as insufficient in quantity. At Afabet, drinking water was in short supply and sometimes quite "salty." At Nakfa, there were often serious water shortages because the tanker trucks failed to appear as scheduled or failed to supply enough to meet the needs of the

camp. There is also testimony that the water secured from other sources (rain barrels and nearby "streams") was dirty and insect-ridden. Water for bathing was also in short supply; prisoners were allowed, at best, to bathe and launder only once a week.

97. Virtually all of the declarants allege that, at all of these camps, the food provided consisted of inedible (*e.g.*, "dirty," "worm-ridden") bread and lentil stew. The testimony about food at Nakfa indicates that the diet was frequently insufficient in quantity and quality and that there was often widespread hunger.

98. [...] Nakfa was chosen in May 2000 as the site for a new camp to which all prisoners should be removed. The preparations for reception of prisoners appear to have been inadequate. There is considerable testimony that the first group to arrive at Nakfa was put in underground, windowless, dark, dank and dirty quarters, which were littered with human trash and the dung of donkeys and goats, and thereafter these premises were never properly cleaned. This evidence, coupled with that portraying the problems encountered in providing enough water for the prisoners, suggests a serious failure to meet the basic obligation of Geneva Convention III to provide at the outset "premises... affording every guarantee of hygiene and healthfulness." [...]

100. Eritrea has failed to rebut the *prima facie* case established by Ethiopia. Eritrea's rebuttal depended primarily on the declarations of two senior officers who were involved in the administration of the POW camps, who did not testify at the hearing. [...]

6. Inadequate Medical Care in Camps

104. A detaining Power has the obligation to provide in its POW camps the medical assistance on which the POWs depend to heal their battle wounds and to prevent further damage to their health. This duty is particularly crucial in camps with a large population and a greater risk of transmission of contagious diseases.

105. The protections provided by Articles 15, 20, 29, 30, 31, 109 and 110 of Geneva Convention III are unconditional. These rules, which are based on similar rules in Articles 4, 13, 14, 15 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, are part of customary international law.

106. Many of these rules are broadly phrased and do not characterize precisely the quality or extent of medical care necessary for POWs. Article 15 speaks of the "medical attention *required* by their state of health;" Article 30 requires infirmaries to provide prisoners "the attention they *require*" (emphasis added). The lack of definition regarding the quality or extent of care "required" led to difficulties in assessing this claim. Indeed, standards of medical practice vary around the world, and there may be room for varying assessments of what is required in a specific situation. Moreover, the

Commission is mindful that it is dealing here with two countries with very limited resources.

107. Nevertheless, the Commission believes certain principles can be applied in assessing the medical care provided to POWs. The Commission began by considering Article 15's concept of the maintenance of POWs, which it understands to mean that a Detaining Power must do those things required to prevent significant deterioration of a prisoner's health. Next, the Commission paid particular attention to measures that are specifically required by Geneva Convention III, such as the requirements for segregation of prisoners with infectious diseases and for regular physical examinations.

a. Ethiopia's Claims and Evidence [...]

110. The Commission was, however, sadly impressed by the high number of Ethiopian POWs who died in the Eritrean camps. A significant mortality rate among a group of predominantly young persons is objectively cause for concern. The evidence, although not wholly consistent, clearly indicated an abnormally high rate of deaths among the prisoners in Eritrean camps. In response to questioning from the Commission, the Ethiopian POW witness testified at the hearing that, within his group of fifty-five POWs (with whom he moved from camp to camp), four had died. Several declarations state that, of the total population of some 1,100 Ethiopian POWs, forty-eight died. Ethiopia gave a list of fifty-one POWs who did not survive the camps. (Eritrea estimated that thirty-nine POWs died in captivity.) Significantly, there was substantial and reinforcing evidence that many of these deaths resulted from diarrhoea, tuberculosis and other illnesses that could have been avoided, alleviated or cured by proper medical care.

111. In the Commission's view, this high death toll, combined with the other specific serious deficiencies discussed below, is clear and convincing evidence that Eritrea did not give the totality of POWs the basic medical care required to keep them in good health as required by Geneva Convention III, and consequently constitutes a *prima facie* case. [...]

b. Eritrea's Defence [...]

115. Eritrea's evidence did demonstrate that many Ethiopian POWs were provided with medical attention, primarily at the camp clinics with the services of paramedical personnel. Some POWs with serious diseases or who required special treatment were referred on occasion to a more specialized hospital (*e.g.*, Keren, Afabet, Ghindu, Nakfa). There was evidence that Eritrea provided for dental care either in hospitals or in the camp clinic by having dentists visit. Likewise, there was evidence that Eritrea gave a few POWs extensive medical treatment, including multiple surgical interventions. It occasionally provided drugs and vitamins beyond such few drugs and pain relievers as were available at the clinics.

c. The Commission's Conclusions

116. Overall, while the Commission is satisfied from the evidence that Eritrea made efforts to provide medical care and that some care was available at each permanent camp, Eritrea's evidence is inadequate to allow the Commission to form judgements regarding the extent or quality of Health care sufficient to overcome Ethiopia's *prima facie* case.

117. The camp clinic logs (where readable) do show that numerous POWs went to the clinics, but they cannot establish that care was appropriate or that all POWs in need of medical attention were treated in a timely manner over the full course of their captivity. For example, from the records it appears that the clinics did not register patients on a daily basis. Under international humanitarian law, a POW has the right to seek medical attention on his or her own initiative and to receive the continuous medical attention required by his or her state of health - which requires daily access to a clinic.

118. International humanitarian law also requires that POWs be treated at a specialized hospital or facility when required medical care cannot be given in a camp clinic. The hospital records submitted by Eritrea, however, are not sufficient to establish that all POWs in need of specialized treatment were referred to hospitals. Moreover, a quantitative analysis of those records shows that, while a few relate to treatment in the first half of 1999 at Digdigta, nearly one half relate to the period from August to December 2000 and one quarter to 2001 and 2002, *i.e.*, the time period after Eritrea acceded to the Geneva Conventions and ICRC camp visits started. Only a few records relate to treatment between July 1999 and May 2000, when POWs were detained at Afabet, and none relates to the time when Barentu and Embakala were open.

119. Likewise, the medicine supply reports submitted by Eritrea indicate that Eritrea distributed some drugs and vitamins to the POWs, but they do not prove that Eritrea provided adequate drugs to all POWs in the camps. It is striking that, according to the evidence submitted, Eritrea apparently distributed substantially more Vitamin A, B and C and multi-vitamins to POWs after August 2000 than before.

120. Preventive care is a matter of particular concern to the Commission. As evidenced by their prominence in Geneva Convention III, regular medical examinations of all POWs are vital to maintaining good health in a closed environment where diseases are easily spread. The Commission considers monthly examinations of the camp population to be a preventive measure forming part of the Detaining Power's obligations under international customary law. [...]

123. The evidence also reflects that Eritrea failed to segregate certain infected prisoners. POWs are particularly susceptible to contagious diseases such as tuberculosis, and customary international law (reflecting proper basic health care) requires that infected POWs be isolated from the general POW population. Several Ethiopian POW declarants describe how tuberculosis patients were lodged with the other POW's, evidence which

was not effectively rebutted by Eritrea. The camp authorities should have detected contagious diseases as early as possible and organized special wards.

124. Accordingly, the Commission holds that Eritrea violated international law from May 1998 until the last Ethiopian POWs were released and repatriated in August 2002, by failing to provide Ethiopian POWs with the required minimum standard of medical care. Consequently, Eritrea is liable for this violation of customary international law.

125. In closing, the Commission notes its recognition that Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict.

7. Unlawful Conditions of Labor

126. Ethiopia claims that Eritrea forced POWs to work in conditions that violated requirements of Articles 13, 14, 26, 27, 49-55, 62, 65 and 66 of Geneva Convention III.

127. Article 49 of Geneva Convention III does not forbid a Detaining Power to compel POWs who are physically fit to work, but it does forbid compelling officers to work. The declarations by former Ethiopian POWs make clear that, while the most seriously disabled were generally excused from work, other sick or wounded POWs who were not physically fit were not excused and were generally forced to work and that officers were forced to work. [...]

133. Finally, Ethiopia asserted that Eritrea required its POWs to perform work of a military character in breach of Article 50 of Geneva Convention III. However, no sufficient evidence has been submitted for this allegation. To build residence houses and other facilities for the camp and the guards is not work of a military character, but concerns the installation of the camp, and is allowed under Article 50. Similarly, under Article 50, roads are considered works of public utility and therefore work on them is permissible, unless it is proven that they have a military character or purpose. Ethiopia did not submit such evidence. Consequently, the Commission does not find that Eritrea breached Article 50 of Geneva Convention III.

134. In conclusion, the Commission holds that Eritrea has subjected Ethiopian POWs to conditions of labour that violated Articles 13, 27, 49, 51, 53, 54 and 62 of Geneva Convention III. Consequently, Eritrea is liable for these unlawful labour conditions.

8. Conditions of Transfer Between Camps

135. The Commission turns next to Ethiopia's allegations that Eritrea treated POWs inhumanely in the course of transfer between camps. As recited by Ethiopia, Articles 46 and 47 of Geneva Convention III require the Detaining Power to conduct transfers humanely. At a minimum, as with evacuation from the front, the Detaining Power should not subject POWs to transfer conditions less favourable than those to which its own forces are subjected. In all circumstances, the Detaining Power must consider the interests of the prisoners so as not to make repatriation more difficult than necessary, and should provide food, water, shelter and medical attention. The sick and wounded should not be transferred if it endangers their recovery, unless mandated by safety reasons.

136. The Ethiopian POW declarations consistently recount hours and days of travel on overcrowded military trucks or buses, over rough roads, in extremes of heat and cold, with few if any toilet breaks and little if any food and water. In rebuttal, Eritrea presented evidence that its own forces, at least to some extent, endured these same difficult transportation conditions, particularly given the lack of paved roads in Eritrea. The Commissioned recognizes that drastically limited Eritrean resources and infrastructure made transfer of prisoners in this conflict unavoidably miserable, but, again, only to some extent.

137. However, the evidence also reflects that, to a certain and critical extent, Eritrea did not do all within its ability to make transfer of the POWs as humane as possible. The evidence indicates that transfers were often accompanied by deliberate physical abuse by guards, and that Eritrea provided no effective measures to prevent such misconduct. The Commission is troubled by accounts, fortunately few, of purposefully cruel treatment: one declaration describes Eritrean soldiers pouring fuel on the bed of transport truck before a twelve-hour trip in open sun. Of even greater concern is the clear and convincing evidence presented by Ethiopia that Eritrean soldiers frequently beat POWs during transfer. Particularly serious is repetitive evidence of Eritrean soldiers beating the sick and wounded. In one case, two declarations recounted the death of one sick Ethiopian prisoner who was thrown from a truck on the transfer from Afabet to Nakfa and left to die.

138. In the absence of effective rebuttal by Eritrea, the Commission finds Eritrea liable for permitting unnecessary suffering of POWs during transfer between camps.

9. Treatment of the Dead

139. Ethiopia, unlike Eritrea, brought separate claims for alleged violations of customary international law requirements following the death of a POW. Specifically citing Articles 120 and 121 of Geneva Convention III, Ethiopia alleged that Eritrea failed to provide medical examination and death certificates for POWs who died in captivity, to investigate potential non-natural causes of death, or to ensure honourable burial with religious rites in marked graves. [...]

10. Failure to Post Camp Rules and Allow Complaints

142. As noted previously, Geneva Convention III establishes an extremely detailed regime. Earlier sections of this Award address Ethiopia's claims alleging violations of core elements of this regime involving killings, physical or mental abuse of POWs, or matters vital to POWs' survival, such as food, housing and medical care.

143. This final section addresses Ethiopia's claims involving two sets of obligations of a somewhat different character. Ethiopia claims violations of requirements to (a) post camp regulations and (b) have complaint procedures. These provisions establish administrative or procedural requirements partly aimed at protecting POWs' rights or at remedying deficiencies. The Commission does not mean to minimize their role in the total scheme of protection under the Convention. Nevertheless, these claims loom less large than many others considered previously.

a. Camp Regulations

144. Article 41 of Geneva Convention III requires every POW camp to post both the Convention and "regulations, orders, notices and publications of every kind," where prisoners may read them in the prisoners' language. Prior to August 14, 2000, the Geneva Convention was not in force between the Parties; the Commission sees no basis to hold that customary law requires the posting of the Convention before that date. However, the Commission finds that there is a customary obligation to post camp regulations in a clear and accessible location and otherwise to ensure that POWs are aware of their rights and obligations. [...]

b. Complaint Procedures

147. Ethiopia also claimed that Eritrea did not provide effective complaint procedures. Article 78 of Geneva Convention III assures POWs the right to "make known" to the military authorities holding them "requests" regarding their conditions. Requests and complaints cannot be limited, cannot be punished, and must be transmitted immediately.

148. Taking account, for instance, of the practice during World War I cited by Ethiopia and the inclusion of this concept in the 1929 Convention, the Commission finds that both customary law and the Convention guarantee POWs right to complain about their conditions of detention free from retribution. Ethiopia's evidence, although not as extensive as on some other more fundamental issues, establishes that this right frequently was not allowed and that complaining prisoners were subjected to severe punishments. [...]

150. Based on clear and convincing evidence, the Commission finds that Eritrea, in violation of its obligations under international law, did not allow Ethiopian POWs held at any of its camps to complain about their conditions and to seek redress. Further, the evidence shows that in all of the camps, but particularly in Nakfa, prisoners who attempted to complain were often subjected to heavy and unlawful sanctions, including segregation from the

rest of the camp population and beatings by guards. Consequently, Eritrea is liable for these violations.

V. AWARD

In view of the foregoing, the Commission determines as follows: [...]

B. Applicable Law

1. With respect to matters prior to Eritrea's accession to the Geneva Conventions of 1949, effective August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949.

2. Whenever either Party asserts that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof will be on the asserting Party.

3. With respect to matters subsequent to August 14, 2000, the international law applicable to this claim is the relevant parts of the four Geneva Conventions of 1949, as well as customary international law. [...]

D. Findings of Liability for Violation of International Law

The respondent is liable to the Claimant for the following violations of international law committed by its military personnel and by other officials of the State of Eritrea:

1. For refusing permission, from May 1998 until August 2000, for the ICRC to send delegates to visit all places where Ethiopian POWs were detained, to register those POWs, to interview them without witnesses, and to provide them with relief and services customarily provided;

2. For failing to protect Ethiopian POWs from being killed at capture or its immediate aftermath;

3. For permitting beatings or other physical abuse of Ethiopian POWs, which occurred frequently at capture or its immediate aftermath;

4. For depriving all Ethiopian POWs of footwear during long walks from the place of capture to the first place of detention;

5. For permitting its personnel to threaten and beat Ethiopian POWs during interrogations, which occurred frequently at capture or its immediate aftermath;

6. For the general confiscation of the personal property of Ethiopian POWs;

7. For permitting pervasive and continuous physical and mental abuse of Ethiopian POWs in its camps from May 1998 until August 2002;

8. For seriously endangering the health of Ethiopian POWs at the Embakala, Digdigta, Afabet and Nakfa camps by failing to provide adequate housing, sanitation, drinking water, bathing opportunities and food;

9. For failing to provide the standard of medical care required for Ethiopian POWs, and for failing to provide required preventive care by segregating prisoners with infectious diseases and conducting regular physical examinations, from May 1998 until August 2002;

10. For subjecting Ethiopian POWs to unlawful conditions of labor;

11. For permitting unnecessary suffering of POWs during transfer between camps; and

12. For failing to allow the Ethiopian POW in its camps to complain about their conditions and to seek redress, and frequently punishing POWs who attempted to complain.

DISCUSSION

1. a. Was the IHL of international armed conflicts applicable to the conflict between Eritrea and Ethiopia? Even though Eritrea was not a party to the Geneva Conventions? (*Cf.* Art. 2 common to the Conventions.)

   b. Was Convention III applicable to that conflict even before 14 August 2000, the date of Eritrea's accession to the Geneva Conventions? Did at least Ethiopia, as a party to the Convention, have to respect it? (*Cf.* Art. 2 common to the Conventions.)

   c. Why did Eritrea not succeed to Ethiopia as a party to the Geneva Conventions?

   d. Are there specific criteria for assessing whether Convention III corresponds to customary international law? Why? Do you agree that the examples offered by Eritrea, mentioned in para. 29 of the Award, do not correspond to customary international law? What requirements of Convention III does the Commission find are not requirements of customary international law?

2. a. What is the legal basis and purpose of the ICRC's right to visit POWs? Does such a right exist even in conflicts where the parties are represented by Protecting Powers? (*Cf.* Arts. 10 (3) and 126 of Convention III.)

   b. Are procedural rules, mechanisms or institutions for implementation prescribed by treaties particularly unlikely to become part of customary international law? Is the ICRC's right to visit POWs such a procedural rule or mechanism of implementation? Why does it nevertheless correspond to customary international law? Is the Commission's conclusion on this issue based on an analysis of State practice? (*Cf.* Art. 126 of Convention III.)

   c. What impact of ICRC visits upon the respect of IHL is shown by the Commission's findings?

3. May persons be protected by both Convention I and III? In which circumstances? (*Cf.* Art. 14 of Convention I.)

4. Is Article 121 of Convention III applicable to the killing of enemy soldiers at the time of capture? Immediately before capture? (*Cf.* Arts. 4 and 13 of Convention III and Art. 41 of Protocol I.)

5. Must the medical care required for POWs be provided according to one single standard or does the standard vary according to the general health standards and resources of the parties involved? Are your thoughts regarding housing, clothing, food, conditions of evacuation, working conditions or criminal proceedings similar to those regarding medical care? (*Cf.* Arts. 15, 20, 25, 26, 27, 30, 51, 82, 87, 102 and 105 of Convention III.)

6. Which are the main fields in which the Commission has found that Eritrea violated IHL? Which of Ethiopia's claims were rejected? For reasons relating to the interpretation of Convention III? For reasons relating to the insufficient severity of the violations? Because the factual basis of those claims could not be established?

7. Is it lawful and appropriate for the Commission not to establish all the violations committed by the parties, but only serious violations? What are the reasons for such a limitation? What do those reasons indicate about Convention III?

8. What are the reasons for the ICRC's refusal to give its consent to the parties to provide the Commission access to its reports? Could the parties have provided those reports to the Commission despite the ICRC's refusal? On what basis do parties to an armed conflict have an obligation to respect the ICRC's confidentiality?

B. Prisoners of War, Eritrea's Claim 17

[**Source:** Eritrea Ethiopia Claims Commission, Partial Award Prisoners of War, Eritrea's Claim 17 between the State of Eritrea and the Federal Democratic Republic of Ethiopia. The Hague, July 1, 2003. The Permanent Court of Arbitration, The Hague. Footnotes omitted. Full Awards available on http://www.pca-cpa.org/ENGLISH/RPC/]

ERITREA ETHIOPIA CLAIMS COMMISSION
PARTIAL AWARD
Prisoners of War
Eritrea's Claim 17
between
The State of Eritrea
and
The Federal Democratic Republic of Ethiopia
The Hague, July 1, 2003

I. INTRODUCTION

A. Summary of the Positions of the Parties

1. This Claim ("Eritrea's Claim 17"; "ERI 17") has been brought to the Commission by the Claimant, the State of Eritrea ("Eritrea"), pursuant to

Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 ("the Agreement"). The Claim seeks a finding of the liability of the Respondent, the Federal Democratic Republic of Ethiopia ("Ethiopia"), for loss, damage and injury suffered by the Claimant as a result of the Respondent's alleged unlawful treatment of its Prisoners of War ("POWs") who were nationals of the Claimant. In its Statement of Claim, the Claimant requested monetary compensation, costs, and such other relief as is just and proper. In its Memorial, the Claimant requests additional relief in the form of order: (a) that the Respondent cooperate with the International Committee of the Red Cross ("ICRC") in effecting an immediate release of all remaining POWs it holds; (b) that the Respondent return personal property of POWs confiscated by it; and (c) that the Respondent desist from displaying information and photographs of POWs to public view.

2. The Respondent asserts that it fully complied with international law in its treatment of POWs. The Respondent denies that the Commission has jurisdiction over claims relating to the repatriation of POWs and over several claims that it alleges were not filed by December 12, 2001, and consequently were extinguished by virtue of Article 5, paragraph 8, of the Agreement. The Respondent also objects to the Claimant's requests for the additional relief in the form of orders as inappropriate and unnecessary and, with respect to repatriation, as beyond the power of the Commission.

B. Ethiopian POW Camps

3. Ethiopia interned a total of approximately 2,600 Eritrean POWs between the start of the conflict in May 1998 and November 29, 2002, when all remaining Eritrean POWs registered by the ICRC were released.

4. Ethiopia utilized six permanent camps, some only briefly: Fiche, Bilate, Feres Mai, Mai Chew, Mai Kenetal and Dedessa. Ethiopia closed each camp upon transfer of the POWs to their next camp.

[...]

C. General Comment by the Commission

11. As the findings in this Award and in the related Award in Ethiopia's Claim 4 describe, there were significant difficulties in both Parties' performance of important legal obligations for the protection of POWs. Nevertheless, the Commission must record an important preliminary point that provides essential context for what follows. Based on the extensive evidence adduced during these proceedings, the Commission believes that both Parties had a commitment for the most fundamental principles bearing on prisoners of war. Both Parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel

who were *hors de combat* were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.

12. There were deficiencies of performance on both sides, sometimes significant, occasionally grave. Nevertheless, the evidence in these cases shows that both Eritrea and Ethiopia endeavored to observe their fundamental humanitarian obligations to collect and protect enemy soldiers unable to resist on the battlefield. The Awards in these cases, and the difficulties that they identify, must be read against this background. [...]

III. JURISDICTION

A. Jurisdiction over Claims Arising Subsequent to December 12, 2000 [...]

20. It is beyond dispute that all the persons who are the subject of the present claims became POWs during the armed conflict that ended with the conclusion of the Agreement on December 12, 2000. The Commission believes that the timely release and repatriation of POWs is clearly among the types of measures associated with disengaging contending forces and ending the military confrontation between the two Parties that fall within the scope of its Decision No. 1. In that connection, international law and practice recognize the importance of the timely release and return of POWs, as demonstrated by Article 118 of Geneva Convention III which requires that such POWs "be released and repatriated without delay following the cessation of active hostilities." [...]

22. The Commission finds unconvincing Ethiopia's further arguments that Article 2 of the Agreement effectively replaced Article 118 of Geneva Convention III as the governing law and that the Commission could not exercise jurisdiction over Eritrea's claim based on Article 118 without thereby deciding whether Ethiopia was in breach of its obligations under Article 2 of the Agreement. It frequently occurs in international law that a party finds itself subject to cumulative obligations arising independently from multiple sources. Article 2 itself recognizes that the relevant repatriation obligations are obligations "under international humanitarian law, including the 1949 Geneva Conventions...." Article 5 of the Agreement grants the Commission jurisdiction over all claims related to the conflict that result from violations of the 1949 Geneva Conventions or from other violations of international law. The Commission finds no basis in the text of either Article 2 or Article 5 for the conclusion that its jurisdiction over claims covered by Article 5 is repealed or impaired by the provisions of Article 2. Consequently, the Commission finds that it has jurisdiction over Eritrea's claims concerning the repatriation of POWs. Nevertheless, in dealing with those claims, the Commission shall exercise care to avoid assuming or exercising jurisdiction over any claims concerning compliance with Article 2 of the Agreement.

IV. THE MERITS

A. Applicable Law [...]

41. Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law, as exemplified by the relevant parts of the four Geneva Conventions of 1949.The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defences is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of those Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party. [...]

C. Violations of the Law [...]

2. Mistreatment of POWs at Capture and its Immediate Aftermath [...]

a. Abusive Treatment

59. The forty-eight Eritrean POW declarations recount a few disquieting instances of Ethiopian soldiers deliberately killing POWs following capture. Three declarants gave eyewitness accounts alleging that wounded comrades were shot and abandoned to speed up evacuation.

60. The Commission received no evidence that Ethiopian authorities conducted inquiries into any such battlefield events or pursued discipline as required under Article 121 of Geneva Convention III. However, several Eritrean POW declarants described occasions when Ethiopian soldiers threatened to kill Eritrean POWs at the front or during evacuation, but either restrained themselves or were stopped by their comrades. Ethiopia presented substantial evidence regarding the international humanitarian law training given to its troops. The accounts of capture and its immediate aftermath presented to the Commission in this Claim suggest that this training generally was effective in preventing unlawful killing, even "in the heat of the moment" after capture and surrender.

61. On balance, and without in any way condoning isolated incidents of unlawful killing by Ethiopian soldiers, the Commission finds that there is not sufficient corroborated evidence to find Ethiopia liable for frequent or recurring killing of Eritrean POWs at capture or its aftermath.

62. In contrast, Eritrea did present clear and convincing evidence, in the form of cumulative and reinforcing accounts in the Eritrean POW declarations, of frequent physical abuse of Eritrean POWs by their captors both at the front and during evacuation. A significant number of the declarants reported that Ethiopian troops threatened and beat Eritrean prisoners, sometimes brutally and sometimes inflicting blows directly to wounds. In some cases, Ethiopian soldiers deliberately subjected Eritrean POWs to verbal and

physical abuse, including beating and stoning from civilian crowds in the course of transit.

63. This evidence of frequent beatings and other unlawful physical abuse of Eritrean POWs at capture or shortly after capture is clear, convincing and essentially unrebutted. Although the Commission has no evidence that Ethiopia encouraged its soldiers to abuse POWs at capture, the conclusion is unavoidable that, at a minimum, Ethiopia failed to take effective measures, as required by international law, to prevent such abuse. Consequently, Ethiopia is liable for that failure.

b. Medical Care Immediately After Capture

64. The Commission turns next to Eritrea's allegations that Ethiopia failed to provide necessary medical attention to Eritrean POWs after capture and during evacuation, as required under customary law as reflected in Geneva Conventions I (Article 12) and III (Articles 20 and 15). Some fourteen of the Eritrean declarants testified that their wounds or their comrades' wounds were not bandaged at the front or cleaned in the first days and weeks after capture, in at least one case apparently leading to death after a transit journey. In rebuttal, Ethiopia offered evidence that its soldiers carried bandages and had been trained to wrap wounds to stop bleeding, but not to wash wounds immediately at the front because of the scarcity of both water and time.

65. The Commission believes that the requirement to provide POWs with medical care during the initial period after capture must be assessed in light of the harsh conditions on the battlefield and the limited extent of medical training and equipment available to front line troops. On balance, and recognizing the logistical and resource limitations on the medical care Ethiopia could provide at the front, the evidence indicates that, on the whole, Ethiopian forces gave wounded Eritrean soldiers basic first aid treatment upon capture. Hence, Ethiopia is not liable for this alleged violation.

c. Evacuation Conditions [...]

68. On balance, and with one exception, the Commission finds that Ethiopian troops satisfied the legal requirements for evacuations from the battlefield under the harsh geographic, military and logistical circumstances. The exception is the frequent, but not invariable, Ethiopian practice of seizing footwear, testified to by several declarants. Although the harshness of the terrain and weather on the marches to the camps may have been out of Ethiopia's control, to force the POWs to walk barefoot in such conditions unnecessarily compounded their misery. Although Ethiopia suggested, in the context of transit camps, that it is permissible to restrict shoes to prevent escape, the ICRC Commentary is to the contrary, and Ethiopia has claimed against Eritrea for the same offense. The Commission finds Ethiopia liable for inhumane treatment during evacuations from the battlefield as a result of its

forcing Eritrean POWs to go without footwear during evacuation marches. [...]

d. Coercive Interrogation

70. Eritrea alleges frequent abuse in Ethiopia's interrogation of POWs, commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."

71. However, only a very small number of Eritrean declarants testified that they were beaten or seriously threatened during interrogation. Without condoning any isolated incidents of abuse, the Commission finds that the evidence was insufficient to show a pattern of coercive interrogation of POWs at capture or thereafter.

3. Taking of the Personal Property of POWs

72. Eritrea alleges widespread confiscation by Ethiopian soldiers of POWs' money and other valuables, and of photographs and identity cards, either at the time of capture or thereafter. Eritrea accordingly asked the Commission to "order the return of all irreplaceable personal property to Eritrean POWs that was confiscated by Ethiopia ..., and in particular that Ethiopia return identity documents and personal photographs displayed on the Internet." [...]

76. Weighing the conflicting evidence, the Commission finds that it shows that personal property frequently was taken from Eritrean prisoners by Ethiopian military personnel, without receipts or any hope of return, all contrary to Articles 17 and 18 of Geneva Convention III. Sometimes this occurred at the front soon after capture, where such thefts have been all too common during war as the independent actions of rapacious individuals. However, the Commission is troubled by evidence of taking of personal property at transit facilities and after arrival at permanent camps and by evidence that property for which receipts were given was not returned or was partly or fully "lost." The conflicting evidence obviously cannot be fully reconciled.

77. The Commission concludes that Ethiopia made efforts to protect the rights of POWs to their personal property, but that these efforts fell short in practice of what was necessary to ensure compliance with the relevant requirements of Geneva Convention III. Consequently, Ethiopia is liable to Eritrea for the resulting losses suffered by Eritrean POWs. [...]

4. Physical and Mental abuse of POWs in Camps [...]

81. Even if one were to give full credibility to the evidence submitted by Eritrea, the evidence as a whole indicates that the Ethiopian POW camps were not characterized by a high level of physical abuse by the guards. The evidence does suggest that there were some incidents of beating and that disciplinary punishments were sometimes imposed contrary to Article 96 of Geneva

Convention III in that they were decided by Ethiopian guards, rather than by camp commanders or officers to whom appropriate authority had been delegated or that the accused had been denied the benefit of the rights granted by that Article. The disciplinary punishments themselves appear to have been a mixture of clearly legitimate punishments, such as solitary confinement of less than one month and fatigue duties, such as digging, unloading cargo at the camp or carrying water to the camp, along with punishments of questionable legality, such as running, crawling and rolling on the ground. Moreover, there are allegations that some penalties, such as running, crawling or rolling on the ground in the hot sun, even if they could properly be considered fatigue duties, which seem doubtful, were painful and exceeded the limits permitted by Article 89 of Geneva Convention III. That Article permits fatigue duties not exceeding two hours daily as disciplinary punishments of POWs other than officers, but fatigue duties, as well as the other authorized punishments, become unlawful if they are "inhuman, brutal or dangerous to the health" of the POWs. The Commission lacks sufficient evidence to determine whether the punishments actually imposed upon Eritrean POWs violated that standard. [...]

82. [...] Considering all relevant evidence, the Commission holds that the Claimant has failed to prove by clear and convincing evidence that Ethiopia's POW camps, despite the likely inconsistencies, noted above, with the requirements of Articles 89 and 96 of the Convention, were administered in such a way as to give rise to liability for frequent or pervasive physical abuse of POWs. [...]

84. Regrettably, the Commission's finding regarding physical abuse does not apply as well to mental abuse. Ethiopia admits that its camps were organized in a manner that resulted in the segregation of various groups of POWs from each other. It is acknowledged that POWs who had been in the armed forces during the much earlier fighting against the Derg were kept isolated from POWs who began their military service later, and there is some evidence that other groups were also segregated depending upon the years in which the POWs began their military service. Such segregation is contrary to Article 22 of Geneva Convention III, which states that "prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent." Ethiopia argues that this segregation was done to reduce hostility between the groups, but the Commission finds that argument unpersuasive. It seems far more likely that these actions were taken to promote defections of POWs and to break down any sense of internal discipline and cohesion among the POWs.

85. In that connection, the Commission notes that Ethiopia conducted extensive indoctrination programs for the various groups of POWs in Bilate, Mai Chew, Mai Kenetal and Dedessa and encouraged the discussion among groups of POWs of questions raised in these programs, including the responsibility for starting the war and the nature of the Eritrean Government. While Ethiopia asserts that attendance at these indoctrination and discussion sessions was

not compulsory, there is considerable evidence that, except for sick or wounded POWs, attendance was effectively made compulsory by Ethiopia, contrary to Article 38 of Geneva Convention III. Moreover, there is substantial evidence that POWs were sometimes put under considerable pressure to engage in self-criticism during the discussion sessions. While there are some allegations that those POWs who made statements that appealed to the Ethiopian authorities were subsequently accorded more favorable treatment than those who refused to make such statements, the Commission does not find sufficient evidence to prove such a violation of the fundamental requirement of Article 16 of Geneva Convention III that all POWs must be treated alike, "without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria." Nevertheless, the Commission notes with concern the evidence of mental and emotional distress felt by many Eritrean POWs and concludes that such distress was caused in substantial part by these actions by Ethiopia in violation of Articles 22 and 38 of the Convention.

86. Consequently, Ethiopia is liable for the mental and emotional distress caused to Eritrean POWs who were subjected to programs of enforced indoctrination from the date of the first indoctrination sessions at the Bilate camp in July 1998 until the release and repatriation of the last POWs in November 2002. The evidence indicates that this group includes essentially all of the POWs held by Ethiopia at the four named camps, except for those unable to attend the indoctrination sessions due to their medical conditions.

5. Unhealthy Conditions in Camps [...]

c. Analysis of Health-Related Conditions at Each of Ethiopia's POW Camps

92. While there is certainly some disturbing testimony to support Eritrea's claim that Ethiopia's northern, short term POW camps at Feres Mai and Mai Chew were in serious violation of one or more basic health standards, the Commission finds the evidence relating to these camps insufficient to justify a finding that conditions there seriously endangered the health of POWs.

93. Mai Kenetal presents a different picture. Its commander testified in writing that the site for the camp was selected because it was close to an arterial road linking the camp to Mekele and Addis Ababa to the south, and because the location included a number of administrative buildings which had been vacated by the Mai Kenetal wereda government. Despite these advantages, two circumstances combined to impose great difficulties on the camp's administrators: first, Mai Kenetal was put into operation at the onset of the winter season in Northern Ethiopia - a three-month period characterized, at times, by torrential rains, high winds and cold temperatures; second, in May 2000, Ethiopia launched a major offensive which produced, quite rapidly, an unanticipated camp population of around 2,000 POWs - a development which strained the resources of the camp during difficult climatic conditions. [...]

95. Nearly all POWs who were not wounded were housed in tents, of varying size, made up of plastic sheeting propped up by wooden poles. It is undisputed that there was no flooring; that prisoners slept on the damp ground; that prisoners were provided with only one or two blankets; that the plastic tents were inadequate to keep out the rain; that some tents blew down in the high winds; that during much of the time these quarters were quite cold and damp and even muddy; and, that they were seriously overcrowded. [...]

97. At least twenty POWs testified regarding unsanitary toilet conditions. These facilities consisted of holes dug in the ground and covered by sheets of wood with holes cut into them, and sheltered from the rains by plastic tenting. The holes regularly became filled with rain water and mud, and there is also cumulative testimony that the ground under many of the toilet tents became muddy and contaminated and that these conditions exacerbated the hardships suffered by those POWs who lacked shoes. At least ten POWs testified that flooded toilets affected their conditions of shelter. [...]

99. There is little dispute about the content of the diet offered at Mai Kenetal. It consisted of bread and tea in the morning and bread and lentils for lunch and dinner. Overwhelmingly, the thirty-eight POWs who testified about conditions at Mai Kenetal complained about the inadequacy of this diet. Many say they were in a state of constant hunger. Many assert this diet produced serious malnutrition, which, combined with other conditions, facilitated contagious diseases, notably tuberculosis. Nearly all of the thirty-eight POWs also claim that the medical facilities provided were inadequate in terms of qualified personnel, medical supplies and other resources necessary to treat the many sick or wounded POWs at Mai Kenetal. While complaints regarding food and medical care were regularly levelled at the administration of all camps by POWs from both sides, it does appear from considerable cumulative testimony that there was serious hunger and sickness at Mai Kenetal. For example, at least twenty POWs claimed that they suffered from diarrhea. Many others complained that tuberculosis became widespread and that POWs suffering from this disease were housed in the overcrowded tents rather than isolated in facilities set up for medical care of that disease.

100. Ethiopia made extensive efforts to discredit and rebut this evidence, [...]. [...] They testified that clothing in the form of coveralls, as well as shoes and a mat and two blankets, were issued to each POW. They assert that drinking water was at first piped from the wells at Mai Kenetal village into the camp, but then the new wells were dug at the camp, and that the water from these wells - despite some complaints by POWs - was chlorinated, potable and plentiful. They also assert that showers were available for bathing. Each of these officers further stated that ICRC teams regularly visited the camps and made no serious complaints about its conditions. The Commission notes that this is a specific instance where access to the relevant ICRC reports would have been very helpful.

101. It is clear that these officers were aware of their duties, and the Commission may assume they did their best to maintain the health of the POWs under difficult circumstances. Much of their testimony can be credited if one assumes, as the evidence justifies, that the steps taken to improve the conditions of the POWs came towards the end of the relatively brief period in which the camp was in operation. But the cumulative, reinforcing, detailed testimony of so many POWs persuades the Commission that, despite the efforts of the camp's staff, a combination of serious, sub-standard health conditions did exist at Mai Kenetal for some time, that these conditions seriously and adversely affected the health of some POWs there and endangered the health of others, and that this situation constituted a violation of customary international law. [...]

105. Nearly all of the Eritrean prisoners were ultimately interned at Dedessa. This camp had originally been constructed during the Derg era as a military training base. It was put into operation as a POW camp in June 1999 and remained so until all prisoners were finally repatriated in November 2002. There are thirty-eight declarations describing health-related conditions at this camp. While some allege serious deficiencies regarding sanitation, shelter and lack of shoes, these complaints are contradicted or mitigated by the testimony of others. Weighing the evidence, the Commission finds insufficient evidence to support a finding that the camp was in serious violation of health-related standards. Evidence regarding the food provided at Dedessa is discussed in the context of Eritrea's general claim regarding the insufficiency of the diet provided to prisoners during their entire captivity.

d. Eritrea's General Claim Regarding the Insufficiency of the Food Provided to Eritrean POWs During the Entire Period of their Captivity

106. In its Statement of Claim and Memorial, Eritrea appears to claim that, throughout their captivity, Eritrean POWs were provided food which was insufficient in "quantity, quality, and variety to keep them in good health and prevent loss of weight." This claim does not require a finding that the food provided by every internment camp was so inadequate in quantity or quality and variety that the health of POWs in each camp was endangered. Rather, the task of the Commission is to determine whether there is clear and convincing evidence that the food provided at all camps was such that, over time, the health of some POWs came to be seriously endangered because of an insufficiency of food in quantity, quality or variety. [...]

114. In conclusion, the Commission holds, first, that the health standards at the POW camp at Mai Kenetal seriously and adversely affected the health of a number of the POWs there and endangered the health of others in violation of applicable international humanitarian law; and second, that the food provided by Ethiopia to POWs at all camps prior to December 2000 was sufficiently deficient in needed nutrition, over time, as to endanger seriously the health of Eritrean POWs in violation of applicable international humanitarian law. Consequently, Ethiopia is liable for the unlawful health standards at Mai Kenetal and, prior to December 2000, for providing food so

inadequate in nutrition that, over time, it seriously endangered the health of all Eritrean POWs.

6. Inadequate Medical care in Camps [...]

c. The Commission's Conclusions

128. Despite the substantial amount of evidence and hearing time devoted to medical care in Eritrea's claim, the Commission had difficulty in determining the availability and quality of medical care in the Ethiopian POW camps. Focusing on specifics did not prove necessarily helpful. For example, the evidence of psychological/psychiatric problems does not prove that Ethiopia failed to provide appropriate care; lengthy captivity can be psychologically very disturbing, and psychological care after repatriation is frequently indicated. The discussion of sympathetic ophthalmia was clearly very narrow. The hospital records submitted by Ethiopia do not establish that all POWs in need of specialized treatment were, in fact, referred to hospitals, but only that some were. Although a few Eritrean declarants complained about insufficient medical staffing, other evidence showed that camp infirmaries were staffed by one or more medical doctors and paramedics; a detained Eritrean doctor was involved in caring for the Eritrean POWs. [...]

130. First, in response to questioning, Ethiopia indicated that, to the best of its knowledge, twenty Eritrean POWs died while in captivity in Ethiopia. The Eritrean POW declarants frequently allege, especially with regard to Mai Kenetal (the seriously inadequate conditions of which the Commission discusses above), that deaths resulted from lack of medical attention. As regrettable as each and every death is, the Commission finds that a death ratio of less than one percent - in a total population of some 2,600 POWs, many seriously wounded - does not in itself indicate substandard medical care.

131. Second, the Commission was struck by the detailed testimony of the Eritrean doctors who examined the Eritrean POWs repatriated after hostilities ended in December 2000. They were of the firm opinion that these wounded and sick POWs could not have received required medical care. They testified that, of the 359 POWs they examined, twenty-two had tuberculosis - a very high ratio. They also testified that the POWs showed signs of malnutrition, which had adversely affected their health, contributed to the development of tuberculosis and scurvy, and left many unready for necessary surgery until they could put on weight. The doctors also found that nearly one-half of the POWs they examined had fractures that had not been properly treated, evidenced by non-union or mal-union of the bones. Although Ethiopia responded that fractures sometimes could not heal properly for reasons beyond its control, for example, because of unavoidable delays in evacuation, the Eritrean doctors countered that many of the post-repatriation orthopedic operations have been successful; if those operations had been done earlier, while the patients were in Ethiopia's custody, they could have been even more successful.

132. Finally, preventive care is a matter of particular concern to the Commission. As evidenced by their prominence in Geneva Convention III, regular medical examinations of all POWs are vital to maintaining good health in a closed environment where diseases are easily spread. The Commission considers monthly examinations of the camp population to be a preventive measure forming part of the Detaining Power's obligations under international customary law.

133. The Commission must conclude that Ethiopia failed to take several important preventive care measures specifically mandated by international law. In assessing this issue, the Commission looked not just to Eritrea but also to Ethiopia, which administered the camps and had the best knowledge of its own practices. [...]

136. In conclusion, on the basis of clear and convincing evidence, including the essentially unrebutted evidence of the prevalence of malnutrition, tuberculosis and improperly treated fractures and the absence of required preventive care, the Commission finds that Ethiopia failed to provide Eritrean POWs with the required minimum standard of medical care prior to December 2000. Consequently, Ethiopia is liable for this violation of customary international law.

137. In comparison, Eritrea has failed to prove that the medical care provided to Eritrean POWs after December 2000 was less than required by applicable law. In response to Eritrea's allegations, Ethiopia submitted considerable rebuttal evidence of the increased medical care it provided at Mai Kenetal and Dedessa from December 2000 through repatriation of the remaining POWs in November 2002. The evidence indicated that approximately forty medical personnel staffed the Mai Kenetal clinic and that some POW patients were taken to a local hospital. The evidence also indicated that POWs with tuberculosis or other contagious diseases were isolated at Mai Kenetal and Dedessa and that, contrary to Eritrea's allegation, medical equipment was sterilized before each use. With respect to medical care at Dedessa, Ethiopia presented medical records rebutting the specific complaints made in a number of the Eritrean declarations.

138. In closing, the Commission notes its recognition that Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict.

7. Unlawful Assault on Female POWs

139. Eritrea brings a discrete claim for the alleged unlawful assault of female POWs, alleging in its Statement of Claim that Ethiopian soldiers raped female POWs and, in one case, raped and killed a female prisoner at Sheshebit on the Western Front. The Parties agree that Article 14 of Geneva

Convention III, which provides that POWs are "entitled in all circumstances to respect for their person and their honor" and that women "shall be treated with all the regard due to their sex," prohibits sexual assault of female POWs. [...]

141. The Commission finds that Eritrea has not presented clear and convincing evidence of rape, killing or other assault aimed at female POWs. Given the small number of female Eritrean POWs, the Commission has not looked for systematic or widespread abuse of women. The fact remains, however, that not one of the female Eritrean declarants stated explicitly or - more importantly, given the sensitivities - even implicitly that she was sexually assaulted, or that any other female prisoner she knew was assaulted. Some male Eritrean declarants described occasional or frequent screaming from the women's quarters, but did not (and perhaps could not) observe Ethiopian guards entering or leaving. Several declarants described abuse of women that, although serious in its own right, was unrelated to their gender. Eritrea failed to submit evidence documenting the one rape and murder alleged in the Statement of Claim. Ethiopia defended these claims, in large part, by presenting detailed evidence that there were separate quarters for women in the camps, which were inspected only by senior camp officials in pairs.

142. Accordingly, and without in any way undermining its recognition of the particular vulnerability of female POWs, the Commission does not find Ethiopia liable for breaching customary international law obligations to protect the person and honor of female Eritrean POWs.

8. Delayed Repatriation of POWs

143. The Commission has determined in this Award that Eritrea's claims regarding the timely release and repatriation of POWs are within its jurisdiction under the Agreement and Commission Decision No. 1.

144. In its Statement of Claim, Eritrea alleged that Ethiopia failed to release and repatriate POWs without delay after December 12, 2000. In its Memorial, Eritrea asked the Commission to "order Ethiopia to cooperate with the International Committee of the Red Cross in effecting an immediate release and repatriation of all POWs...." However, on November 29, 2002, shortly before the hearing in this claim, Ethiopia released all POWs registered by the ICRC remaining in its custody. While some chose to remain in Ethiopia for family or other reasons, 1,287 returned to Eritrea. During the hearing, counsel for Eritrea expressed Eritrea's great pleasure at this action. The Commission too welcomes this important and positive step by Ethiopia, which rendered moot Eritrea's request for an order regarding repatriation. Nevertheless, Eritrea's claim that Ethiopia failed to repatriate the POWs it held as promptly as required by law remains.

145. As noted above, Eritrea acceded to the four Geneva Conventions of 1949 effective August 14, 2000, so they were in force between the Parties after that date. Article 118 of Geneva Convention III states that "[p]risoners of war

shall be released and repatriated without delay after the cessation of active hostilities". The Parties concluded an Agreement on the Cessation of Hostilities on June 18, 2000. However, the Commission received no evidence regarding implementation of that agreement and could not assess whether it marked an end to active hostilities sufficiently definitive for purposes of Article 118.

146. By contrast, Article 1 of the December 12, 2000, Agreement states that "[t]he parties shall permanently terminate military hostilities between themselves." Given the terms of this Agreement and the ensuing evolution of the Parties' relationship, including the establishment and work of this Commission, the Commission concludes that as of December 12, 2000, hostilities ceased and the Article 118 obligation to repatriate "without delay" came into operation.

147. Applying this obligation raises some issues that were not thoroughly addressed during the proceedings, in part because Eritrea focused on the return of POWs still detained, which was mooted on the eve of the hearing, while Ethiopia consistently relied on the argument that these claims were outside the Commission's jurisdiction, a defense that the Commission has now rejected. Nevertheless, given their everyday meaning and the humanitarian object and purpose of Geneva Convention III, these words indicate that repatriation should occur at an early time and without unreasonable or unjustifiable restrictions or delays. At the same time, repatriation cannot be instantaneous. Preparing and coordinating adequate arrangements for safe and orderly movement and reception, especially of sick or wounded prisoners, may be time-consuming. Further, there must be adequate procedures to ensure that individuals are not repatriated against their will.

148. There is also a fundamental question whether and to what extent each Party's obligation to repatriate depends upon the other's compliance with its repatriation obligations. The language of Article 118 is absolute. Nevertheless, as a practical matter, and as indicated by state practice, any state that has not been totally defeated is unlikely to release all the POWs it holds without assurance that its own personnel held by its enemy will also be released, and it is unreasonable to expect otherwise. At the hearing, distinguished counsel for Eritrea suggested that the obligation to repatriate should be seen as unconditional but acknowledged the difficulty of the question and the contrary arguments under general law.

149. The Commission finds that, given the character of the repatriation obligation and state practice, it is appropriate to consider the behavior of both Parties in assessing whether or when Ethiopia failed to meet its obligations under Article 118. In the Commission's view, Article 118 does not require precisely equivalent behavior by each Party. However, it is proper to expect that each Party's conduct with respect to the repatriation of POWs will be reasonable and broadly commensurate with the conduct of the other. Moreover, both Parties must continue to strive to ensure compliance with the basic objective

of Article 118 - the release and repatriation of POWs as promptly as possible following the cessation of active hostilities. Neither Party may unilaterally abandon the release and repatriation process or refuse to work in good faith with the ICRC to resolve any impediments.

150. The Parties submitted limited evidence regarding this claim, a fact that complicates some key judgements by the Commission. As noted, until the eve of the hearing, Eritrea's emphasis was on the release of POWs still being held, while Ethiopia argued that the whole matter was outside the jurisdiction of the Commission. [...] [T]he Parties, acting with the assistance of the ICRC, began a substantial process of repatriation in both directions promptly after December 12, 2000. Between December 2000 and March 2001, Ethiopia repatriated 855 Eritrean POWs, 38 percent of the total number it eventually repatriated. Eritrea repatriated a smaller number of Ethiopian POWs (628), but they constituted 65 percent of the total eventually repatriated by Eritrea.

151. After March 2001, the process halted for a substantial period. It then resumed in October 2001 with two small repatriations by each Party. Eritrea repatriated all remaining Ethiopian POWs in August 2002. This was followed by the November 2002 Ethiopian repatriation noted above. (The only repatriation of POWs prior to December 2000 was in August 1998 when Eritrea repatriated seventy sick or wounded POWs to Ethiopia.) [...]

153. The record is unclear regarding the circumstances of the interruption and eventual resumption of repatriations. The record includes an August 3, 2001, press report that the Ethiopian Ministry of Foreign Affairs had stated that Ethiopia was suspending the exchange of POWs with Eritrea until Eritrea clarified the situation of an Ethiopian pilot and thirty-six militia and police officers who it understood had been captured by Eritrea in 1998, but whose names were not included in the lists of POWs held by Eritrea that it had received from the ICRC. Eritrea responded that it would also halt further repatriation of Ethiopian POWs but that it was willing to resume repatriations when Ethiopia did so. [...] [T]here were several small repatriations of POWs in October and November 2001 and in February 2002, but it seems clear that the repatriation of the bulk of the remaining POWs was held up for twelve months or more by a dispute over the accounting for these missing persons or other matters not in the record before this Commission.

154. There was conflicting evidence regarding the details of the pilot's capture, but it was common ground that he had been captured and made a POW. The Commission received no direct evidence concerning his fate. Eritrea's Memorial states that "Ethiopia was repeatedly informed about the death of the individual in question by the facilitators in the peace process." The Memorial does not indicate when Eritrea believes that may have occurred, nor does it provide evidence that it, in fact, did occur. Ethiopia's Counter-Memorial does not respond to that statement or directly address the fate of the pilot and other personnel. Neither Party offered documentary or testimonial evidence on this point.

155. Communications between the Parties concerning the delay in repatriations were presumably transmitted through the ICRC but, unfortunately, they have not been made available to the Commission. However, press reports in the record suggest that, at some point, the dispute may have been narrowed to the missing pilot. In particular, documents introduced by Eritrea indicate that, on May 8, 2002, Professor Jacques Forster, Vice President of the ICRC, stated at a press conference at the end of a visit in Ethiopia that the ICRC was concerned by a "slowdown on the part of both countries" in the repatriation of POWs. However, as of that time, in the ICRC's view, "Ethiopia was not in violation of the four Geneva Conventions by failing to repatriate POWs."

156. On July 16, 2002, the Prime Minister of Ethiopia confirmed in a press conference that the "stumbling block" to the completion of the exchange of POWs was the lack of response by Eritrea to what happened to the pilot. The next month, the dispute was evidently resolved. An ICRC press release, dated August 23, 2002, states the following:

> Geneva (ICRC) - The President of the International Committee of the Red Cross (ICRC) Mr Jakob Kellenberger, has today completed his first visit to the region since the end of the international armed conflict between the two countries in 2000. During his official visits to Eritrea and Ethiopia, Mr Kellenberger met Eritrean President Isaias Afewerki in Asmara on 20 August, and Ethiopian President Girma Wolde Georgis and Prime Minister Meles Zenawi in Addis Ababa on 22 August.
>
> The ICRC President's main objective in both capitals was to ensure the release and repatriation of all remaining Prisoners of War (POWs) in accordance with the Third Geneva Convention and the peace agreement signed in Algiers on 12 December 2000.
>
> During his meeting with Eritrean President Isaias Afewerki, Mr Kellenberger took note of Mr Afewerki's commitment to release and repatriate the Ethiopian POWs held in Eritrea. The release and repatriation of the POWs, registered and visited by the ICRC, will take place next week.
>
> During his meeting with Mr Kellenberger, Ethiopian Prime Minister Meles Zenawi expressed his government's commitment to release and repatriate the Eritrean POWs held in Ethiopia and other persons interned as a result of the conflict. Release and repatriation will take place upon completion of internal procedures to be worked out with the ICRC.
>
> In both capitals, Mr Kellenberger reiterated the ICRC's strong commitment to helping resolve all remaining issues related to persons captured or allegedly captured during the conflict.
>
> The ICRC welcomes the decisive steps taken towards the prompt return of the POWs to their home country and to their families, and looks forward to facilitating the release and repatriation they have been so anxiously awaiting for close to eighteen months.

157. While Eritrea promptly released and repatriated its remaining POWs in late August 2002, Ethiopia waited three months, until November 29, 2002, to release the remainder of its POWs and to repatriate those desiring repatriation. This three-month delay was not explained.

158. In these circumstances, the Commission concludes that Ethiopia did not meet its obligation promptly to repatriate the POWs it held, as required by

law. However, the problem remains to determine the date on which this failure of compliance began, an issue on which Eritrea has the burden of proof. Eritrea did not clearly explain the specific point at which it regarded Ethiopia as having first violated its repatriation obligation, and Ethiopia did not join the issue, in both cases for reasons previously explained. The lack of discussion by the Parties has complicated the Commission's present task.

159. Eritrea apparently dates the breach from Ethiopia's decision in August 2001 to suspend further repatriation of POWs until Eritrea clarified the fate of a few persons who Ethiopia believed to have been captured by Eritrea in 1998 but who were not listed among POWs held by Eritrea. Eritrea argues that concerns about the fate of a relatively few missing persons cannot justify delaying for a year or more the release and repatriation of nearly 1,300 POWs. It also asserts that Ethiopia's suspension of POW exchanges cannot be justified as a non-forcible counter-measure under the law of state responsibility because, as Article 50 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts emphasizes, such measures may not affect "obligations for the protection of fundamental human rights," or "obligations of a humanitarian character prohibiting reprisals." Likewise, Eritrea points out that this conduct cannot be a permitted reprisal under the law of armed conflict; Article 13 of Geneva Convention III emphazises that "measures of reprisal against prisoners of war are prohibited." As noted, Ethiopia defended this claim on jurisdictional grounds and consequently has not responded to these legal arguments.

160. Eritrea's arguments are well founded in law. Nevertheless, they are not sufficient to establish that Ethiopia violated its repatriation obligation as of August 2001. In particular, the Commission is not prepared to conclude that Ethiopia violated its obligation under Article 118 of Geneva Convention III by suspending temporarily further repatriations pending a response to a seemingly reasonable request for clarification of the fate of a number of missing combatants it believed captured by Eritrea who were not listed as POWs. Eritrea presented no evidence indicating that it sought to respond to these requests, or to establish that they were unreasonable or inappropriate.

161. In this connection, the Commission must give careful attention and appropriate weight to the position of the ICRC. As noted above, ICRC Vice-President Forster stated in May 2002 that, as of that time, the ICRC did not regard Ethiopia as being in breach of its repatriation obligation. Eritrea did not address that statement. The ICRC's conclusion is particularly worthy of respect because the ICRC was in communication with both Parties and apparently had been the channel for communications between them on POW matters. Consequently, the ICRC presumably had a much fuller appreciation of the reasons for the delay in repatriations than is provided by the limited record before the Commission.

162. While the length of time apparently required to resolve this matter is certainly troubling, on the record before it the Commission is not in a position to disagree with the conclusion of the ICRC or to conclude that Ethiopia alone was responsible for the long delay in the repatriations that ended when Eritrea repatriated its remaining Ethiopian POWs in August 2002. Consequently, the claim that Ethiopia violated its repatriation obligation under Article 118 of Geneva Convention III by suspending repatriation of POWs in August 2001 must be dismissed for failure of proof.

163. However, in view of the ICRC press release of August 23, 2002, and the repatriation of all remaining Ethiopian POWs in that same month, the Commission sees no legal justification for the continued prolonged detention by Ethiopia of the remaining Eritrean POWs. Ethiopia waited until November 29, 2002, to release and repatriate the remaining Eritrean POWs. Ethiopia has not explained this further delay, and the Commission sees no justification for its length. While several weeks might understandably have been needed to make the necessary arrangements with the ICRC and, in particular, to verify that those who refused to be repatriated made their decision freely, the Commission estimates that this process should not have been required more than three weeks at the most. Consequently, the Commission holds that Ethiopia violated its obligations under Article 118 of Geneva Convention III by failing to repatriate 1,287 POWs by September 13, 2002, and that it is responsible to Eritrea for the resulting delay of seventy-seven days.

V. AWARD

In view of the foregoing, the Commission determines as follows:

[...]

B. Applicable Law

1. With respect to matters prior to Eritrea's accession to the Geneva Conventions of 1949 on August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by relevant parts of the four Geneva Conventions of 1949.

2. Whenever either Party asserts that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof will be on the asserting Party.

3. With respect to matters subsequent to August 14, 2000, the international humanitarian law applicable to this claim is relevant parts of the four Geneva Conventions of 1949, as well as customary international law. [...]

D. Findings of Liability for Violation of International Law

The Respondent is liable to the Claimant for the following violations of international law committed by its military personnel and by other officials of the State of Ethiopia:

1. For failing to take effective measures to prevent incidents of beating or other unlawful abuse of Eritrean POWs at capture or its immediate aftermath;
2. For frequently depriving Eritrean POWs of footwear during long walks from the place of capture to the first place of detention;
3. For failing to protect the personal property of Eritrean POWs;
4. For subjecting Eritrean POWs to enforced indoctrination from July 1998 to November 2002 in the camps at Bilate, Mai Chew, Mai Kenetal and Dedessa;
5. For permitting health conditions at Mai Kenetal to be such as seriously and adversely to affect or endanger the health of the Eritrean POWs confined there;
6. For providing all Eritrean POWs prior to December 2000 a diet that was seriously deficient in nutrition;
7. For failing to provide the standard of medical care required for Eritrean POWs, particularly at Mai Kenetal, and for failing to provide required preventive care by segregating from the outset prisoners with infectious diseases and by conducting regular physical examinations, from May 1998 until December 2000; and
8. For delaying the repatriation of 1,287 Eritrean POWs in 2002 for seventy-seven days longer than was reasonably required. [...]

DISCUSSION

1. a. Was the IHL of international armed conflicts applicable to the conflict between Eritrea and Ethiopia?

   b. Was Convention III applicable to that conflict even before 14 August 2000, the date of Eritrea's accession to the Geneva Conventions? Did at least Ethiopia, as a party to the Convention, have to respect it? (*Cf.* Art. 2 common to the Conventions.)

2. Which are the main fields in which the Commission has found that Ethiopia violated IHL? Which of Eritrea's claims were rejected? For reasons relating to the interpretation of Convention III? For reasons relating to the insufficient severity of the violations? Because the factual basis of those claims could not be established?

3. a. Must the medical care required for POWs be provided according to one single standard or does the standard vary according to the general health standards and resources of the parties involved? Are your thoughts regarding housing, clothing, food, conditions of evacuation, working conditions or criminal proceedings similar to those regarding medical care? (*Cf.* Arts. 15, 20, 25, 26, 27, 30, 51, 82, 87, 102 and 105 of Convention III.)

b. What do you think of the Commission's statement in para. 138, that "scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict"?

4. a. When should Ethiopia have repatriated all Eritrean POWs? According to the Commission? According to Art. 118 of Convention III?

b. When do active hostilities cease, making the repatriation of POWs compulsory under Art. 118 of Convention III? Is a cease-fire agreement sufficient? Must it be actually implemented? What if hostilities cease without an agreement?

c. Do you agree with the findings of the Commission in paras 145 and 160? Are they compatible with the wording of Art. 118 of Convention III? Has "state practice" (the Commission refers to in para. 148) modified the sense of Art. 118? Does the Commission consider that repatriations may be lawfully suspended if the enemy fails to comply with its repatriation obligations? Is that compatible with Art. 13 of Convention III? Is this justified under the law of treaties? (*See* Art. 60 of the Vienna Convention on the Law of Treaties, quotation *supra* Chapter 13. IX. 2 c) dd), p. 301.) May this be justified under the law of State responsibility (*See* **Case No. 38**, ILC, Draft Articles on State Responsibility [*Cf.* Art. 50], p. 805.)

d. Assuming, like the Commission, that the obligation to repatriate POWs may be subject to certain considerations of reciprocity, may a State suspend temporarily repatriations of POWs who were registered by the ICRC pending clarification by the enemy of the fate of missing servicemen who were not registered by the ICRC, if it believes those persons to have been captured by the enemy? According to para. 160 of the Award? In your opinion? What is the risk for the prisoners if their repatriation is linked to the clarification of the fate of missing persons? How long does it usually take to clarify the fate of persons who went missing during a conflict? Is the obligation to repatriate POWs an obligation of result? Is the obligation to provide information on persons reported as missing an obligation of result? (*Cf.* Arts. 13, 118 and 122 (7) of Convention III and Art. 33 of Protocol I.)

Case No. 137, Sudan, Eritreans Fighting in Blue Nile Area

THE CASE

[**Source:** Reuters News Service, February 19, 1997.]

SUDAN SAYS ERITREANS FIGHTING IN BLUE NILE AREA

Cairo, Feb. 19 (Reuters) - Sudan said on Wednesday it had arrested an Eritrean spy in Blue Nile state and had learnt from him that Eritrean forces were fighting the army in the area, about 350 km (215 miles) south of the Eritrean border.

Sudan has previously said only that Ethiopian forces are fighting in Blue Nile and Eritreans in the Kassala area further north. The Sudanese opposition National Democratic Alliance says its forces alone are responsible for all the military operations and both Sudan's neighbours deny helping the rebels.

The government news agency SUNA quoted the governor of Blue Nile state, army Colonel Babiker Jaber Kabalo, as saying the spy had provided information on the force which attacked government troops in eastern Sudan in January.

The fighting appears to have reached a stalemate and the rebels continue to hold at least two Sudanese towns close to the Sudanese-Ethiopian border.

Kabalo said the spy told them morale was low among the forces attacking the Sudanese army. The agency did not give his name or say when or how he was arrested.

Eritrea openly allows the Sudanese opposition to train its armed forces on Eritrean territory.

DISCUSSION

1. If the facts presented in the case are correct, is there an armed conflict between Ethiopia and Sudan? Between Eritrea and Sudan? (*Cf.* Art. 2 common to the Conventions.)

2. Taking into account that, at that time, Eritrea was not a party to Convention III, had Sudan, a party to Convention III, to treat captured members of Eritrean armed forces according to Convention III? If not, did they benefit from any protection under IHL? (*Cf.* Art. 2 of Convention III.)

   N.B.: Eritrea acceded to the Geneva Conventions in August 2000.

3. If the captured Eritrean was a member of the Eritrean armed forces, under what circumstances would he qualify as a spy? Does he have POW status if he is a spy? (*Cf.* Art. 46 of Protocol I.)

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur

THE CASE

A. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General

[**Source:** Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva 25 January 2005; footnotes are partially reproduced; full report available on http://www.ohchr.org/english/darfur.htm]

Pursuant to Security Council Resolution 1564 of 18 September 2004
Geneva, 25 January 2005

INTRODUCTION

[...]

II. THE HISTORICAL AND SOCIAL BACKGROUND

[...]

3. The Current Conflict in Darfur

61. The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, [...] deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the current crisis.

62. It appears evident that the two rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) began organizing themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including socio-economic and political marginalization of Darfur and its people. In addition, the members of the rebel movements were mainly drawn from local village defence groups from particular tribes, which had been formed as a response to increases in attacks by other tribes. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Initially the SLM/A, at that stage named the Darfur Liberation Front, came into existence with an agenda focused on the situation of the people of Darfur, and only later expanded its agenda to cover all of the Sudan. The Justice and Equality Movement based its agenda on a type of manifesto - the "Black Book", published in 2001 - which essentially seeks to prove the disparities in the distribution of power and wealth, by noting that Darfur and its populations, as well as some populations of other regions, have been

consistently marginalized and not included in influential positions in the central Government in Khartoum. It is noteworthy that the two movements did not argue their case from a tribal point of view, but rather spoke on behalf of all Darfurians, and mainly directed their attacks at Government installations. It also appears that with regard to policy formulation, the *New Sudan* policy of the SPLM/A in the South had an impact on the SLM/A, while the JEM seemed more influenced by trends of political Islam. Furthermore, it is possible that the fact that the peace negotiations between the Government and the SPLM/A were advancing rapidly, did in some way represent an example to be followed by other groups, since armed struggle would apparently lead to fruitful negotiations with the Government. It should also be recalled that despite this broad policy base, the vast majority of the members of the two rebel movements came from essentially three tribes: The Fur, the Massalit and the Zaghawa.

63. It is generally accepted that the rebel movements began their first military activities in late 2002 and in the beginning of 2003 through attacks mainly directed at local police offices, where the rebels would loot Government property and weaponry. [...]

66. Most reports indicate that the Government was taken by surprise by the intensity of the attacks, as it was ill-prepared to confront such a rapid military onslaught. Furthermore, the looting by rebels of Government weaponry strengthened their position. An additional problem was the fact that the Government apparently was not in possession of sufficient military resources, as many of its forces were still located in the South, and those present in Darfur were mainly located in the major urban centres. Following initial attacks by the rebels against rural police posts, the Government decided to withdraw most police forces to urban centres. This meant that the Government did not have *de facto* control over the rural areas, which was where the rebels were based. The Government was faced with an additional challenge since the rank and file of the Sudanese armed forces was largely composed of Darfurians, who were probably reluctant to fight "their own" people.

67. From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements and combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels. In this way, it exploited the existing tensions between different tribes.

68. In response to the Government's call, mostly Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, responded to the call. They perhaps found in this an opportunity to be allotted land. One senior government official involved in the recruitment informed the Commission that tribal leaders were paid in terms of grants and gifts on the basis of their recruitment efforts and how many persons they provided. In addition, the Government paid some of the Popular Defence Forces (PDF) staff their salaries through the tribal leaders,

with State budgets used for these purposes. The Government did not accept recruits from all tribes. One Masaalit leader told the Commission that his tribe was willing to provide approximately one thousand persons to the PDF but, according to this source, the Government did not accept, perhaps on the assumption that the recruits could use this as an opportunity to acquire weapons and then turn against the Government. Some reports also indicate that foreigners, from Chad, Libya and other states, responded to this call and that the Government was more than willing to recruit them.

69. These new "recruits" were to become what the civilian population and others would refer to as the "Janjaweed", a traditional Darfurian term denoting an armed bandit or outlaw on a horse or camel. [...]

70. [...] On 8 April 2004, the Government and the SLM/A and JEM signed a humanitarian ceasefire agreement, and in N'Djamena on 28 May they signed an agreement on ceasefire modalities. Subsequent peace talks took place [...] under the mediation of the African Union. On 9 November in Abuja, the Government, the SLM/A and the JEM signed two Protocols, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur. In the context of further negotiations, the parties have not been able to overcome their differences and identify a comprehensive solution to the conflict.

[...]

SECTION I: THE COMMISSION'S FINDINGS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW BY THE PARTIES

[...]

II. THE NATURE OF THE CONFLICT IN DARFUR

74. The first [...] issue relates to the nature of the armed conflict raging in Darfur. This determination is particularly important with regard to the applicability of the relevant rules of international humanitarian law. The distinction is between international armed conflicts, non-international or internal armed conflict, and domestic situations of tensions or disturbances. The Geneva Conventions set out an elaborate framework of rules that are applicable to international armed conflict or 'all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties'. Common Article 3 of the Geneva Conventions and Additional Protocol II set out the prerequisite of a non-international armed conflict. It follows from the above definition of an international conflict that a non-international conflict is a conflict without the involvement of two States. Modern international humanitarian law does not legally set out the notion of armed conflict. Additional Protocol II only gives a negative definition which, in addition, seems to narrow the scope of Article 3 common to the Geneva Conventions. The jurisprudence of the interna-

tional criminal tribunals has explicitly elaborated on the notion: 'an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. Internal disturbances and tensions, 'such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are generally excluded from the notion of armed conflict.

75. The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels, namely the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). [...] The rebels exercise *de facto* control over some areas of Darfur. The conflict therefore does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met.

76. All the parties to the conflict (the Government of the Sudan, the SLA and the JEM) have recognised that this is an internal armed conflict. Among other things, in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, *inter se*, in which they invoke or rely upon the Geneva Conventions.

III. CATEGORIES OF PERSONS OR GROUPS PARTICIPATING IN THE ARMED CONFLICT

[...]

1. Government Armed Forces

[...]

(iv) Popular Defence Forces

81. For operational purposes, the Sudanese armed forces can be supplemented by the mobilization of civilians or reservists into the Popular Defence Forces (PDF). [...]

82. According to information gathered by the Commission, local government officials are asked by army Headquarters to mobilize and recruit PDF forces through tribal leaders and sheikhs. [...] As one tribal leader explained to the Commission, 'in July 2003 the State called on tribal leaders for help. We called on our people to join the PDF. They responded by joining, and started taking orders from the Government as part of the state military apparatus.'

83. The PDF provides arms, uniforms and training to those mobilized, who are then integrated into the regular army for operations. At that point, the recruits come under regular army command and normally wear the same uniform as the unit they are fighting with. [...]

2. Government supported and/or controlled militias - the 'Janjaweed'

[...]

(ii.) Uses of the term in the context of current events in Darfur

105. [...] [I]n practice, the term "Janjaweed" is being used interchangeably with other terms used to describe militia forces working with the Government. Where victims describe their attackers as Janjaweed, these persons might be from a tribal Arab militia, from the PDF or from other entity, as described below.

[...]

(vi.) The question of legal responsibility for acts committed by the Janjaweed

[...]

123. When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadic (Appeal)*, at para. 98-145 [*See* **Case No. 180**, ICTY, The Prosecutor v. Tadic, p. 1804]. Thus they are acting as *de facto* State officials of the Government of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those crimes, or for failing to prevent or repress them, under the notion of superior responsibility.

124. When militias are incorporated in the PDF and wear uniforms, they acquire, from the viewpoint of international law the status of organs of the Sudan. Their actions and their crimes could be legally attributed to the Government. [...]

125. On the basis of its investigations, the Commission is confident that the large majority of attacks on villages conducted by the militia have been undertaken with the acquiesecence of State officials. The Commission considers that in some limited instances militias have sometimes taken action outside of the direct control of the Government of Sudan and without receiving orders from State officials to conduct such acts. In these circumstances, only individual perpetrators of crimes bear responsibility for such crimes. However, whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (i) the Government incurs international responsibility (vis-à-vis all other member States of the international community) for any violation of international human rights law committed by the militias, and in addition (ii) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias.

[...]

IV. THE INTERNATIONAL LEGAL OBLIGATIONS INCUMBENT UPON THE SUDANESE GOVERNMENT AND THE REBELS

[...]

1. Relevant Rules of International Law Binding the Government of the Sudan

143. Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.

[...]

149. In the case of a state of emergency, international human rights law contains specific provisions which prescribe the actions of States. In particular, article 4 of the International Covenant on Civil and Political Rights sets out the circumstances under which a State party may derogate temporarily from part of its obligations under the Covenant. Two conditions must be met in order for this article to be invoked: first, there must be a situation that amounts to a public emergency that threatens the life of the nation, and secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such proclamation and the exercise of emergency powers. The State also must immediately inform the other States parties, through the Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Even during armed conflict, measures derogating from the Covenant 'are allowed only if and to the extent that the situation constitutes a threat to the life of the nation'. In any event, they must comply with requirements set out in the Covenant itself, including that those measures be limited to the extent strictly required by the exigencies of the situation. Moreover, they must be consistent with other obligations under international law, particularly the rules of international humanitarian law and peremptory norms of international law.

150. Article 4 of the ICCPR clearly specifies the provisions which are non-derogable and which therefore much be respected at all times. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Moreover, measures derogating from the Covenant must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

151. Other non-derogable 'elements' of the Covenant, as defined by the Human Rights Committee, include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against taking hostages, abductions or unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition of deportation or forcible transfer of population; and the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence. The obligation to provide effective remedies for any violation of the provisions of article 2, paragraph 3, of the Covenant must be always complied with.

152. In addition, the protection of those rights recognized as non-derogable require certain procedural safeguards, including judicial guarantees. For example, the right to take proceedings before a court to enable the court to decide on the lawfulness of detention, and remedies such as *habeas corpus* or *amparo*, must not be restricted by derogations under article 4. In other words, 'the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.'

153. The Sudan has been under a continuous state of emergency since 1999 and, in December 2004, the Government announced the renewal of the state of emergency for one more year. According to the information available to the Commission, the Government has not taken steps legally to derogate from its obligations under the ICCPR. In any event, whether or not the Sudan has met the necessary conditions to invoke article 4, it is bound at a minimum to respect the non-derogable provisions and 'elements' of the Covenant at all times.

(ii.) International humanitarian law

154. With regard to international humanitarian law, the Sudan is bound by the four Geneva Conventions of 1949, as well as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 18 September 1997, whereas it is not bound by the two Additional Protocols of 1977, at least *qua* treaties. As noted above, the Sudan has signed, but not yet ratified, the Statute of the International Criminal Court and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and is therefore bound to refrain from "acts which would defeat the object and purpose" of that Statute and the Optional Protocol.

[...]

156. In addition to international treaties, the Sudan is bound by customary rules of international humanitarian law. These include rules relating to internal armed conflicts, many of which have evolved as a result of State practice and jurisprudence from international, regional and national courts, as well as pronouncements by States, international organizations and armed groups.

157. The core of these customary rules is contained in Article 3 common to the Geneva Conventions. [...]

158. Other customary rules crystallized in the course of diplomatic negotiations for the adoption of the two Additional Protocols of 1977, for the negotiating parties became convinced of the need to respect some fundamental rules, regardless of whether or not they would subsequently ratify the Second Protocol. Yet other rules were adopted at the1974-77 Diplomatic Conference as provisions that spelled out general principles universally accepted by States. States considered that such provisions partly codified, and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or not the former ratified the Protocols. Subsequent practice by, or attitude of, the vast majority of States showed that over time yet other provisions of the Second Additional Protocol came to be regarded as endowed with a general purport and applicability. Hence they too may be held to be binding on non-party States and rebels.

159. That a body of customary rules regulating internal armed conflicts has thus evolved in the international community is borne out by various elements. For example, some States in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applies to internal conflicts. Other States have taken a similar attitude with regard to many rules of international humanitarian law.

[...]

161. Furthermore, in 1995, in its judgment in *Tadic (Interlocutory appeal)* the ICTY Appeals Chamber held that the main body of international humanitarian law also applied to internal conflicts as a matter of customary law, and that in addition serious violations of such rules constitute war crimes.

[...]

163. The adoption of the ICC Statute, followed by the Statute of the Special Court for Sierra Leone, can be regarded as the culmination of a law-making process that in a matter of few years led both to the crystallization of a set of customary rules governing internal armed conflict and to the criminalization of serious breaches of such rules (in the sense that individual criminal liability may ensue from serious violations of those rules).

164. This law-making process with regard to internal armed conflict is quite understandable. As a result both of the increasing expansion of human rights doctrines and the mushrooming of civil wars, States came to accept the idea that it did not make sense to afford protection only in *international* wars to civilians and other persons not taking part in armed hostilities: civilians suffer from armed violence in the course of internal conflicts no less than in international wars. It would therefore be inconsistent to leave civilians unprotected in civil wars while protecting them in international armed conflicts. Similarly, it was felt that a modicum of legal regulation of the conduct of hostilities, in particular of the use of means and methods of

warfare, was also needed when armed clashes occur not between two States but between a State and insurgents.

165. Customary international rules on internal armed conflict thus tend both to protect civilians, the wounded and the sick from the scourge of armed violence, and to regulate the conduct of hostilities between the parties to the conflict. [...]

166. For the purposes of this report, it is sufficient to mention here only those customary rules on internal armed conflicts which are relevant and applicable to the current armed conflict in Darfur. These include:

(i) the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder [footnote 77: The rule is laid down in Common Article 3 of the 1949 Geneva Conventions, has been restated in many cases, and is set out in the 2004 *British Manual on the Law of Armed Conflict* (at para. 15.6). It should be noted that in the Report made pursuant to para. 5 of the UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN Forces in Somalia, the UN Secretary-General noted that "The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. [...] [T]hey are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of armed conflict than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants." (UN doc. S/26351, 24 August 1993, Annex, para. 12). According to a report of the Inter-American Commission on Human Rights on the human rights situation in Colombia issued in 1999, international humanitarian law prohibits "the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives." (Third Report on the Human Rights Situation in Colombia, Doc OAS/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, para. 40). See also *Tadic* (ICTY Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, (1995), paras. 98, 117, 132 [See **Case No. 180**, ICTY, The Prosecutor v. Tadic, p. 1804]; *Kordic and Cerkez,* Case No. IT-95-14/2 (Trial Chamber III), *Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the limited Jurisdictional Reach of Articles 2 and 3,* 2 March 1999, paras. 25-34 (recognizing that Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II constitute customary international law).] (this rule was reaffirmed in some agreements concluded by the Government of the Sudan with the rebels);

(ii) the prohibition on deliberate attacks on civilians;

(iii) the prohibition on indiscriminate attacks on civilians, [footnote 80: In a press release concerning the conflict in Lebanon, in 1983 the ICRC stated that "the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people." (ICRC, Press release no. 1474, Geneva, 4 November 1983). In 1997 in *Tadic* and ICTY Trial Chamber held that "it is clear that the targeted population [of a crime against humanity.] must be of predominantly civilian nature. The presence of certain non-civilian elements inacter of the population" (judgment of 7 May 1997, at para. 638 and see also para. 643).] even if there may be a few armed elements among civilians; [footnote 81: In a press release concerning the conflict in Lebanon, in 1983 the ICRC stated that "the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people." (ICRC, Press release no. 1474, Geneva, 4 November 1983). In 1997 in *Tadic* and ICTY Trial Chamber held that "it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilian elements in the midst does not change the character of the population" (judgment of 7 May 1997, at para. 638 and see also para. 643).]

(iv) the prohibition on attacks aimed at terrorizing civilians; [footnote 82: See the 2004 *British Manual of the Law of Armed Conflict,* at para. 15.8.]

(v) the prohibition on intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(vi) the prohibition of attacks against civilian objects; [footnote 84: Pursuant to para. 5 of General Assembly Resolution 2675 (XXV, of 9 December 1970), which was adopted unanimously and, according to the 2004 *British Manual of the Law of Armed Conflict,* "can be regarded as evidence of State practice" (paras. 15-16.2), "dwellings and other installations that are used only by the civilian population should not be the object o military operations". See also the 2004 *British Manual of the Law of Armed Conflict,* at paras.15.9 and 15.9.1, 15.16 and 15.16.1-3).]

(vii) the obligation to take precautions in order to minimize incidental loss and damage as a result of attacks, [footnote 85: See the 2004 *British Manual of the Law of Armed Conflict,* at paras. 15.22-15.22.1.] such that each party must do everything feasible to ensure that targets are military objectives [footnote 86: See *Zoran Kupreskic and others*, ICTY Trial Chamber, judgment of 14 January 2000, at para. 260 [*See* **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al*, p. 1911.]] and to choose means or methods of combat that will minimise loss of civilians; [footnote 87: See for instance the Military Manual of Benin (*Military Manual,*1995, Fascicule III, pp. 11 and 14 [...], of Germany (*Military Manual,* 1992, at para. 457), of Kenya (*Law of Armed Conflict Manual,* 1997, Precis no. 4, pp. 1 and 8), of Togo (*Military Manual,* 1996, Fascicule III, pp. 11 and 14), as well as the *Joint Circular on Adherence to International humanitarian Law and Human Rights* of the Philippines (1992, at para. 2 (c)). See also *Zoran Kupreskic and others*, [*See* **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al*, p. 1911.] ICTY Trial Chamber, judgment of 14 January 2000, at para. 260.]

(viii) the obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated; [footnote 88: In *Zoran Kupreskic and others*, an ICTY Trial Chamber held in 2000 that "Even if it can be proved that the Muslim population of Ahmici [a village in Bosnia and Herzegovina] was not entirely civilians but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. [...]" (judgment of 14 January 2000, at para. 513). See also some pronouncements of States. For instance, in 2002, in the House of Lords the British Government pointed out that, with regard to the civil war in Chechnya, it had stated to the Russian Government that military "operations must be proportionate and in strict adherence to the rule of law." (in 73 *British Yearbook of International Law* 2002, at 955). The point was reiterated by the British Minister for trade in reply to a written question in the House of Lords (*ibidem*, at 957). See also the 2004 *British Manual of the Law of Armed Conflict,* at para. 15.22.1. In 1992, in a joint memorandum submitted to the UN, Jordan and the US stated that "the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited" (UN doc. A/C.6/47/3, 28 September 1992, at para. 1(h)). In a judgment of 9 December 1985, an Argentinean Court of Appeals held in the *Military Junta case* that the principle of proportionality constitutes a customary international norm [...]. Spain insisted on the principle of proportionality in relation to the internal armed conflicts in Chechnya and in Bosnia and Herzegovina (see the statements in the Spanish Parliament of the Spanish Foreign Minister, in *Activitades, Textos y Documentos de la Politica Exterior Española,* Madrid 1995, at 353, 473. In addition, see the 1999 Third Report on Colombia of the Inter-American Commission on Human Rights (Doc. OAS/Se.L/V/II.102 Doc.9, rev.1, 26 February 1999, at paras. 77 and 79). See also the 1999 UN Secretary-General's Bulletin, para. 5.5 (with reference to UN forces).]

(ix) the prohibition on destruction and devastation not justified by military necessity; [footnote 89: Rome Statute, at Article 8(2)(e)(xii). See also the 2004 *British Manual of the Law of Armed Conflict*, at paras. 15.17- 15.17.2). Under Article 23(g) of the Hague Regulations, it is prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". The grave breaches provisions in the Geneva Conventions also provide for the prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (see First Geneva Convention, Article 50 *in fine*; Second Geneva Convention, Article 51 *in fine*; Fourth Geneva Convention, Article 147 *in fine*; Additional Protocol I, Article 51(1) *in fine*.]

(x) the prohibition on the destruction of objects indispensable to the survival of the civilian population; [footnote 90: Article 14 of the Second Additional Protocol; as rightly stated in the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.19.1, "the right to life is a non-derogable human right. Violence to the life and person of civilians is prohibited, whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow, is also prohibited.";]

(xi) the prohibition on attacks on works and installations containing dangerous forces;

(xii) the protection of cultural objects and places of worship;

(xiii) the prohibition on the forcible transfer of civilians;

(xiv) the prohibition on torture and any inhuman or cruel treatment or punishment; [footnote 94: See common Article 3 (1) (a).]

(xv) the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence; [footnote 95: See common Article 3 (1) (c).]

(xvi) the prohibition on declaring that no quarter will be given; [footnote 96: See Article 8 (2) (e) (x) of the ICC Statute.]

(xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely; [footnote 97: See common Article 3(1) as well as the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.6.4.]

(xviii) the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by the world community; [footnote 98: See common Article 3 (1) (d); see also General Comment 29 of the Human Rights Committee, at para. 16.]

(xix) the prohibition on collective punishments; [footnote 99: See Article 4(b) of the Statute of the ICTR and Article 3 (b) of the Statute of the Special Court for Sierra Leone; see also General Comment 29 of the Human Rights Committee, at para. 11, according to which any such punishment is contrary to a peremptory rule of international law.]

(xx) the prohibition on the taking of hostages;

(xxi) the prohibition on acts of terrorism;

(xxii) the prohibition on pillage;

(xxiii) the obligation to protect the wounded and the sick; [footnote 103: Common Article 3 (2) of the Geneva Conventions.]

(xxiv) the prohibition on the use in armed hostilities of children under the age of 15; [footnote 104: There are two treaty rules that ban conscripting or enlisting children under the age of *15 years* into armed forces or groups or using them to participate actively in

> hostilities (see Article 8 (2) (e)(vii) of the ICC Statute and Article 4 (c) of the Statute of the Special Court for Sierra Leone). The Convention on the Rights of the Child, at Article 38, and the Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflicts [See **Document No. 16**, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000, p. 636.] raise the minimum age of persons directly participating in armed conflicts to *18 years*, although not in mandatory terms [...] It may perhaps be held that a general consensus has evolved in the international community on a minimum common denominator: children *under 15* may not take an active part in armed hostilities.]

167. It should be emphasized that the international case law and practice indicated above show that serious violations of any of those rules have been criminalized, in that such violations entail individual criminal liability under international law.

168. Having surveyed the relevant rules applicable in the conflict in Darfur, it bears stressing that to a large extent the Government of the Sudan is prepared to consider as binding some general principles and rules laid down in the two Additional Protocols of 1977 and to abide by them, although formally speaking it is not party to such Protocols. This is apparent, for instance, from the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 by the Government of the Sudan with the SLA and JEM, stating in Article 10 (2) that the three parties undertook to respect a corpus of principles, set out as follows:

> "The concept and execution of the humanitarian assistance in Darfur will be conform [sic] to the international principles with a view to guarantee that it will be credible, transparent and inclusive, notably: the 1949 Geneva Conventions *and its two 1977 Additional Protocols*; the 1948 Universal Declaration on Human Rights, the 1966 International Convention [sic] on Civil and Public[sic] Rights, the 1952 Geneva Convention on Refugees [sic], the Guiding Principles on Internal Displacement (Deng Principles) and the provisions of General Assembly resolution 46/182" (emphasis added).

[...]

170. Significantly, in Article 8(a) of the Status of Mission Agreement (SOMA) on the Establishment and Management of the Cease Fire Commission in the Darfur Area of the Sudan (CFC), of 4 June 2004, between the Sudan and the African Union, it is provided that 'The African Union shall ensure that the CFC conducts its operation in the Sudan with full respect for the principles and rules of international Conventions *applicable to the conduct of military* and diplomatic personnel. These international Conventions include the four Geneva Conventions of 12 August 1949 and their *Additional Protocols of 8 June 1977* and the UNESCO Convention of 14 May 1954 on the Protection of Cultural property in the event of armed conflict [...]" (emphasis added). Article 9 then goes on to provide that "The CFC and the Sudan shall therefore ensure that members of their respective military and civilian personnel are *fully acquainted with the principles and rules of the above mentioned international instruments.*" (emphasis added)

[...]

2. Rules binding rebels

172. The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for the NMRD.

173. Furthermore, as with the implied acceptance of general international principles and rules on humanitarian law by the Government of the Sudan, such acceptance by rebel groups similarly can be inferred from the provisions of some of the Agreements mentioned above.

174. In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRD concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

[...]

VI. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW - THE COMMISSION'S FACTUAL AND LEGAL FINDINGS.

1. Overview of violations of international human rights and humanitarian law reported by other bodies

[...]

182. [...] [T]he Commission carefully studied reports from different sources including Governments, inter-governmental organizations, various United Nations mechanisms or bodies, as well as non-governmental organizations. [...] The Commission [...] received a great number of documents and other material from a wide variety of sources, including the Government of the Sudan. [...] The following is a brief account of these reports, which serves to clarify the context of the fact finding and the investigations conducted by the Commission. In the sections following this overview, individual incidents are presented according to the type of violation or international crime identified.

[...]

184. Most reports note a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur states beginning in early 2003. [...]

185. A common conclusion is that, in its response to the insurgency, the Government has committed acts against the civilian population, directly or through surrogate armed groups, which amount to gross violations of human rights and humanitarian law. While there has been comparatively less

information on violations committed by the rebel groups, some sources have reported incidents of such violations.There is also information that indicates activities of armed elements who have taken advantage of the total collapse of law and order to settle scores in the context of traditional tribal feuds, or to simply loot and raid livestock.

186. There are consistent accounts of a recurrent pattern of attacks on villages and settlements, sometimes involving aerial attacks by helicopter gunships or fixed-wing aircraft (Antonov and MIG), including bombing and strafing with automatic weapons. However, a majority of the attacks reported are ground assaults by the military, the Janjaweed, or a combination of the two. Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages. These incidents have resulted in the massive displacement of large parts of the civilian population within Darfur as well as to neighbouring Chad. The reports indicate that the intensity of the attacks and the atrocities committed in any one village spread such a level of fear that populations from surrounding villages that escaped such attacks also fled to areas of relative security.

187. Except in a few cases, these incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces. [...]

191. While a majority of the reports are consistent in the description of events and the violations committed, the crimes attributed to the Government forces and Janjaweed have varied according to the differences in the interpretation of the events and the context in which they have occurred. Analyses of facts by most of the observers, nevertheless, suggest that the most serious violations of human rights and humanitarian law have been committed by militias, popularly termed "Janjaweed", at the behest of and with the complicity of the Government, which recruited these elements as a part of its counter-insurgency campaign.

192. Various reports and the media claim to have convincing evidence that areas have been specifically targeted because of the proximity to or the *locus* of rebel activity, but more importantly because of the ethnic composition of the population that inhabits these areas. [...]

[...]

5. Two Irrefutable Facts: Massive displacement and large-scale destruction of villages

225. Results of the fact finding and investigations are presented in the next sections of the report and are analysed in the light of the applicable legal framework as set out in the preceding Section. However, before proceeding, two uncontested facts must be highlighted.

226. [...] Firstly, there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur. [...]

[...]

6. Violations committed by the parties

[...]

(i.) Indiscriminate attacks on civilians

(a.) Factual findings

240. From all accounts the Commission finds that the vast majority of attacks on civilians in villages have been carried out by Government of the Sudan armed forces and Janjaweed, either acting independently or jointly. Although attacks by rebel forces have also taken place, the Commission has found no evidence that these are widespread or that they have been systematically targeted against the civilian population. Incidents of rebel attacks are mostly against military targets, police or security forces. Nevertheless, there are a few incidents in which rebel attacks have been carried out against civilians and civilian structures, as well as humanitarian convoys.

(1). Attacks by Government armed forces and the Janjaweed

241. [...] [T]he Commission found that attacks on villages in Darfur conducted by Government of the Sudan armed forces and the Janjaweed took place throughout the conflict with peaks in intensity during certain periods. Most often the attacks began in the early morning, just before sunrise between 04:30 AM and 08:00 AM when villagers were either asleep or at prayer. In many cases the attacks lasted for several hours. [...]

242. In many cases a ground attack began with soldiers appearing in Land Cruisers and other vehicles, followed by a large group of Janjaweed on horses and camels, all with weapons such as AK47s, G3s and rocket-propelled grenades. Many of the attacks involved the killing of civilians, including women and children, the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops. Looting and theft of civilian property, in particular livestock, invariably followed the attacks and in many instances every single item of moveable property was either stolen or destroyed by the attackers. Often the civilians were forcibly displaced as a result of the attack.

[...]

249. In this context, the Commission also noted the comments made by Government officials in meetings with the Commission. The Minister of

Defence clearly indicated that he considered the presence of even one rebel sufficient for making the whole village a legitimate military target. The Minister stated that once the Government received information that there were rebels within a certain village, 'it is no longer a civilian locality, it becomes a military target.' In his view, 'a village is a small area, not easy to divide into sections, so the whole village becomes a military target.' [...]

Case Study 1: Anka village, North Darfur

251. [...] At about 9 am on or about the 17 or 18 February 2004 the village of Barey, situated about 5 kilometres from the village of Anka, was attacked by a combined force of Government soldiers and Janjaweed. [...]

At about 5 PM on the same day, witnesses from Anka observed between 300 and 400 Janjaweed on foot, and another 100 Janjaweed on camels and horseback, advancing towards Anka from the direction of Barey. The attackers were described as wearing the same khaki uniforms as the Government soldiers, and were armed with Kalashnikovs G3s and rocketpropelled grenades (RPGs).

Witnesses observed about 18 vehicles approaching from behind the Janjaweed forces, including four heavy trucks and eighteen Toyota pickup vehicles. Some of the vehicles were green and others were coloured navy blue. The pickups had Dushka (12.7mm tripod mounted machine guns) fitted onto the back, and one had a Hound rocket launcher system which was used to fire rockets into, and across, the village. The trucks carried Government armed forces and were later used to transport looted property from the village. According to witnesses, villagers fled the village in a northerly direction, towards a wooded area about 5 kilometers from the village.

Before the Janjaweed entered the village, the Government armed forces bombed the area around the village with Antonov aircraft. One aircraft circled the village while the other one bombed. [...] The bombing lasted for about two hours, during which time 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment.

After the bombing the Janjaweed and Government soldiers moved in and looted the village including bedding, clothes and livestock. Remaining buildings were then destroyed by burning. Janjaweed also fired RPGs into the village from the top of the hill overlooking Anka. The bombing of the areas around the village appear to have been conducted in order to facilitate the looting and destruction of the village by Janjaweed and Government armed forces on the ground.

According to witnesses, approximately 30 SLM/A members were present in the village at the time of the attack, apparently to defend the village following the announcement of the imminent attack.

15 civilians were killed in Anka as a result of shrapnel injuries during and after the attack. 8 others were wounded. While some have recovered, others reportedly are disabled as a result of their injuries. The village is now totally deserted.

[...]

(b.) Legal appraisal

[...]

259. To ensure that attacks on places or areas where both civilians and combatants may be found, do not unlawfully jeopardize civilians, international law imposes two fundamental obligations, applicable both in international and internal armed conflicts. First the obligation to take precautions for the purpose of sparing civilians and civilian objects as much as possible. Such precautions, laid down in customary international law, are as follows: a belligerent must (i) do everything feasible to verify that the objectives to be attacked are not civilian in character; (ii) take all feasible precautions in the choice of means and methods of combat with a view to avoiding or at least minimizing incidental injury to civilians or civilian objects; (iii) refrain from launching attacks which may be expected to cause incidental loss of civilian life or injury to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated; (iv) give effective advance warning of attacks which may affect the civilian population, except "in cases of assault" (as provided for in Article 26 of the Hague Regulations of 1907) or (as provided for in Article 57(2)(C)) "unless circumstances do not permit" (namely when a surprise attack is deemed indispensable by a belligerent). Such warnings may take the form of dropping leaflets from aircraft or announcing on the radio that an attack will be carried out. According to the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, Y. Sandoz and others eds., 1987, at para. 2224) a warning can also be given by sending aircraft that fly at very low altitude over the area to be attacked, so as to give civilians the time to evacuate the area.

260. The second fundamental obligation incumbent [...] on any party to an international or internal armed conflict [...] is to respect the principle of proportionality when conducting attacks on military objectives that may entail civilian losses. Under this principle a belligerent, when attacking a military objective, shall not cause incidental injury to civilians disproportionate to the concrete and direct military advantage anticipated. In the area of combat operations the principle of proportionality remains a largely subjective standard, based on a balancing between the expectation and anticipation of military gain and the actual loss of civilian life or destruction of civilian objects. It nevertheless plays an important role, first of all because it must be applied in good faith, and secondly because its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians. [...]

263. As noted above, one justification given for the attacks by Government of the Sudan armed forces and Janjaweed on villages is that rebels were present at the time and had used the villages as a base from which to launch attacks - or, at the very least, that villagers were providing support to the rebels in their insurgency activities. Government officials therefore suggested that the villagers had lost their legal status as protected persons.

264. [...] [I]t is clear that the mere presence of a member or members of rebel forces in a village would not deprive the rest of the village population of its civilian character.

265. [...] [C]ontrary to assertions made to the Commission by various Government officials, it is apparent from consistent accounts of reliable eyewitnesses that no precautions have ever been taken by the military authorities to spare civilians when launching armed attacks on villages. [...]

266. The issue of proportionality did obviously not arise when no armed groups were present in the village, as the attack exclusively targeted civilians. However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be patently excessive in relation to the expected military advantage of killing rebels or putting them *hors de combat*.

267. *Concluding observations.* It is apparent from the Commission's factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels - an assertion that finds little support from the material and information collected by the Commission - the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack. The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks were conducted (at dawn, preceded by the sudden hovering of helicopter gun ships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.

268. From the Commission's findings it is clear that the rebels are responsible for attacks on civilians, which constitute war crimes. In general, the Commission has found no evidence that attacks by rebels on civilians have been

widespread, or that rebel attacks have systematically targeted the civilian population.

(ii.) Killing of civilians

(a.) Factual findings

1. Killing by Government forces and/or militias

269. [...] [T]he great majority of the killings were committed by people who witnesses described as Janjaweed, in most cases uniformed and on horses or camels. [...] Witness testimonies reflected in these reports describe attackers with Kalashnikovs and other automatic weapons shooting either indiscriminately or targeting specific people, usually men of military age. [...] Incidents of confinement of the civilian population, accompanied by arbitrary executions have also been reported, as well as civilian deaths as a result of indiscriminate air attacks by Government forces. The reports note that killings have continued during displacement in camps at the hand of the militias surrounding the camps, and that some IDPs have also been the victims of indiscriminate police shooting inside camps, in response to alleged rebel presence.

[...]

271. [...] [M]ost of the civilians killed at the hands of the Government or the militias are, in a strikingly consistent manner, from the same tribes, namely Fur, Massalit, Zaghawa and, less frequently, other African tribes, in particular the Jebel and the Aranga in West Darfur.

a. Killing in joint attacks by Government forces and Janjaweed

272. As an example of a case of mass killing of civilians documented by the Commission, the attack on Surra, a village with a population of over 1700, east of Zalingi, South Darfur, in January 2004, is revealing. Witnesses interviewed in separate groups gave a very credible, detailed and consistent account of the attack, in which more than 250 persons were killed, including women and a large number of children. An additional 30 people are missing. The Janjaweed and Government forces attacked jointly in the early hours of the morning. The military fired mortars at unarmed civilians. The Janjaweed were wearing camouflage military uniform and were shooting with rifles and machine guns. They entered the homes and killed the men. They gathered the women in the mosque. There were around ten men hidden with the women. They found those men and killed them inside the mosque. They forced women to take off their maxi (large piece of clothing covering the entire body) and if they found that they were holding their young sons under them, they would kill the boys. The survivors fled the village and did not bury their dead.

[...]

274. A second attack occurred in March 2004. Government forces and Janjaweed attacked at around 15h00, supported by aircraft and military

vehicles. Again, villagers fled west to the mountains. Janjaweed on horses and camels commenced hunting the villagers down, while the military forces remained at the foot of the mountain. They shelled parts of the mountains with mortars, and machinegunned people as well. People were shot when, suffering from thirst, they were forced to leave their hiding places to go to water points. There are consistent reports that some people who were captured and some of those who surrendered to the Janjaweed were summarily shot and killed. [...] Men who were in confinement in Kailek were called out and shot in front of everyone or alternatively taken away and shot. Local community leaders in particular suffered this fate. There are reports of people being thrown on to fires to burn to death. There are reports that people were partially skinned or otherwise injured and left to die.

[...]

276. The Commission considers that almost all of the hundreds of attacks that were conducted in Darfur by Janjaweed and Government forces involved the killing of civilians.

b. Killing in attacks by Janjaweed

[...]

c. Killing as a result of air bombardment

279. Several incidents of this nature were verified by the Commission. In short, the Commission has collected very substantial material and testimony which tend to confirm, in the context of attacks on villages, the killing of *thousands* of civilians.

[...]

2. Killing by Rebel Groups

a. Killing of civilians

285. The Commission also has found that rebels have killed civilians, although the incidents and number of deaths have been few.

[...]

(b.) Legal appraisal

291. As stated above murder contravenes the provisions of the International Covenant on Civil and Political Rights and of the African Charter on Human and People's Rights, which protect the right to life and to not be "arbitrarily deprived of his life". As for international humanitarian law, murder of civilians who do not take active part in hostilities in an internal armed conflict, is prohibited both by common Article 3 of the 1949 Geneva Conventions and by the corresponding rule of customary international law, as codified in Article 4(2)(a) of Additional Protocol II. [...] It is crucial to stress again at this point that when considering if the murder of civilians amounts to a war crime

or crime against humanity, the presence of non-civilians does not deprive a population of its civilian character. Therefore, even if it were proved that rebels were present in a village under attack, or that they generally used the civilian population as a 'shield', nothing would justify the murder of civilians who do not take part in the hostilities.

292. A particular feature of the conflict in Darfur should be stressed. Although in certain instances victims of attacks have willingly admitted having been armed, it is important to recall that most tribes in Darfur possess weapons, which are often duly licensed, to defend their land and cattle. Even if it were the case that the civilians attacked possessed weapons, this would not necessarily be an indication that they were rebels, hence lawful targets of attack, or otherwise taking active part in the hostilities. In addition, it should be noted that the Government of the Sudan did not claim to have found weapons in the villages that were attacked. Furthermore, many attacks occurred at times when civilians were asleep, or praying, and were then not in a position to "take direct part in the hostilities". The mere presence of arms in a village is not sufficient to deprive civilians of their protected status as such.

[...]

(iii.) Killing of detained enemy servicemen

[...]

(b.) Legal appraisal

298. International humanitarian law prohibits ill-treatment of detained enemy combatants, in particular violence to life and person, including murder of all kinds (see common Article 3(1)(a) of the Geneva Conventions). It also specifically prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (see Article 3(1) (d) of the Geneva Conventions). Wilful killing of a detained combatant amounts to a war crime.

[...]

315. In conclusion, the Commission finds that there is large-scale destruction of villages in all the three states of Darfur. This destruction has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government forces may not have participated directly in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene are sufficient to make them jointly responsible. The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces. The targets

of destruction during the attacks under discussion were exclusively civilian objects; and objects indispensable to the survival of civilian population were deliberately and wantonly destroyed.

[...]

(vi.) Forcible transfer of civilian populations

[...]

328. With regard to specific patterns in the displacement, the Commission notes that it appears that one of the objectives of the displacement was linked to the counter-insurgency policy of the Government, namely to remove the actual or potential support base of the rebels. The displaced population belongs predominantly to the three tribes known to make up the majority in the rebel movements, namely the Masaalit, the Zaghawa and the Fur, who appear to have been systematically targeted and forced off their lands. The areas of origin of the displaced coincide with the traditional homelands of the three tribes, while it is also apparent that other tribes have practically not been affected at all.

[...]

(vii.) Rape and other forms of sexual violence

(a.) Factual findings

333. Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called "slaves" or "Tora Bora."

[...]

336. In general, the findings of the Commission confirmed the above reported patterns. However, the Commission considers that it is likely that many cases went unreported due to the sensitivity of the issue and the stigma associated with rape. On their part, the authorities failed to address the allegations of rape adequately or effectively.

[...]

Case Study: Attack on a school in Tawila, North Darfur

339. One of the victims of rape during the attack on a boarding school in February 2004, a young girl, told the Commission that:

> At about 6:00 in the morning, a large number of Janjaweed attacked the school. She knew that they were Janjaweed because of their "red skin", a term she used for Arabs. They were wearing camouflage Government

uniforms. They arrived in a pickup truck of the same colour as the uniforms they were wearing. On the day before, she noticed that the Government soldiers had moved in position to surround the school. When they attacked the boarding house, they pointed their guns at the girls and forced them to strip naked, took their money, valuables and all of their bedding. There were around 110 girls at the boarding school. [...]

The victim was taken from the group, blindfolded, pushed down to the ground on her back and raped. She was held by her arms and legs. Her legs were forced and held apart. She was raped twice. She confirmed that penetration occurred. The rape lasted for about one hour. Nothing was said by the perpetrators during the rape. She heard other girls screaming and thought that they were also being raped. After the rape, the Janjaweed started burning and looting. [...] The victim became pregnant as a result of this rape and later gave birth to a child.

[...]

342. [T]he Commission found that women who went to market or were in search of water in Tarne, North Darfur, were abducted, held for two to three days and raped by members of the military around March 2003. [...]The Commission further found that twenty-one women were abducted during thejoint Government armed forces and Janjaweed attack on Kanjew, West Darfur, in January 2004. The women were held for three months by Janjaweed and some of them became pregnant as a result of rape during their confinement [...].

Case study: Flight from Kalokitting, South Darfur

349. [...] The village was attacked around four in the morning. [...] One of the victims stated as follows: "It was around 04h00 when I heard the shooting. Three of us ran together. We were neighbours. Then we realised that we did not bring our gold. When we returned, we saw soldiers. They said stop, stop. They were several. The first gave his weapon to his friend and said to me to lie down. He pulled me and threw me on the floor. He took off his trousers. He ripped my dress and there was one person holding my hands. Then he "entered" [a word for intercourse]. Then the second "entered", and the third "entered." I could not stand afterwards. There was another girl. When he said lie down, she said no. Kill me. She was young. She was a virgin. She was engaged. He killed her." The third woman who was also there stated that she was raped in the same way.

[...]

(b.) Legal appraisal

[...]

357. Common article 3 to the Geneva Conventions binds all parties to the conflict and, inter alia, prohibits "violence to life and person, in particular cruel treatment and torture" and "outrages upon personal dignity, in particular,

humiliating and degrading treatment." While Sudan is not a party to the Additional Protocol II to the Geneva Conventions, some of its provisions constitute customary international law binding on all parties to the conflict. This includes prohibition of "rape, enforced prostitution and any form of indecent assault," and "slavery".

358. Rape may be either a war crime, when committed in time of international or internal armed conflict, or a crime against humanity (whether perpetrated in time of war or peace), if it is part of a widespread or systematic attack on civilians; it may also constitute genocide. Rape has been defined in international case law [...]. In short, rape is any physical invasion of a sexual nature perpetrated without the consent of the victim, that is by force or coercion, such as that caused by fear of violence, duress, detention or by taking advantage of a coercive environment.

(viii.) Torture, outrages upon personal dignity and cruel, inhuman or degrading treatment

[...]

(ix.) Plunder

(b.) Legal appraisal

390. As noted above under customary international law the crime of plunder or pillage is a war crime. It consists of depriving the owner, without his or her consent, of his or her property in the course of an internal or international armed conflict, and appropriating such goods or assets for private or personal use, with the criminal intent of depriving the owner of his or her property.

[...]

394. The Commission also finds it plausible that the *rebel movements* are responsible for the commission of the war crime of plunder, albeit on a limited scale.

(x.) Unlawful confinement, incommunicado *detentions and enforced disappearances*

[...]

(b.) Legal appraisal

403. The right to liberty and security of person is protected by Article 9 of the ICCPR. The provisions of this Article are to be necessarily read in conjunction with the other rights recognized in the Covenant, particularly the prohibition of torture in Article 7, and article 10 that enunciates the basic standard of humane treatment and respect for the dignity of all persons deprived of their liberty. Any deprivation of liberty must be done in conformity with the provisions of Article 9: it must not be arbitrary; it must be based on grounds and procedures established by law; information on the reasons for detention must be given; and court control of the detention must

be available, as well as compensation in the case of a breach. These provisions apply even when detention is used for reasons of public security.

404. An important guarantee laid down in paragraph 4 of Article 9 is the right to control by a court of the legality of detention. In its General Comments the Human Rights Committee has stated that safeguards which may prevent violations of international law are provisions against *incomunicado* detention, granting detainees suitable access to persons such as doctors, lawyers and family members. In this regard the Committee has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized and that there must be proper registration of the names of detainees and places of detention. [...] [F]or the safeguards to be effective, these records must be available to persons concerned, such as relatives, or independent monitors and observers.

405. Even in situations where a State has lawfully derogated from certain provisions of the Covenant, the prohibition against unacknowledged detention, taking of hostages or abductions is absolute. [...] [T]hese norms of international law are not subject to derogation.

406. The ultimate responsibility for complying with obligations under international law rests with the States. The duty of States extends to ensuring the protection of these rights even when they are violated or are threatened by persons without any official status or authority. States remain responsible for all violations of international human rights law that occur because of failure of the State to create conditions that prevent, or take measures to deter, as well as by any acts of commission including by encouraging, ordering, tolerating or perpetrating prohibited acts.

407. The importance of determining individual criminal responsibility for international crimes whether committed under the authority of the State or outside such authority stands in addition to State responsibility and is a critical aspect of the enforceability of rights and of protection against their violation. International human rights law and humanitarian law provide the necessary linkages for this process of determination.

408. [...] [C]ommon Article 3 of the Geneva Conventions prohibits acts of violence to life and person, including cruel treatment and torture, taking of hostages and outrages upon personal dignity, in particular, humiliating and degrading treatment.

409. According to the Statute of the International Criminal Court, enforced disappearance means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, these acts may amount to a crime against humanity.

410. The abduction of women by Janjaweed may amount to enforced disappearance [...]. The incidents investigated establish that these abductions were systematic, were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the IDP population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law.

411. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military intelligence, including during attacks and intelligence operations against villages [...] may also amount to the crime of enforced disappearance as a crime against humanity. These acts were both systematic and widespread.

412. Abduction of persons during attacks by the Janjaweed and their detention in camps operated by the Janjaweed, with the support and complicity of the Government armed forces amount to gross violations of human rights, and to enforced disappearances. However, the Commission did not find any evidence that these were widespread or systematic so as to constitute a crime against humanity. Nevertheless, detainees were subjected to gross acts of violence to life and person. They were tortured or subjected to cruel and humiliating and degrading treatment. The acts were committed as a part of and were directly linked to the armed conflict. As serious violations of Common Article 3 of the Geneva Conventions [...] the Commission finds that the acts constitute war crimes.

413. Abduction of persons by the rebels also constitute serious and gross violations of human rights, and amount to enforced disappearance, but the Commission did not find any evidence that they were either widespread or systematic in order to constitute a crime against humanity. The Commission, nevertheless, has sufficient information to establish that acts of violence to life and person of the detainees were committed in the incidents investigated by the Commission. They were also subjected to torture and cruel, inhuman and degrading treatment. The acts were committed as a part of and directly linked to the armed conflict and, therefore, constitute war crimes as serious violations of the Common Article 3 of the Geneva Conventions.

(xi.) Recruitment and use of children under the age of 15 in armed hostilities

[...]

(b.) Legal appraisal

[...]

418. [...] [I]f it is convincingly proved that the Government or the rebels have recruited and used children under 15 in active military hostilities, they may be held accountable for such a crime.

VII. ACTION OF SUDANESE BODIES TO STOP AND REMEDY VIOLATIONS

[...]

1. Action by the police

[...]

422. Normally, in an international armed conflict the civil police force does not formally take part in the hostilities and can, at least theoretically, be considered as a non-combatant benefiting from the safeguards and protections against attack. However, in the particular case of the internal conflict in Darfur, the distinction between the police and the armed forces is often blurred. There are strong elements indicating occurrences of the police fighting alongside Government forces during attacks or abstaining from preventing or investigating attacks on the civilian population committed by the Janjaweed. There are also widespread and confirmed allegations that some members of the Janjaweed have been incorporated into the police. President El-Bashir confirmed in an interview with international media that in order to rein in the Janjaweed, they were incorporated in "other areas", such as the armed forces and the police. Therefore, the Commission is of the opinion that the 'civilian' status of the police in the context of the conflict in Darfur is questionable.

[...]

SECTION III: IDENTIFICATION OF THE POSSIBLE PERPETRATORS OF INTERNATIONAL CRIMES

I. GENERAL

[...]

525. The Commission has [...] decided to withhold the names of these persons from the public domain. [...]

531. The Commission notes at the outset that it has identified ten (10) high-ranking central Government officials, seventeen (17) Government officials operating at the local level in Darfur, fourteen (14) members of the Janjaweed, as well as seven (7) members of the different rebel groups and three (3) officers of a foreign army (who participated in their individual capacity in the conflict), who may be suspected of bearing individual criminal responsibility for the crimes committed in Darfur.

532. The Commission's mention of the number of individuals it has identified should not however be taken as an indication that the list is exhaustive. [...]

II. MODES OF CRIMINAL LIABILITY FOR INTERNATIONAL CRIMES

1. *Perpetration* or *co-perpetration* of international crimes

[...]

2. *Joint criminal enterprise* to commit international crimes

538. [...] International law also criminalizes conduct of all those who participated, although in varying degrees, in the commission of crimes, without performing the same acts [...].

540. There may be two principal modalities of participation in a joint criminal enterprise to commit international crimes. First, there may be a multitude of persons participating in the commission of a crime, who share from the outset a common criminal design (to kill civilians indiscriminately, to bomb hospitals, etc.). In this case, all of them are equally responsible under criminal law, although their role and function in the commission of the crime may differ (one person planned the attack, another issued the order to the subordinates to take all the preparatory steps necessary for undertaking the attack, others physically carried out the attack, and so on). The crucial factor is that the participants voluntarily took part in the common design and intended the result. Of course, depending on the importance of the role played by each participant, their position may vary at the level of sentencing [...].

541. There may be another major form of joint criminal liability. It may happen that while a multitude of persons share from the outset the same criminal design, one or more perpetrators commit a crime that had not been agreed upon or envisaged at the beginning, neither expressly nor implicitly, and therefore did not constitute part and parcel of the joint criminal enterprise. For example, a military unit [...] sets out to detain, contrary to international law, a number of enemy civilians; however, one of the servicemen, in the heat of military action, kills or tortures one of those civilians. If this is the case, the problem arises of whether the participants in the group other than the one who committed the crime not previously planned or envisaged, also bear criminal responsibility for such crime. As held in the relevant case law, 'the responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group, and (ii) the accused *willingly took that risk*." In the example given above [...], a court would have to determine whether it was foreseeable that detention at gunpoint of enemy servicemen might result in death or torture.

[...]

3. *Aiding* and *abetting* international crimes

547. *The notion of aiding and abetting in international criminal law.* As pointed by international case law, aiding and abetting a crime involves that a person (the accessory) gives practical assistance (including the provision of arms),

encouragement or moral support to the author of the main crime (the principal), and such assistance has a substantial effect on the perpetration of the crime. The subjective element or *mens rea* resides in the accessory having knowledge that his actions assist the perpetrator in the commission of the crime.

[...]

4. *Planning* international crimes

551. Planning consists of devising, agreeing upon with others, preparing and arranging for the commission of a crime. As held by international case law, planning implies that "one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases."

[...]

5. *Ordering* international crimes

[...]

6. *Failing to prevent or repress the perpetration* of international crimes (superior responsibility)

[...]

561. With regard to the position of rebels, it would be groundless to argue (as some rebel leaders did when questioned by the Commission) that the two groups of insurgents (SLA and JEM) were not tightly organized militarily, with the consequence that often military engagements conducted in the field had not been planned, directed or approved by the military leadership. Even assuming that this was true, commanders must nevertheless be held accountable for actions of their subordinates. The notion is widely accepted in international humanitarian law that each army, militia or military unit engaging in fighting either in an international or internal armed conflict must have a commander charged with holding discipline and ensuring compliance with the law. This notion is crucial to the very existence as well as enforcement of the whole body of international humanitarian law, because without a chain of command and a person in control of military units, anarchy and chaos would ensue and no one could ensure respect for law and order.

562. There is another and more specific reason why the political and military leadership of SLA and JEM may not refuse to accept being held accountable for any crime committed by their troops in the field, if such leadership refrained from preventing or repressing these crimes. This reason resides in the signing by that leadership of the various agreements with the Government of the Sudan. By entering into those agreements on behalf of their respective "movements" the leaders of each "movement" assumed full responsibility for conduct or misconduct of their combatants. [...]

SECTION IV: POSSIBLE MECHANISMS TO ENSURE ACCOUNTABILITY FOR THE CRIMES COMMITTED IN DARFUR

I. GENERAL: THE INADEQUACIES OF THE SUDANESE JUDICIAL CRIMINAL SYSTEM AND THE CONSEQUENT NEED TO PROPOSE OTHER CRIMINAL MECHANISMS

[...]

II. MEASURES TO BE TAKEN BY THE SECURITY COUNCIL

1. Referral to the International Criminal Court

(i.) Justification for suggesting the involvement of the ICC

[...] [see hereafter, para. 648]

2. Establishment of a Compensation Commission

[...]

(i.) Justification for suggesting the establishment of a Compensation Commission

[...]

593. Serious violations of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the perpetrator was acting. This international responsibility involves that the State (or the state-like entity) must pay compensation to the victim.

594. At the time this international obligation was first laid down, and perhaps even in 1949, when the Geneva Conventions were drafted and approved, the obligation was clearly conceived of as an obligation of each contracting State towards any other contracting State concerned. In other words, it was seen as an obligation between States, with the consequence that (i) each relevant State was entitled to request reparation or compensation from the other State concerned, and (ii) its nationals could concretely be granted compensation for any damage suffered only by lodging claims with national courts or other organs of the State. National case law in some countries has held that the obligation at issue was not intended directly to grant rights to individual victims of war crimes or grave breaches. [...]

595. The emergence of human rights doctrines in the international community [...] had a significant impact on this area as well. In particular, the right to an effective remedy for any serious violation of human rights has been enshrined in many international treaties. Furthermore, the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985, provides that States should develop and make readily available appropriate rights and remedies for victims.

596. The right to an effective remedy also involves the right to reparation (including compensation), if the relevant judicial body satisfies itself that a violation of human rights has been committed; indeed, almost all the provisions cited above mention the right to reparation as the logical corollary of the right to an effective remedy.

597. As the then President of the ICTY, Judge C. Jorda, rightly emphasized in his letter of 12 October 2000 to the United Nations Secretary-General, the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.

598. In light of the above [...] the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as *de jure* or *de facto* organs, to make reparation (including compensation) for the damage made.

599. Depending on the specific circumstances of each case, reparation may take the form of *restitutio in integrum* (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation including medical and psychological care as well as legal and social services, satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility, or guarantees of non-repetition. As rightly stressed by the U.N. Secretary-General in 2004, it would also be important to combine various mechanisms or forms of reparation.

600. [...] A similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished.

[...]

III. POSSIBLE MEASURES BY OTHER BODIES

604. While referral to the ICC is the main immediate measure to be taken to ensure accountability, the Commission wishes to highlight some other available measures, which are *not* suggested as possible *substitutes* for the referral of the situation of Darfur to the ICC.

1. Possible role of national courts of States other than Sudan

[...]

(i.) Referral by the Security Council and the principle of complementarity

[...]

608. [...] [A] referral by the Security Council is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so. Therefore, the principle of complementarity will not usually be invoked *in casu* with regard to that State.

609. The Commission's recommendation for a Security Council referral to the ICC is based on the correct assumption that Sudanese courts are unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003. The Commission acknowledges that the final decision in this regard lies however with the ICC Prosecutor.

(ii.) The notion of "universal jurisdiction"

[...]

613. It seems indisputable that a general rule of international law exists authorising States to assert universal jurisdiction over war crimes, as well as crimes against humanity and genocide. The existence of this rule is proved by the convergence of States' pronouncements, national pieces of legislation, as well as by case law.

614. However, the customary rules in question, construed in the light of general principles currently prevailing in the international community, arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting State. Second, before initiating criminal proceedings this State should request the territorial State (namely, the State where the crime has allegedly been perpetrated) or the State of active nationality (that is, the State of which the person suspected or indicted is a national) whether it is willing to institute proceedings against that person and hence prepared to request his or her extradition. Only if the State or States in question refuse to seek the extradition, or are patently unable or unwilling to bring the person to justice, may the State on whose territory the person is present initiate proceedings against him or her.

615. In the case of Darfur the second condition would not need to be applied, for, as pointed out above, Sudanese courts and other judicial authorities have clearly shown that they are unable or unwilling to exercise jurisdiction over the crimes perpetrated in Darfur.

(iii.) Exercise of universal jurisdiction and the principle of complementarity of the ICC

616. [...] The Commission takes the view that complementarity would also apply to the relations between the ICC and those national courts of countries other than

Sudan. In other words, the ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction. [...] [T]here is [...] no reason to doubt *a priori* the ability or willingness of any other State asserting either universal jurisdiction or jurisdiction based on any of the basis for extra-territorial jurisdiction mentioned above. The principle of complementarity, one of the mainstays of the ICC system, should therefore operate fully in cases of assertion of universal jurisdiction over a crime which had been referred to the ICC by the Security Council.

[...]

SECTION V: CONCLUSIONS AND RECOMMENDATIONS

[...]

I. FACTUAL AND LEGAL FINDINGS

[...]

632. The Commission finds that large scale destruction of villages in Darfur has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government may not have participated in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene of destruction are sufficient to make them jointly responsible for the destruction. [...]

633. The Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed both by the Government of the Sudan and the Janjaweed. It is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing and the participation of officials or authorities are amongst the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.

634. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a *crime against humanity*. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to rape as a crime against humanity, or sexual slavery as a crime against humanity.

635. The Commission considers that torture has formed an integral and consistent part of the attacks against civilians by Janjaweed and Government forces. Torture and inhuman and degrading treatment can be considered to have been committed in both a widespread and systematic manner, amounting to a crime against humanity. In addition, the Commission considers, that conditions in the Military Intelligence Detention Centre witnessed in Khartoum clearly amount to torture and thus constitute a serious violation of international human rights and humanitarian law.

636. It is estimated that more than 1,8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.

637. The Commission finds that the Janjaweed have abducted women, conduct which may amount to enforced disappearance as a crime against humanity. [...]

638. In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence againstcivilians was of such a discriminatory character and may constitute persecution as a crime against humanity.

639. While the Commission did not find a systematic or a widespread pattern to violations commited by rebels, it nevertheless found credible evidence that members of the SLA and JEM are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?

640. The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. The

rift between tribes, and the political polarization around the rebel opposition to the central authorities has extended itself to the issues of identity. The tribes in Darfur supporting rebels have increasingly come to be identified as "African" and those supporting the Government as "Arabs". However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

641. The Commission does recognize that in some instances, individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis.

642. The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from the gravity of the crimes perpetrated in that region. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur [...].

III. WHO ARE THE PERPETRATORS?

[...]

645. The Commission decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.

646. The Commission's mention of the number of individuals it has identified should not, however, be taken as an indication that the list is exhaustive. [...] [T]he Commission has gathered substantial material on different influential individuals, institutions, groups of persons, or committees, which have played a

significant role in the conflict in Darfur, including on planning, ordering, authorizing, and encouraging attacks. These include, but are not limited to, the military, the National Security and Intelligence Service, the Military Intelligence and the Security Committees in the three States of Darfur. These institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

IV. THE COMMISSION'S RECOMMENDATIONS CONCERNING MEASURES DESIGNED TO ENSURE THAT THOSE RESPONSIBLE ARE HELD ACCOUNTABLE

1. Measures that should be taken by the Security Council

647. With regard to the judicial accountability mechanism, the Commission strongly recommends that the Security Council should refer the situation in Darfur to the International Criminal Court, pursuant to Article 13(b) of the Statute of the Court. Many of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds of the Rome Statute for the International Criminal Court. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.

648. The Commission holds the view that resorting to the ICC would have at least six major merits. First, the International Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13 (b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trials proceedings would be conducted in The Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might impel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so called mixed or internationalized courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.

649. [...] [T]he Commission also proposes the establishment of an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body.

2. Action that should be taken by the Sudanese authorities

650. [...] The Commission of Inquiry therefore recommends the government of Sudan to:

[...]

(iv) grant the International Committee of the Red Cross and the United Nations human rights monitors full and unimpeded access to all those detained in relation to the situation in Darfur;

[...]

B. UN Security Council Resolution 1593 (2005)

[**Source:** http://www.un.org/Docs/sc/unsc_resolutions05.htm]

Adopted by the Security Council at its 5158th meeting, on 31 March 2005

The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

[...]

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;
3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily; [...]

DISCUSSION

1. How would you classify the conflict? If Sudan had been party to it, would Protocol II have applied? Did the non applicability of Protocol II have any impact on the Commission's conclusions?

2. Are the rebels bound by exactly the same rules as the government? In the field of International Humanitarian Law (IHL)? Of international criminal law? Of International Human Rights Law?

3. What Human Rights norms apply? In what circumstances may the government derogate from some norms? What are these norms? Are certain norms partially derogable? Did the Sudanese government actually derogate from any of its obligations?

4. a. How does the Commission identify customary IHL? Does it look into the actual practice of the parties to non-international armed conflicts? Should it have done so?

   b. On what kind of practice are the customary rules listed in para. 166 based? Are you able to identify different categories of such rules according to the supporting practice mentioned by the Commission in the footnotes?

   c. How can the prohibition of attacking civilian objects be customary if it is not mentioned in Protocol II? Is the Commission's reference to the provisions of the Geneva Conventions on grave breaches relevant?

5. Is the finding of a systematic pattern of violations relevant for IHL? For international criminal law? To find war crimes? To identify crimes against humanity? To identify genocide?

6. Do the irrefutable facts of massive population displacements and of large scale destruction of villages necessarily violate IHL? In the case of Darfur, which facts indicate an obvious violation of IHL?

7. Could the attacks on villages described in paras. 240-251 possibly be justified if some or many rebels were present in those villages? Is the government correct in stating that when rebels were within a certain village, the latter became a military objective (para. 249)?

8. Are the obligations to take precautionary measures and to respect the proportionality principle as prescribed in Art. 57 of Protocol I the same in international and in non-international armed conflicts? Why? Because they can be derived from the actual practice of belligerents? Because they are necessary in order to comply with the substantive provisions?

9. Is the Commission correct in holding (paras. 291-292) that even civilians used by rebels as shields or possessing weapons may not be killed? Under what circumstances would civilians lose their protection?

10. Can the aim to deprive rebels of the support they receive from the civilian population justify the forced displacement of that population?

11. Do the instances of rape and sexual violence mentioned in the report raise any question regarding the interpretation or adequacy of the applicable IHL?

12. Must every detention in non-international armed conflicts be subject to control by a court? In international armed conflicts?

13. Are police forces legitimate targets of attacks: in non-international armed conflicts? In international armed conflicts? What could justify a different status of police forces in the two kinds of armed conflicts?

14. What elements of the crime of genocide were fulfilled in Darfur? What elements were not fulfilled? Why could the genocidal intent not be deduced from the pattern of violations?

15. What are the modes of criminal liability for international crimes? For which crimes may a participant in international crimes be held liable? Only for those covered by the common purpose or also for those committed by some other participants beyond the common purpose?

16. May leaders of rebel groups more easily escape from command responsibility than leaders of governmental armed forces?

17. Why should the perpetrators of international crimes committed in Darfur be brought before the International Criminal Court (ICC)? How was this achieved?

18. a. When may third States exercise universal jurisdiction over international crimes? Even in non-international armed conflicts? Do they have an obligation to exercise such jurisdiction?

b. When seized by the Security Council, does the ICC have precedence over the obligation of third States to exercise universal jurisdiction over international crimes?

19. a. Does Sudan have an obligation to cooperate with the ICC although it is not a party to the ICC Statute (*See* **Case No. 15**, The International Criminal Court, p. 608.)

b. May Sudan invoke the complementarity principle and argue that a case is not admissible under Art. 17 of the ICC Statute (*See* **Case No. 15**, The International Criminal Court, p. 608.) because Sudan itself will investigate and prosecute the alleged perpetrator?

c. Do States party to the ICC Statute (*See* **Case No. 15**, The International Criminal Court, p. 608.) have an obligation to cooperate with the ICC concerning Sudan? According to what legal basis? Do States not party to the ICC Statute have an obligation to cooperate with the ICC concerning Sudan? According to what legal basis?

d. Is para. 6 of Resolution 1593 a deferral under Art. 16 of the ICC Statute (*See* **Case No. 15**, The International Criminal Court, p. 608.)? Is it valid only for 12 months?

20. Who must pay compensation for violations of IHL? Who has the right to receive such compensation? How come the obligation also exists for non-international armed conflicts even though in treaties it is only foreseen for international armed conflicts?

XXI. SOUTH AFRICA

Case No. 139, South Africa, Sagarius and Others

THE CASE

[**Source:** *South African Law Reports*, vol. 1, 1983, pp. 833-838; original in Afrikaans, unofficial translation.]

THE STATE
v.
SAGARIUS AND OTHERS

(SOUTH WEST AFRICA DIVISION)
1982 May 24-28; June 1-2 Before Judge BETHUNE

[...]

A criminal trial. The facts appear from the reasons for judgment.

J.S. Hiemstra for the State.

B. O'Linn SC (assisted by *P. Teek* and *A.T.E.A. Lubowski*) for the accused. [...]

Judge BETHUNE: On 24 February of this year, the three accused were found guilty of participating in terrorist activities in terms of the provisions of Law 83 of 1967. [T]he evidence pointing to their guilt was overwhelming.

In brief, what the evidence comes down to is that the three accused were part of a group of 22 members of SWAPO which, in April last year, infiltrated South West African territory from Angola while in possession of firearms, ammunition and explosives. The group later split into smaller groups, but, following various contacts with the Defence Force, all of them, with the exception of the three accused, were either wiped out or driven back across the frontier. It is common knowledge that the members of the group were clad in a characteristic uniform worn by the armed wing of SWAPO, and that their contacts with the Defence Force occurred in what could be described as a war situation. The three accused were taken prisoner at a stage when they were already in the process of retreating towards the northern frontier of South West Africa. [...].

[...]

When the hearing was resumed [...]. The evidence relating to the verdict dealt with historical events before, during and after the period of German colonial administration and, in particular, with political and constitutional complications which have come into effect since the Second World War.

After the first defence witness had given his evidence, Mr *Hiemstra*, for the State, objected to it on the grounds of irrelevance, given that there was no evidence that the events which had been referred to influenced any of the accused in any way when they committed the crimes. I did, however, allow the defence to proceed with this evidence [...] I shall, in the accuseds favour, accept that the

events about which the defence witnesses gave evidence probably did play a part in the state of mind of the accused when they committed the offence. The events which led to the armed conflict of SWAPO extend over many years, and their effect has been widespread. [...]

It appears, moreover, that the World Court and the authoritative organs of UNO brand South Africas presence in SWA illegal, and that this view is subscribed to by a large part of the international community.

Even if the accused had no previous knowledge of this fact, it is highly probably that they would have been told about it by SWAPO supporters during their training outside South Africa. All three were obviously youths when they left South Africa. Considering all the circumstances, they probably regarded their actions as part of a legitimate conflict which enjoyed strong support both at home and abroad. In the evidence, reference was made to the fact that there is a tendency in international law to accord prisoner of war status to captives who have openly participated, in a characteristic uniform, in an armed conflict against a colonial, racist or foreign regime. However, Professor Dugard, who testified on this point, made it clear that such recognition rests on a contractual basis. Governments such as those of South Africa and Great Britain, which do not accept the relevant Protocol, are not bound by it. In my opinion, Professor Dugard was right in his opinion that this Court cannot simply declare that the accused must be treated as prisoners of war, but that the tendency in international law must be taken into consideration when deciding whether the death sentence must be imposed.

In this connection, I would refer you to the following passage from his testimony:

South Africa did not sign the text of the First Protocol, nor had it ratified or acceded to the 1977 Protocols. Consequently it was quite clear that South Africa is not bound by Protocol 1 and therefore, in terms of the treaty, is not obliged to confer prisoner of war status upon members of SWAPO.

Although South Africa is not bound in terms of this treaty, I suggested that there is support for the view that this position has now become part of customary international law, part of the common law of international law. In my judgment this argument is premature, in that Protocol 1 has not yet received that support to argue that it is a part of international law, binding upon States that have not ratified the convention.

Yes, I have already expressed the view that in my judgment a South African Court has no option but to exercise criminal jurisdiction over SWAPO; that a Court cannot simply direct that members of SWAPO be treated as prisoners of war. Nevertheless, it is my view, having regard to new developments in international humanitarian law as reflected in Protocol 1 of the 1977 Geneva Convention and having regard to the special status of a Namibian, that such factors should be taken into account when it comes to the imposition of a sentence and, in particular, it is my view that a Court might have regard to these developments when it comes to the question of the death penalty because the Convention on Prisoners of War of 1949 makes it clear that a prisoner of war may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war crimes.

Mr *O'Linn* has argued that, in the light of the extent of the armed conflict, a heavy sentence would not have any deterrent effect. I cannot agree with this assertion. It may be the case that people who have already decided to participate in the armed conflict would not, perhaps, be deterred by the sentences which this Court imposes, but the provisions of the Law also apply to any other citizen of this country who may possibly consider committing an act of terrorism (as defined by the Law). Such persons would certainly, in my opinion, take heed of the penalties which this Court imposes. [...]

Mr *Hiemstra* has argued that it is in the interests of the community that a very heavy sentence be imposed. However, it appears from the undisputed evidence that a large part of the population of this country, as well as of the international community, would view the accuseds actions in a less serious light. In addition, it is probable that the accused were exploited by others for political gain. It is not unusual for people who are not themselves prepared to run the risks of armed conflict to influence young people to commit actions such as this.

All three of the accused are very young, and have no previous convictions. I accept that, after they left South Africa, they were trapped in a web of events over which they had little or no control. It seems, judging from the statement that Accused No. 3 made to the police, that he was disillusioned when he found out precisely what the promised training which he would undergo outside South Africa consisted of. After their military training began, it was certainly extremely difficult, and even life-threatening, for them to leave. This situation, which to a certain extent was of their own making, is not in itself a justification for their actions, but it is nonetheless an important factor which must be weighed when deciding their punishment. On the other hand, the accused must have foreseen that the actions (such as the laying of land mines and the damaging of railway tracks), which they and the group of infiltrators certainly did perform, could injure or kill innocent people. While I am of the opinion that this is not a case in which the death penalty must be imposed, I am satisfied that a long term of imprisonment is justified. [...]

In the light of the indications by the defence that a heavy sentence will not deter members of SWAPO, it will not serve any purpose to suspend any part of the sentence.

Accordingly, the following sentences are imposed:

Accused Nos. 1 and 2: 9 years imprisonment.

Accused No. 3: 11 years imprisonment.

DISCUSSION

1. Is this "war situation" an international or non-international armed conflict under IHL? Does it matter that the accused have infiltrated from Angola? Whether the South African presence in Namibia was lawful or unlawful? Whether the South African government could be qualified as a "racist regime"? (*Cf.* Art. 2 common to the Conventions, Arts. 1 (4) and 96 of Protocol I and Art. 1 of Protocol II.)

2. a. Is SWAPO a national liberation movement? If so, because of the international status of Namibia? Because of recognition by the international community? Of what relevance is it whether SWAPO is deemed a national liberation movement? Must SWAPO represent the South African people to be a national liberation movement fighting against South Africa? Or is it sufficient that it represents the South West African people? Is its national liberation war here directed against the South African government as "colonial domination," "alien occupation," or "racist regime"? (*Cf.* Art. 1 (4) of Protocol I.)

   b. If SWAPO formally declared its intention to respect and apply the Geneva Conventions and the Protocols, would they then apply to this conflict? (*Cf.* Art. 96 of Protocol I.)

3. a. As only 163 States are party to Protocol I (compared with the 192 States party to the four Conventions as of July 2005), does this indicate that its Article 1 (4) has little or no practical effect or value? Particularly because Israel and South Africa were not State Parties? Why?

   b. Are none of the principles reflected in the Protocols customary law and, thus, binding on South Africa? Did the law of international armed conflicts under customary law of 1982 apply to national liberation wars? Under today's customary law, taking into account that South Africa became a State party to Protocol I in 1995? How could a rule like Art. 1 (4) of Protocol I become customary?

   c. Although the Court rejects the Protocols as a reflection of customary law, what remains the significance of Court's consideration and use of the Protocols? What do you think of Professor John Dugard's assessment of the status of the Protocols?

4. If the law of international armed conflicts applies, have the accused prisoners-of-war status? Could they be sentenced, as in this judgment, if they were prisoners of war?

5. What impact would it have if the accused had not been wearing distinctive uniforms during their military engagement: Under the law of international armed conflict? Under the Court's approach? (*Cf.* Arts. 43-44 of Protocol I.)

6. Does Professor Dugard correctly state that Convention III "makes it clear that a prisoner of war may not be executed by the Detaining Power for military activities prior to his arrest unless they amounted to war crimes"? (*Cf.* Arts. 85 and 100 of Convention III.)

7. Under IHL, are the accused penally responsible if they "had foreseen that the actions (such as the laying of land mines and the damaging of railway tracks), which they and the group of infiltrators certainly did perform, could injure or kill innocent people"? (*Cf.* Arts. 51, 57 and 85 (3) of Protocol I.)

8. If the law of international armed conflicts did not apply, was the law of non-international armed conflicts necessarily applicable? Is the judgment compatible with that law?

Case No. 140, South Africa, S. v. Petane

THE CASE

[**Source:** *South African Law Reports*, vol. 3, 1988, pp. 51-67.]

S v. PETANE

CAPE PROVINCIAL DIVISION

[...]

Postea (November 3 [1987]).

Conradie J: The accused has been indicted before this Court on three counts of terrorism, that is to say, contraventions of s 54(1) of the Internal Security Act 74 of 1982. He has also been indicted on three counts of attempted murder. [...]

When [...] the accused was called upon to plead he refused to do so. A plea of not guilty on each count was accordingly entered [...].

The accused's position is stated to be that this Court has no jurisdiction to try him.

I then heard argument on what was submitted to be a jurisdictional question. As the argument progressed I began to doubt whether the point which was being raised was really a jurisdictional point at all. The point in its early formulation was this. By the terms of Protocol I to the Geneva Conventions the accused was entitled to be treated as a prisoner-of-war. A prisoner-of-war is entitled to have notice of an impending prosecution for an alleged offence given to the so-called 'protecting power' appointed to watch over prisoners-of-war. Since, if such a notice were necessary, the trial could not proceed without it, Mr *Donen* suggested that the necessity or otherwise for giving such a notice should be determined before evidence was led. [...]

Articles 45(1) and (2) of Protocol I contain the following provisions:

1. A person who takes part in hostilities and falls in the power of an adverse party shall be presumed to be a prisoner-of-war and therefore shall be protected by the Third Convention if he claims the status of prisoner-of-war, or if he appears to be entitled to such status, or if the party on which he depends claims such status on his behalf by notification to the detaining power or to the protecting power. Should any doubt arise as to whether any such person is entitled to the status of prisoner-of-war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse party is not held as a prisoner-of-war and is to be tried by that party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.

Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence.'

It is not necessary to quote the remainder of para 2 of art 45.

If the terms of the Protocol were found to apply I would be bound by these provisions and failure to give effect thereto might amount to an irregularity. I say 'might' amount to an irregularity because the article, to my mind, clearly envisages a situation where the applicability of the Protocol is conceded and the only question before the Court is the entitlement to protection of an individual captive.

The issue raised by such a plea is, in my view, not a jurisdictional issue. A captive who raises such a defence avers that, because he fought a war as a soldier in accordance with the laws of war, he is not guilty of any crime, despite having deliberately killed or injured others or damaged their property. In *R v Guiseppe and Others* 1942 TPD 139, Malan J set aside the conviction of Italian prisoners-of-war on the ground that the convictions, without notice to the protecting power, had been irregular. He did not hold that the court, in that case a magistrate's court, had no jurisdiction to try the offenders. The case is not authority for the proposition that the accused's acts are not justiciable before a municipal tribunal. Indeed, art 45(1) of Protocol I envisages that the status of such a prisoner should be determined by a competent municipal tribunal. [...]

On 12 August 1949 there were concluded at Geneva in Switzerland four treaties known as the Geneva Conventions. The only one of these Conventions which concerns me today is the Geneva Convention Relative to the Treatment of Prisoners-of-War of 12 August 1949.

South Africa was among the nations which concluded the treaties. According to the *International Review of the Red Cross* (January/February 1987 No 256), 165 countries were as at 31 December 1986 parties to the Geneva Conventions. This must be very nearly all the countries in the world. It is fair to state that the terms of these Conventions enjoy universal recognition. One of these terms is, of course, that which describes their field of application. Except for the common art 3, [...] they apply to wars between States.

After the Second World War many conflicts arose which could not be characterised as international. It was therefore considered desirable by some States to extend and augment the provisions of the Geneva Conventions so as to afford protection to victims of and combatants in conflicts which fell outside the ambit of these Conventions. The result of these endeavours was Protocol I and Protocol II to the Geneva Conventions, both of which came into force on 7 December 1978.

Protocol II relates to the protection of victims of non-international armed conflicts. Since the state of affairs which exists in South Africa has by Protocol I been characterised as an international armed conflict, Protocol II does not concern me at all. [...]

Article 2 common to all the Geneva Conventions provides, *inter alia*, that:

'The present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the high contracting parties, even if the State of war is not recognised by one of them.'

Article 1(4) of Protocol I amplifies and extends common art. 2 by providing that:

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

The extension of the scope of art 2 of the Geneva Conventions was, at the time of its adoption, controversial. According to Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), the debate about this article took up almost the whole of the first session.

The article has remained controversial. More debate has raged about its field of operation than about any other articles in Protocol I. It has been criticised for having introduced political objectives into humanitarian law, thus making it very difficult for any State to concede its applicability; and it has been criticised for the vagueness of its terminology. (*See* Andrew Borrowdale "The Law of War in Southern Africa": The Growing Debate XV *Cilsa* 1982 at 41.) So, although practically every State in the world has agreed that the principles of the Geneva Conventions should apply to conventional international armed conflicts, far fewer (as I shall show) were or are satisfied with the extension of these provisions to the new conflicts characterised as 'international'.

South Africa is one of the countries which has not acceded to Protocol I. Nevertheless, I am asked to decide, [...] as a preliminary point, whether Protocol I has become part of customary international law. If so, it is argued that it would have been incorporated into South African law. If it has been so incorporated it would have to be proved by one or other of the parties that the turmoil which existed at the time when the accused is alleged to have committed his offences was such that it could properly be described as an 'armed conflict' conducted by 'peoples' against a 'racist régime' in the exercise of their 'right of self-determination'. Once all this has been shown it would have to be demonstrated to the Court that the accused conducted himself in such a manner as to become entitled to the benefits conferred by Protocol I on combatants, for example that, broadly speaking, he had, while he was launching an attack, distinguished himself from civilians and had not attacked civilian targets. [...]

[T]he Appellate Division accepted that customary international law was, subject to its not being in conflict with any statutory or common municipal law, directly operative in the national sphere. The Appellate Division described the attributes of a rule of customary international law which would make it applicable in South Africa. It would have to be either universally recognised or it would have to have received the assent of this country. In holding this, the Court referred to a passage in Oppenheim *International Law* 8th ed vol 1 at 39 which States the conditions concerning universal acceptance or State assent for recognition of a rule of customary international law as part of the law of England. Our law and English law in this respect is therefore the same.

[...] International law does not require universal acceptance for a usage of States to become a custom.

[...] I am prepared to accept that where a rule of customary international law is recognised as such by international law it will be so recognised by our law. [...]

Custom is usage which is considered by States to be legally binding:

> 'All that theory can say is this: Whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.'

(Oppenheim (*op cit* vol 1 at 27).) The conduct of States is referred to as State practice. The view that such conduct is legally right or obligatory is called the *opinio juris*.

G J H van Hoof *Rethinking the Sources of International Law* (1983) is one of the many writers on international law who supports this two-element approach. He says at 93 that it

> 'buttresses the practice-oriented character of international custom by demanding that the formulation of the content of the rule in stage one takes place through *usus*: customary law is built upon repetition. Without the repetition of similar conduct in similar situations there can be no custom, and without custom there can be no customary law. It is therefore a reminder of the fact, sometimes overlooked, that although *opinio juris* turns a rule into a rule of international law, it is the *usus* which makes it a rule of customary law'. [...]

There are writers who espouse the view that State practice alone is sufficient to create a rule of customary international law, and others who believe that the *opinio juris* alone is sufficient. [...]

I am prepared to accept that, as might happen in rapidly developing fields of technical or scientific endeavour, like space exploration, if all the States involved share an understanding that a particular rule should govern their conduct, such a rule may be created with little or no practice to support it. Indeed, the opportunity for putting the understanding into practice may not arise. It may be, as *Van Hoof* (*op cit*) suggests at 86, that it would be better to regard customary international law so created as not emanating from custom but from a new and different source.

I am also prepared to accept that customary international law may in this way be created very quickly, but before it will be considered by our municipal law as being incorporated into South African law the custom, whether created by *usus* and *opinio juris* or only by the latter, would at the very least have to be widely accepted.

Mr *Donen* says that by near-universal State practice the provisions of Protocol I have passed into customary international law which, since it is part of South African law, obliges this Court to apply the provisions thereof. He argues that the State practice which has made the provisions of the first Protocol part of customary international law is the attitude of States, practically all the States of the world, expressed in frequent condemnation of the policies of this country at

the United Nations. There are, to my mind, several difficulties with this proposition.

In the first place, it is doubtful whether resolutions passed by the United Nations General Assembly qualify as State practice at all. There is, says *Van Hoof* (*op cit* at 108), no unanimity on what is to be considered State practice [...]. *Akehurst's* detailed study on custom shows that it is far from easy to indicate *in abstracto* whether a certain type of act can be taken to belong to *usus* or not. *Akehurst* himself employs an extremely broad concept of *usus*. Almost all activities of States are counted. Illustrative in this respect is his opinion on statements by States *in abstracto*:

> 'It is impossible to study modern international law without taking account of declaratory resolutions and other statements made by States *in abstracto* concerning the content of international law.'

This statement as such is certainly correct. It does not follow, however, that such resolutions or declarations can be classified as *usus* giving rise to custom. They may constitute *opinio juris* which, if expressed with respect to a rule sufficiently delineated through *usus*, may create a customary rule of international law. To this extent *Akehurst* is correct in stating that

> '(w)hen States declare that something is customary law it is artificial to classify such a declaration as about something other than customary law'.

But, if there is no preceding *usus*, such a declaration cannot give birth to a customary rule, unless, of course, the declaration itself is treated as *usus* at the same time. However, it takes too wide a stretching of the concept of *usus* to arrive at the latter conclusion. As was rightly observed, 'repeated announcements at best develop the custom or usage of making such pronouncements'.

As was already reiterated in the foregoing, it is dangerous to denaturate the practice-oriented character of customary law by making it comprise methods of law-making which are not practice-based at all. This undermines the certainty and clarity which the sources of international law have to provide. The Universal Declaration on Human Rights may be taken as an example in this respect. It has been asserted that in the course of time its provisions have grown into rules of customary international law. This view is often substantiated by citing abstract statements by States supporting the Declaration or references to the Declaration in subsequent resolutions or treaties. Sometimes it is pointed out that its provisions have been incorporated in national constitutions. But what if States making statements like these or drawing up their constitutions in conformity with the Universal Declaration at the same time treat their nationals in a manner which constitutes a flagrant violation of its very provisions, for instance, by not combatting large-scale disappearances, by practicing torture or by imprisoning people for long periods of time without a fair trial? Even if abstract statements or formal provisions in a constitution are considered a State practice, they have at any rate to be weighed against concrete acts like the ones mentioned.

In the present author's view, the best position would seem to be that it is solely the material, concrete and/or specific acts of States which are relevant as *usus*. As was said, it is difficult to come up with a definition *in abstracto*, but the following description would seem to offer a useful handhold:

> 'The substance of the practice required is that States have done, or abstained from doing, certain things in the international field [...]. State practice, as the material element in the formulation of custom, is, it is worth emphasizing, material: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord.'

It is, I believe, correct to say that the practice of condemnation of South Africa is evidence only of a general dislike of its internal policies. There is nothing in the condemnation from which the content of a rule of customary international law may be derived. I fail completely to appreciate how the condemnation of South Africa, or even the labelling of apartheid as a crime against humanity, leads to the inference that Protocol I has been accepted as part of customary international law by those States uttering those condemnations. I suppose that, since ratification of Protocol I is open to every State, very little short of that could be construed as an acceptance of its provisions.

In particular, United Nations resolutions cannot be said to be evidence of State practice if they relate, not to what the resolving States take it upon themselves to do, but to what they prescribe for others. Customary international law is founded on practice, not on preaching.

Indeed, Amato [sic], *The Concept of Customary International Law* (Cornell University Press 1971) puts forward the view that not even claims put forward by States can be considered as State practice. The State must act.

> 'What is an "act" of State? In most cases a State's action is easily recognised. A State sends up an artificial satellite, tests nuclear weapons, receives ambassadors, levies customs duties, expels an alien, captures a pirate vessel, sets up a drilling rig in the continental shelf, visits and searches a neutral ship and similarly engages in thousands of acts through its citizens and agents. On the other hand, a claim is not an act. As a matter of daily practice, international law is largely concerned with conflicting international claims. But the claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom, for a State has not done anything when it makes a claim; until it takes enforcement action the claim has little value as a prediction of what the State will actually do.'

MacGibbon (in Bin Cheng (ed.) *International Law Teaching Practice*) in a chapter entitled 'Means for the Identification of International Law' and subtitled 'General Assembly Resolutions: Custom Practice and Mistaken Identity', concludes that General Assembly resolutions can neither create new customary international law, nor be evidence of State practice [...].

Nor, in the view of *MacGibbon*, a view of which the logic seems inescapable, can a General Assembly resolution constitute the required *opinio juris* to create custom:

> 'If the existence of the *opinio juris* is in question, what is sought is evidence of what the Court in the *North Sea Continental Shelf* cases described as a general recognition that a rule of law or legal obligation is involved. To

> focus that search exclusively on a General Assembly resolution is bound to prove profitless because such an instrument of an essentially recommendatory character is incapable of exhibiting such an attribute. Again, the issue turns on the answer to the question posed earlier: what are States voting for when they vote in favour of a resolution? And, as before, the answer can only be: they are voting for what they know to be merely a recommendation. It is axiomatic that such a vote cannot convey the sense of legal obligation essential to an expression of the *opinio juris*. [...]'

(*MacGibbon* (*op cit* at 23).)

The same point is also well made by Thirlway *International Customary Law and Codification*, who writes at 58:

> "The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of State practice; but it may be adduced as evidence of the acceptance by the State against which it is sought to set up a claim, of the customary rule which is alleged to exist, assuming that the State asserts that it is not bound by the alleged rule. More important, such assertions can be relied on as supplementary evidence, both of State practice and of the existence of the *opinio juris*; but only as supplementary evidence, and not as one element to be included in the summing up of State practice for the purpose of assessing its generality."

[...] The only apparent exception to this principle -which is not really an exception- is the act of a State in ratifying or acceding to a multilateral treaty which directly or indirectly asserts the existence, at least for the future and for the States party to the treaty, of a rule of law. Just as a series of bilateral treaties concluded over a period of time by various States, all consistently adopting the same solution to the same problem of the relationships between them, may give rise to a new rule of customary international law, so the general ratification of a treaty laying down general rules to govern the future relationships of States in a given field has a similar effect. The practice here is concrete in the sense that each State does not merely assert the desirability, or even the existence, of the rule of law in question, but by a definite and formal decision accepts the rule for the regulation of its own interests in future differences in the field covered by the treaty. For this reason it is possible, as the International Court of Justice stated in the *North Sea Continental Shelf* cases, for a custom to arise simply from the general (but not universal) ratification of a codifying treaty.

To my way of thinking, the trouble with the first Protocol giving rise to State practice is that its terms have not been capable of being observed by all that many States. At the end of 1977 when the treaty first lay open for ratification there were few States which were involved in colonial domination or the occupation of other States and there were only two, South Africa and Israel, which were considered to fall within the third category of racist regimes. Accordingly, the situation sought to be regulated by the first Protocol was one faced by few countries; too few countries, in my view, to permit any general usage in dealing with armed conflicts of the kind envisaged by the Protocol to develop. [...]

Mr *Donen* contended that the provisions of multilateral treaties can become customary international law under certain circumstances. I accept that this is so. There seems in principle to be no reason why treaty rules cannot acquire wider application than among the parties to the treaty.

Brownlie *Principles of International Law* 3rd ed at 13 agrees that non-parties to a treaty may by their conduct accept the provisions of a multilateral convention as representing general international law. *Van Hoof* (*op cit*) writes at 109:

> "Most writers agree that treaties are to be considered State practice which may generate customary rules of international law. They may find support in the ICJ's statement in the *North Sea Continental Shelf* case, holding that: "There is no doubt that this process is a perfectly possible one and does from time to time occur. It constitutes indeed one of the recognised methods by which new rules of customary international law may be formed."

It is true that treaties may be considered *usus*, but a number of things should be kept in mind in this respect. First, the treaty concerned must be concrete or specific enough to be able to delineate the content of a customary rule. Furthermore, and this is more important here, a treaty is, of course, binding on the States parties to it. Consequently, the question of its being capable of generating a customary rule is relevant only with respect to States which are not parties to it. For a customary rule of international law to come into being for non-parties, the latter must express their *opinio juris* with respect to it. One should be careful, however, to draw the conclusion that they indeed have done so. [...] Similarly, it would seem that in the case of a multilateral treaty which is open for ratification by all states, the *opinio juris* constituting the "accession by way of custom" has to be unambiguous. The fact that a State is not prepared to ratify the treaty cannot be without significance in such a situation.

I incline to the view that non-ratification of a treaty is strong evidence of non-acceptance.

Starke (*op cit*) remarks at 43:

> 'The mere fact that there are (*sic*) a large number of parties to a multilateral convention does not mean that its provisions are of the nature of international law binding non-parties. Generally speaking, non-parties must by their conduct distinctly evidence an intention to accept such provisions as general rules of international law. This is shown by the decision of the International Court of Justice in 1969 in the *North Sea Continental Shelf* cases, holding on the facts that art. 6 of the Geneva Convention of 1958 on the Continental Shelf, laying down the equidistance rule of apportionment of a common continental shelf, had not been subsequently accepted by the German Federal Republic -a non-party- in the necessary manifest manner.'

Suppose for the moment that Protocol I had been enthusiastically embraced by the world community, and suppose that it was good law to say that its terms bound South Africa in spite of its non-assent, what we would then have is a situation in which neither party which is engaged in what has been called the 'armed conflict' in South Africa has accepted Protocol I. I shall explain.

The one party to what the accused's counsel characterised as the 'armed conflict' is the South African State. The other party is said to be the ANC through its military wing, Umkhonto We Siswe, of which the accused has been admitted to be a member.

It was suggested by defence counsel that the ANC acceded to the Protocol, as it would have been entitled to do in terms of art. 96. However, this suggestion is open to serious doubt. In his article entitled 'The Law of War in South Africa-The Growing Debate', referred to earlier, *Andrew Borrowdale* writes at 41:

> 'On 20 October 1980 Oliver Tambo, President of the African National Congress of South Africa (ANC), handed to the President of the Red Cross the following declaration signed by himself:
>
> "The African National Congress of South Africa hereby declares that it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.
> Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts." [...]'

Borrowdale comes to the conclusion, however, that the ANC declaration

> 'would not seem to have been made in the context of art 96(3). In the first place, it does not appear to have been addressed to, or deposited with, the depository referred to in art 96(3), viz the Swiss Federal Council. Secondly, the ANC has not undertaken to apply the rules of the Geneva Conventions of 1949 and the additional Protocol I of 1977 unconditionally, but merely to respect them whenever practically possible. [...]'

[...]

Nevertheless, despite the refusal of each party to the 'conflict' to bind itself to the Protocol, Mr *Donen* contends that the Protocol binds them both. This proposition is far-reaching. What one has here are two parties, one of which is not a State, which are agreed on at least one thing. Neither, for its own reasons, appears to desire the protection for civilians or combatants of Protocol I. Were an international tribunal to hear a dispute between the parties about the binding force of Protocol I, it would be faced with contentions from each side that neither desired its application. I have not found a case in which a rule or alleged rule of customary international law has been applied in these circumstances. There is hardly likely to be such a case, since customary international law rests on a foundation of consensuality. For that proposition reference may be made to Oppenheim's *International Law* 8th ed vol 1 at 15-18, and to the work by *Van Hoof*, which I have already cited, at 97. [...]

I have not been persuaded by the arguments which I have heard on behalf on the accused that the assessment of Professor Dugard, writing in the *Annual Survey of South African Law* (1983) at 66, that 'it is argued with growing conviction that under contemporary international law members of SWAPO and the ANC are members of liberation movements entitled to prisoner-of-war status,

in terms of a new customary rule spawned by the 1977 Protocols', is correct. On what I have heard in argument I disagree with his assessment that there is growing support for the view that the Protocols reflect a new rule of customary international law. No writer has been cited who supports this proposition. Here and there someone says that it may one day come about. I am not sure that the provisions relating to the field of application of Protocol I are capable of ever becoming a rule of customary international law, but I need not decide that point today.

For the reasons which I have given I have concluded that the provisions of Protocol I have not been accepted in customary international law. They accordingly form no part of South African law. [...]

In the result, the preliminary point is dismissed. The trial must proceed.

DISCUSSION

1. a. Which roles does IHL assign the Protecting Power?
   b. Which purpose is served by notifying the Protecting Power of trials or sentences of prisoners of war? (*Cf.* Arts. 104 and 107 of Convention III.)
   c. What may be the results, if a court of a Detaining Power fails to notify the Protecting Power of the trial of a prisoner of war? Does the court then have no jurisdiction to try him, as the defendant here argues? Or is it that the trial could not proceed without such notice? Is the issue of notification, thus, a jurisdictional or procedural issue? (*Cf.* Art. 104 of Convention III and Art. 45 of Protocol I.)
2. a. If Protocol I had been binding for South Africa, why does the Court nevertheless state that, even in that case, failure to give effect to its provisions only "might amount to an irregularity"?
   b. Under which condition could the defendant invoke Protocol I although South Africa was at the time not a State Party to it? If Protocol I was applicable, what would be the consequences for the defendant? Could the trial take place? Would he have combatant status? Could the court decide upon this question? If he had combatant status, could he be punished for acts of terrorism? Could he be punished for having killed South African soldiers? Is it necessary for attaining or maintaining prisoner-of-war status that he must not have attacked civilian targets, as the Court asserts? (*Cf.* Arts. 44 and 45 of Protocol I.)
   c. Even if Protocol I binds South Africa as customary law, must not both parties to the conflict be bound by Protocol I for it to be applicable? Is the ANC a party to the Protocol? Is it bound by customary law? If Art. 1 (4) of Protocol I is customary law, has the ANC to declare formally its intention to respect and apply the Geneva Conventions and the Protocols in conformity with Art. 96 of Protocol I? If Art. 1 (4) of Protocol I is customary law, is customary IHL of international armed conflicts applicable in the conflict between the government of South Africa and the ANC even though neither desired its application?

3. a. Has there to be first *usus* and later *opinio iuris* to form a customary rule? Or can both elements appear simultaneously? Are there certain material sources which show *usus* and others *opinio iuris*? Or do all show simultaneously *usus* and *opinio iuris*?

   b. Is customary law based on the acceptance of the States or on their opinion? Does the answer to that question matter? Could you imagine a rule which would be customary or not depending on the answer to this question?

   c. Can customary IHL also be derived from State acts such as diplomatic statements, undertakings and declarations? Are the latter *usus*? Can only acts or also words show *usus*? Are claims necessarily conflicting or can they also show agreement on a norm? If declarations also count as practice, must they refer to an actual situation, or can they also be abstract statements about (*i.e.* in favour of) the rule? Can a rule become customary based solely on abstract statements? What if the actual behaviour of belligerents is incompatible with those abstract statements?

   d. Do UN General Assembly resolutions constitute State practice? Do repeated announcements only "at best develop the custom and usage of making such pronouncements"? What about for instance the prohibition of torture? Is there no customary law against committing torture because some States practice torture? Yet, what explains the fact that most of those States deny committing acts of torture? Do such denials not constitute a concrete act of which the Court speaks? Would D'Amato agree?

   e. Is ratification of Protocol I (together with the practice of other States) an instance of State practice able to make all its provisions customary? Is non-ratification of a treaty strong evidence of its non-acceptance? Does non-ratification indicate non-acceptance of all rules contained in the treaty or only perhaps of some of them? Thus, does non-ratification of Protocol I automatically mean that Art. 1 (4) of Protocol I in particular is not customary law?

   f. Once a rule has been included into a multilateral treaty, is the question whether it is customary only relevant for non-Parties? Has only their practice to be considered whenever evaluating whether it is customary? What would this mean for rules laid down in a treaty as widely accepted as the Geneva Conventions?

   g. Does the fact that, when Protocol I was concluded in 1977, the category of "racist regimes" listed in Art. 1 (4) was limited to very few countries, one of them being South Africa, make it impossible to establish the general usage necessary for establishing the Article as customary law? If so, because those States chose not to be bound to the Protocol? Even if almost all other States considered Protocol I applicable to such a situation? If a situation rarely arises or arises in only a few States, can rules regulating that situation never become customary international law? Is the position of the Court on this question connected to its theory on what counts as *usus*?

   h. Can a rule of IHL become customary even if South Africa objects to it? Must a rule of customary IHL be applied by South African courts although they have never accepted that rule? Even though South Africa was against that rule as a

treaty rule in Protocol I? Even though South Africa has persistently objected to that rule?

i. Are none of the principles reflected in Protocol I customary law and, thus, binding on South Africa? Did the law of international armed conflicts under customary law of 1987 apply to national liberation wars? Under today's customary law, taking into account that South Africa became a State party to Protocol I in 1995? How could a rule like Art. 1 (4) of Protocol I become customary?

4. Do you agree with the criticism that Art. 1 (4) of Protocol I introduced political objectives into humanitarian law? Does Art. 1 (4) of Protocol I introduce anything at all, *i.e.,* is it an innovative development in the law of war, or is it merely a reflection of existing international law? Does Art. 1 (4) lead to a situation where both sides of an armed conflict are not equal before IHL? Does Art. 1 (4) violate the separation between *ius in bello* and *ius ad bellum*? (*See* **Case No. 61**, US, President Rejects Protocol I. p. 971.)

5. What is the place of international customary law within your national law? Within South African national law? Must customary law be universally recognized before it may or must be incorporated into your national law?

Case No. 141, South Africa, AZAPO v. Republic of South Africa

THE CASE

[**Source:** Constitutional Court of South Africa, Case CCT 17/96, July 25, 1996.]

THE AZANIAN PEOPLES ORGANIZATION (AZAPO) [...]

v.

[...] **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

JUDGMENT

[...]

1) For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. [...]

2) [...] [I]n the early nineties [...] negotiations resulted in an interim Constitution committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. [...] It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.

3) This fundamental philosophy is eloquently expressed in the epilogue to the Constitution which reads as follows:

"National Unity and Reconciliation

[...] The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. [...]"

[...] Parliament enacted during 1995 what is colloquially referred to as the Truth and Reconciliation Act. [...] ("the Act").

4) [...] A Truth and Reconciliation Commission [...] also is required to facilitate "...the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective..." [...]

5) Three committees are established for the purpose of achieving the objectives of the Commission. [...] The Committee on Amnesty is given elaborate powers to consider applications for amnesty. The Committee has the power to grant amnesty in respect of any act, omission or offense to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offense is associated with a political objective committed in the course of the conflicts of the past [...]

6) [...] Section 20 (7) (the constitutionality of which is impugned in these proceedings) provides as follows:
   a) "No person who has been granted amnesty in respect of an act, omission or offense shall be criminally or civilly liable in respect of such act, omission or offense and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offense." [...]

8) The applicants sought in this court to attack the constitutionality of section 20 (7) on the grounds that its consequences are not authorised by the

Constitution. They aver that various agents of the state, acting within the scope and in the course of their employment, have unlawfully murdered and maimed leading activists during the conflict against the racial policies of the previous administration and that the applicants have a clear right to insist that such wrongdoers should properly be prosecuted and punished. [...]

16) I understand perfectly why the applicants would want to insist that those wrongdoers who abused their authority and wrongfully murdered, maimed or tortured very much loved members of their families who had, in their view, been engaged in a noble struggle to confront the inhumanity of apartheid, should vigorously be prosecuted and effectively be punished for their callous and inhuman conduct in violation of the criminal law. [...]

17) [...] Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. [...] Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigors of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. [...]

18) The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependents of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation. [...]

22) South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have

in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.

23) The Argentinean truth commission was created by Executive Decree 187 of December 15, 1983. It disclosed to the government the names of over one thousand alleged offenders gathered during the investigations. The Chilean Commission on Truth and Reconciliation was established on April 25, 1990. It came to be known as the Rettig Commission after its chairman, Raul Rettig. Its report was published in 1991 and consisted of 850 pages pursuant to its mandate to clarify "the truth about the most serious human right violations ... in order to bring about the reconciliation of all Chileans". The Commission on the Truth for El Salvador was established with similar objectives in 1992 to investigate "serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth". In many cases amnesties followed in all theses countries.

24) What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

25) Mr. Soggot contended on behalf of the applicant that the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20 (7) which authorized amnesty for such offenders constituted a breach of international law. We were referred in this regard to the provision of article 49 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 50 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 129 of the third Geneva Convention relative to the Treatment of Prisoners of War and article 146 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The wording of all these articles is exactly the same and provides as follows:

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches..."

defined in the instruments so as to include, inter alia, wilful killing, torture or inhuman treatment and wilfull causing great suffering or serious injury to body or health. They add that each High Contracting Party shall be under an obligation to search for persons alleged to have committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts.

26) The issue which falls to be determined in this Court is whether section 20 (7) of the Act is inconsistent with the Constitution. If it is, the inquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment. [...]

27) [...] Section 35 (1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows:

"In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law".

The court is directed only to "have regard" to public international law if it is applicable to the protection of the rights entrenched in the chapter.

28) The exact terms of the relevant rules of public international law contained in the Geneva Conventions relied upon on behalf of the applicants would therefore be irrelevant if, on a proper interpretation of the Constitution, section 20 (7) of the Act is indeed authorised by the Constitution, but the content of these Conventions in any event do not assist the case of the applicants.

29) In the first place it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict to which I have referred.

30) Secondly, whatever be the proper ambit and technical meaning of these Conventions and Protocols, the international literature in any event clearly appreciate the distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a

struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other. In respect of the latter category, there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterized as serious invasions of human rights. On the contrary, article 6(5) of Protocol II to the Geneva Conventions of 1949 provides that

> "At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".

31) The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatized by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. [...]

Conclusion

50) In the result, I am satisfied that the epilogue to the Constitution authorised and contemplated an "amnesty" in its most comprehensive and generous meaning so as to enhance and optimize the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. Parliament was, therefore, entitled to enact the Act in the terms which it did. This involved more choices apart from the choices I have previously identified. [...]

They could conceivably have chosen to differentiate between the wrongful acts committed in defense of the old order and those committed in the resistance of it, or they could have chosen a comprehensive form of amnesty which did not make this distinction. Again they were entitled to make the latter choice. [...]

Order

51) In the result, the attack on the constitutionality of section 20 (7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 must fail. [...]

DISCUSSION

1. What is your opinion on the dilemma between peace and justice, between reconciliation and prosecution of offenders, between the (practical) chance of the victims to know the truth and their (theoretical) right to see their victimizers punished? In which sense is the South African solution a compromise between the two positions?

2. a. Does Art. 6 (5) of Protocol II really aim at violations of the law of non-international armed conflict, or does it at least also cover those cases? Why should Protocol II deal with prosecutions for its violations only from the standpoint of amnesty, while it does not prescribe their punishment? (*See also* **Case No. 207**, Colombia, Constitutional Conformity of Protocol II, *paras.* 41-43. p. 2266.)

   b. Does the obligation to prosecute grave breaches contained in the cited provisions (concerning international armed conflicts) of the Geneva Conventions exclude amnesty or pardon for such acts? Are Arts. 51/52/131/148 respectively of the four Conventions relevant to the answer? Assuming that IHL does not prohibit grants of amnesty, covering also persons having committed grave breaches, which criteria could be brought forward to circumscribe an admissible amnesty?

   c. Is the explanation of the Court as to why impunity for violations of IHL is more necessary and acceptable in non-international armed conflicts than in international ones convincing? Is the dilemma between peace and justice, between reconciliation and punishment greater within a State than between States? Does the obligation to punish in international armed conflicts only concern "officers of a hostile power"?

   d. In granting amnesty, would a distinction between violations of IHL "committed in defense of the old order and those committed in resistance of it" be acceptable from the point of view of IHL? Does such a distinction violate IHL? At least in international armed conflicts? Which principles of IHL are involved?

3. Does South Africa have to respect IHL or only to "have regard to it"? Why has the Court only to "have regard to" IHL? Would the Court have invalidated the act if it had come to the conclusion that it violated IHL?

4. How does the decision qualify the situation reigning in South Africa before the end of apartheid? Does the Court refer to Art. 1 (4) of Protocol I? Is that provision applicable? On what substantive point does the definition of a "national liberation war" by the court differ from that given in Art. 1 (4) of Protocol I? Is that difference understandable under the philosophy of the South African Constitution and the reasoning of the Court? What remains of Art. 1 (4) if a South African court deems that the situation in South Africa under apartheid did not fall under its provisions? Does this result support or weaken the criticism of the US against Art. 1 (4)? (*See* **Case No. 61**, US, President Rejects Protocol I. p. 971.)

XXII. First Gulf War (Iran/Iraq)

Case No. 142, ICRC, Iran/Iraq Memoranda

THE CASE

A. The Memorandum of May 7, 1983

[**Source:** Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of August 12, 1949 concerning the conflict between Islamic Republic of Iran and Republic of Iraq; Geneva, May 7, 1983.]

APPEAL

Since the outbreak of the conflict between the Islamic Republic of Iran and the Republic of Iraq, the highest authorities of both these States parties to the Geneva Conventions have several times confirmed their intention to honour their international obligations deriving from those treaties.

Despite these assurances, the International Committee of the Red Cross, which has had a delegation in the Islamic Republic of Iran and in the Republic of Iraq from the very start of the hostilities in 1980, has encountered all kinds of obstacles in the exercise of the mandate devolving on it under the Geneva Conventions, despite its repeated representations and the considerable resources which it has deployed in the field.

Faced with grave and repeated breaches of international humanitarian law which it has itself witnessed or of which it has established the existence through reliable and verifiable sources,

and having found it impossible to induce the parties to put a stop to such violations,

the ICRC feels in duty bound to make these violations public in this present Appeal to States and its attached memorandum.

The ICRC wishes to stress that, pursuant to its invariable and published policy, it undertakes such overt steps only in very exceptional circumstances, when the breaches involved are major and repeated, when confidential representations have not succeeded in putting an end to such violations, when its delegates have witnessed the violations with their own eyes (or when the existence and the extent of those breaches have been established by reliable and verifiable sources) and, finally, when such a step is in the interest of the victims who must as a matter of urgency be protected by the Conventions.

The ICRC makes this solemn Appeal to all States parties to the Geneva Conventions to ask them - pursuant to the commitment they have undertaken according to Article 1 of the Conventions to *ensure respect* of the Conventions - to make every effort so that:

- international humanitarian law is respected, with the cessation of these violations which affect the lives, the physical and mental well-being and the treatment of tens of thousands of prisoners of war and civilian victims of the conflict;
- the ICRC may fully discharge the humanitarian task of providing protection and assistance which has been entrusted to it by the States;
- all the means provided for in the Conventions to ensure their respect are used to effect, especially the designation of Protecting Powers to represent the belligerents' interests in their enemy's territory.

The ICRC fervently hopes that its voice will be heeded and that the vital importance of its mission and of the rule of international humanitarian law will be apparent to all and fully recognized, in the transcending interest of humanity and as a first step towards the restoration of peace.

MEMORANDUM

SITUATION OF PRISONERS OF WAR HELD IN THE ISLAMIC REPUBLIC OF IRAN

According to the Iranian authorities they today hold 45,000 to 50,000 prisoners of war. The Third Geneva Convention confers on those prisoners a legal status entitling them to specific rights and guarantees.

Registration and capture cards

One of the essential provisions of the Conventions demands that each prisoner of war be enabled, immediately upon his capture or at the latest one week after his arrival in a camp, to send his family and the Central Prisoners-of-War Agency a card informing them of his captivity and his state of health.

This operation proceeded normally at the beginning. However, the obstacle which the Iranian authorities constantly put in the way of the ICRC delegates' work led to a progressive decline in that activity from May 1982 onwards.

At present the ICRC has registered only 30,000 prisoners of war, leaving 15,000 to 20,000 families in the agony of uncertainty, which is precisely what the imperative provisions of the Conventions are designed to avoid.

Correspondence between prisoners of war and their families

The considerable delay and the holding up of mail, every aspect of which is regulated by the Convention, aggravate the families' worries and the prisoners' distress.

Although thousands of messages are sent each month by Iraqi families through the ICRC and hence to the Iranian military authorities for censorship and distribution, a great many prisoners of war complain they have received no mail for many months. The ICRC is no longer able to exercise any supervision of the distribution and collection of family messages.

ICRC visits to prisoner-of-war camps

The Third Geneva Convention stipulates that ICRC delegates shall be allowed, with no limitation of time or frequency, to visit all places where prisoners of war are held and to interview the prisoners without witnesses. In the Islamic Republic of Iran this essential provision is being violated.

The ICRC has lost track of the interned population since May 1982: only 7,000 prisoners of war have benefited from regular visits by the ICRC.

Many places of internment have been opened since then but the ICRC has never had access to them and has not even been notified of their existence.

Consequently the ICRC can no longer monitor the material living conditions and treatment of the Iraqi prisoners of war interned in Iran.

Although there did occur at the end of 1982 one truncated visit during which the delegates were not permitted to interview prisoners without witnesses, and two spot visits in March 1983, the latest complete visit to a prisoner-of-war camp consistent with treaty rules dates back to May 1982.

The fact that it has not had access to the great majority of prisoners of war for more than a year, and the systematic concealment of some categories of prisoners of war - high ranking officers, foreigners enlisted in the Iraqi army - gives the ICRC cause to be profoundly concerned about the plight of those prisoners.

Treatment of prisoners of war

In a general way, the Iraqi prisoners of war, right from the time of their capture, are subjected to various forms of ideological and political pressure - intimidation, outrages against their honour, forced participation in mass demonstrations decrying the Iraqi Government and authorities - which constitute a serious attack on their moral integrity and dignity. Such treatment, which runs counter to the spirit and the letter of the Convention, has gone from bad to worse since September 1981.

Last but not least, concordant information from various sources and witnesses confirm the ICRC's certainty that some camps have been the scene of tragic events leading to the death of injury of prisoners of war.

Severely wounded and sick prisoners of war

The Third Geneva Convention states that "parties to the conflict are bound to send back to their own country, regardless of numbers or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel...". Although there have been three repatriation operations - on 16 June, 25 August 1981 and 30 April 1983 - and despite the constitution of a mixed medical commission, most of the severely wounded and sick prisoners of war have not been repatriated, as required by the Convention.

SITUATION OF IRANIAN PRISONERS OF WAR AND IRANIAN CIVILIANS IN THE POWER OF THE REPUBLIC OF IRAQ

1. Prisoners of war

So far the ICRC has registered and visited at regular intervals some 6,800 prisoners.

Registration and capture cards

In general, these prisoners of war are registered by the ICRC within the time limit specified by the Convention.

Correspondence between prisoners of war and their families

After some initial difficulties, the exchange of messages between prisoners and their families has been satisfactory for the last several months.

ICRC visits to prisoner-of-war camps

Every single month since October 1980, ICRC delegates have visited prisoners of war in a manner consistent with Article 126 of the Third Geneva Convention, which specifies *inter alia* that the delegates shall be enabled freely to interview prisoners of their choice without witnesses.

However, in the course of its activities in the Republic of Iraq, the ICRC realised that the Iraqi authorities have never fully respected the Third Geneva Convention.

The ICRC has established with certainty that many Iranian prisoners of war have been concealed from it since the beginning of the conflict. The ICRC has drawn up lists containing several hundred names of Iranian prisoners of war incarcerated in places of detention to which the ICRC has never had access. Although several dozen such prisoners have been returned to the camps and registered by the ICRC no acceptable answer has been found to the problem of concealed prisoners.

Treatment of prisoners of war

In the prisoner-of-war camps the ICRC has noted some appreciable improvement in material conditions. On the other hand, ill-treatment has frequently been observed and on at least three occasions disorders have been brutally quelled, causing the death of two prisoners of war and injury to many others.

Severely injured and sick prisoners of war

The Third Geneva Convention states that "parties to the conflict are bound to send back to their own country, regardless of numbers or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel...". Although there have been four repatriation operations - on 16 June, 25 August and 15 December 1981 and on 1 May 1983 - and despite the constitution of a mixed medical commission, most of the severely wounded and sick prisoners of war have not been repatriated, as required by the Convention.

2. Iranian civilians

Tens of thousands of Iranian civilians from the Khuzistan and the Kurdistan border regions [on Iranian territory], residing in areas under Iraqi army control, have been deported to the Republic of Iraq, in grave breach of the Fourth Geneva Convention.

The ICRC delegates have had only restricted access to a few of these people.

In the prisoner-of-war camps the ICRC has registered more than a thousand civilians, including women and old men arrested in the occupied territories by the Iraqi army, deported into the Republic of Iraq and unjustifiably deprived of their freedom since the beginning of the conflict.

GRAVE BREACHES COMMITTED BY BOTH PARTIES TO THE CONFLICT

Both in Iran and Iraq captured soldiers have been summarily executed. These executions were sometimes the act of individuals involving a few soldiers fallen into enemy hands; they have sometimes been systematic action against entire enemy units, on orders to give no quarter.

Wounded enemies have been slain or simply abandoned on the field of battle. In this respect the ICRC must point out that the number of enemy wounded to which it has had access and whom it has registered in hospitals in the territory of both belligerents is disproportionate to the number of registered able-bodied prisoners in the camps or to even the most conservative estimates of the extent of the losses suffered by both parties.

The Iraqi forces have indiscriminately and systematically bombarded towns and villages, causing casualties among the civilian inhabitants and considerable destruction of civilian property. Such acts are inadmissible, the more so that some were declared to be reprisals before being perpetrated.

Iraqi towns also have been the targets of indiscriminate shelling by Iranian armed forces.

Such acts are in total disregard of the very essence of international humanitarian law applicable in armed conflicts, which is founded on the distinction between civilians and military forces.

Geneva, May 7, 1983

B. The Memorandum of February 10, 1984

[**Source:** Second Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of August 12, 1949 concerning the conflict between Islamic Republic of Iran and Republic of Iraq, Geneva, February 10, 1984.]

On May 7, 1983, the International Committee of the Red Cross was compelled to address an appeal to all the States Parties to the Geneva Conventions. With reference to the solemn undertaking of these States to respect and *ensure respect* for the Conventions at all times, the ICRC asked them to make every effort to ensure the rigorous application of International Humanitarian Law by the two belligerent states *i.e.* the Islamic Republic of Iran on the one hand and the

Republic of Iraq on the other, and to enable the ICRC to effectively perform its humanitarian task of helping the great number of civilian and military victims of this conflict.

Nine months after making its first Appeal, the ICRC notes that the results hoped for have been achieved only to a very limited degree, and it feels that the States Parties to the Conventions should be informed of the lack of respect for the principles of Humanitarian Law in the Islamic Republic of Iran and the Republic of Iraq.

The ICRC wishes to stress that its two memoranda concern serious infringements of International Humanitarian Law which are known to have occurred and which endanger the lives and liberty of the tens of thousands of people caught up in this conflict, and which flout the very spirit and principles of that law. These infringements, if unchecked, may, in time, bring into discredit those rules of law and universal principles which the States Parties to the Conventions laid down to provide human beings with a better defence against the evils of war.

From its experience the ICRC is conscious that increasingly numerous violations of International Humanitarian Law have invariably placed insurmountable obstacles in the way of peace negotiations, even when all belligerents wished to end the conflict. For example, recent conflicts have been needlessly prolonged because no agreement was reached on arrangements concerning prisoners of war. The ICRC thus calls upon the States working towards the restoration of peace in the region to consider most carefully the problems which will inevitably arise because of the infringements of the Geneva Conventions by the belligerents.

In particular, the ICRC would ask States, in the course of their dealings with each of the two parties to the conflict, to broach the humanitarian questions which are hereby submitted to them. The States are also urged to lend their active support to the ICRC's efforts to help the victims of the conflict which is strictly within the terms of the humanitarian mandate assigned to the ICRC through the Geneva Conventions. Finally, the ICRC hopes that discussions will be held to designate Protecting Powers willing to undertake the tasks encumbent on such states by the Geneva Conventions. Naturally, the ICRC would wish to work closely with the Protecting Powers.

The ICRC is convinced that the States Parties to the Conventions are aware of what is truly at stake in the steps proposed, and that it will be their desire and intention to translate into action the commitment which they undertook in adopting Article 1 common to the Four Geneva Conventions of 12 August 1949.

ISLAMIC REPUBLIC OF IRAN

A. Iraqi prisoners of war interned in the Islamic Republic of Iran

1. The activities of the International Committee of the Red Cross in favour of the Iraqi prisoners were again suspended on 27 July 1983. The ICRC considers that, in general terms, it has not been able to discharge its mandate as prescribed by the Third Geneva Convention relative to the treatment of prisoners of war for almost two years.

At present, some 50,000 prisoners are without the international protection to which they are entitled by virtue of their status.

In this connection, the ICRC is no longer able to perform the following tasks:

- To ascertain the precise number of prisoners of war and to ascertain how they are distributed among various places of internment.
- To obtain information on the identity and state of health of each prisoner of war in order to notify his family and the Iraqi Government.
- To monitor the material, psychological and disciplinary conditions of internment by means of regular visits to the camps and interviews without witness with the prisoners.
- To draw up lists of prisoners of war who should quickly be repatriated because of severe wounds or illness.
- To maintain effective surveillance of the flow of Red Cross messages between the prisoners and their families.

These tasks of surveillance are all categorically stipulated in the Convention and constitute indispensable requirements for the effective protection of prisoners by ICRC delegates.

2. Numerous facts and indications, when considered together, arouse great concern on the part of the ICRC with regard to the fate of the prisoners and the authorities' real reasons for preventing the ICRC from carrying out its activities. The ICRC has noted the following specific points:
   - The ICRC has constantly been denied access to certain categories of prisoners such as high-ranking officers.
   - Severe sentences have been passed on a number of prisoners. Despite repeated demands, the ICRC has received neither notifications nor explanations which should, by law, have been submitted to it.
   - Serious incidents have occurred in certain camps. Furthermore, among the death certificates issued by the Iranian authorities for members of the enemy armed forces "killed in action", the ICRC has received a number which were despatched very tardily and without any comment in relation to persons who were known to have been interned in the Islamic Republic of Iran for many years, since they had been registered and visited on several occasions by ICRC delegates.
   - Ideological and political pressure, intimidation, systematic "re-education" and attacks on the honour and dignity of the prisoners have remained a constant feature of life in the camps, and even seem to increase as a result of the activities of certain persons having no connection with the normal running of the camps. Representatives of a "department of political and ideological education", members of Iraqi opposition groups who have fled to the Islamic Republic of Iran, and the official press all attempt to incite the prisoners against their government. On many occasions, the ICRC has submitted to the highest authorities of the Islamic Republic of Iran detailed and clearly reasoned requests that a stop should be put to these practices which

States, in drawing up the Third Geneva Convention, agreed to ban. The ICRC has made the abolition of these practices a condition for the resumption of its activities, since the discharge of its mandate is incompatible and irreconcilable with attempts at political and ideological conditioning of prisoners. To date, the ICRC has received no satisfactory reply to the written and oral representations which it has made on the subject to the Government of the Islamic Republic of Iran.

B. Iraqi civilian refugees in the Islamic Republic of Iran

The ICRC has failed in its attempts to bring aid to these groups, consisting mainly of Iraqi Kurds who have fled from their home territory and are now living in camps in the Islamic Republic of Iran. The ICRC knows that these groups are in great need of food and medicine. By virtue of their status as refugees from an enemy power, these people come under the aegis of the Fourth Geneva Convention relative to the protection of civilians in time of war. They should therefore be allowed to receive the aid which an organization such as the ICRC could provide.

REPUBLIC OF IRAQ

A. Iranian prisoners of war held in the Republic of Iraq

1. Every month without fail since October 1980, ICRC delegates have visited Iranian prisoners of war, who currently number 7,300 and are held in six internment camps. The visits take place in accordance with the conditions laid down in Article 126 of the Third Geneva Convention, a main stipulation of which is that the delegates should be able to talk freely and without witnesses with prisoners of their choice.

   As a rule, prisoners of war are registered by the ICRC within a reasonably short time of being captured.

   On the whole, the exchange of Red Cross messages between the prisoners and their families works well, though delays which may sometimes be quite long are still caused by the Iraqi censorship procedure.

2. In the camps themselves, the ICRC has observed a number of significant improvements in the material conditions of internment. Moreover, the authorities have taken steps to put an end to the random acts of brutality to which the ICRC drew their attention on many previous occasions. Furthermore, an improvement in disciplinary measures has been apparent since autumn 1983.

3. On 29 January 1984, 190 Iranian prisoners, 87 of whom were severely wounded or sick, were handed over by the Iraqi authorities to the ICRC in Ankara for repatriation.

4. The ICRC is concerned by the fact that a large number of members of the enemy armed forces, both officers and other ranks, some of whom were taken prisoner by the Iraqi armed forces at the beginning of the conflict, are still being held in detention centres to which the ICRC is denied access. The

ICRC has regularly submitted to the government and military authorities of Iraq lists of names showing that several hundred such prisoners of war exists. The ICRC mentions with satisfaction that at the end of 1983 it was allowed to register several dozens of these prisoners, who had been captured at the start of the conflict and have now been placed in camps visited by the ICRC.

The ICRC has good grounds to be concerned about the prisoners held in places to which it does not have access. These prisoners are deprived of their most basic rights and, according to many mutually corroborating sources of information, are held in conditions which do not meet the requirements of humanitarian law.

B. Iranian civilians who have been deported to or taken refuge in the Republic of Iraq

1. During the conflict, several tens of thousands of Iranian civilians have been displaced from their homes in the frontier areas of Khuzestan and Kurdistan to Iraqi territory.

   The Iraqi authorities have accepted that in principle the ICRC should be present from now on among these civilians, and considerable efforts have recently been made to improve the living conditions of these civilians when it was necessary.

2. Since the start of the conflict, the ICRC has registered more than a thousand civilians in the prisoner-of-war camps, including women and elderly men arrested in the territories occupied by the Iraqi armed forces. Although it has been possible to repatriate several hundred of these people, an overall solution to the problem still has to be found.

C. Bombing of civilian areas by the Iraqi armed forces

The Iraqi air force has continued to carry out regular indiscriminate bombing of Iranian built-up areas, sometimes more than 200 kms from the front. The result has been loss of life, sometimes on a large scale, and considerable destruction of purely civilian property. These deliberate attacks on civilians and civilian property are sometimes designated as reprisals; they contravene the laws and customs of war, in particular with regard to the basic principle that a distinction must be made between military objectives and civilian persons and property.

DISCUSSION

1. a. What must States Parties do in order to fulfil their obligation "to ensure respect" for IHL established in Article 1 common to the Conventions and Protocol I? What may they do? What may they not do?

   b. Must States Parties act to "ensure respect" for IHL only when the ICRC appeals to them to do so? What meaning have ICRC appeals, such as the two

Memoranda, for the obligation of the States Parties? Does such an appeal mean that the normal and specific mechanisms for the implementation of IHL do not function in certain situations?

c. What criteria would you suggest to the ICRC for deciding whether to launch an appeal to all States Parties on violations in a specific situation?

d. Did the two Memoranda respect the Red Cross principles of neutrality and impartiality? Was it necessary for the ICRC under those principles to criticize both Iran and Iraq? Because of the denounced violations? Because the ICRC may never criticize, under those two principles, only one side of an armed conflict?

e. Is the revelation, to all States Parties, in the Memoranda of facts the ICRC learned through its visits to prisoners of war compatible with ICRC's working modality of confidentiality?

2. a. Did Iran and Iraq have an obligation to designate Protecting Powers? Can you imagine why no Protecting Powers were designated? (*Cf.* Arts. 8/8/8/9 respectively of the four Conventions.)

b. If a Protecting Power is designated, can it replace the ICRC for visits to prisoners of war? What is the advantage of a Protecting Power acting parallel to the ICRC? What are the strong points of a Protecting Power? What are the strong points of the ICRC? (*Cf.* Arts. 10 and 126 of Convention III.)

3. a. Has the ICRC a right to visit prisoners of war? Even those who do not want to be visited by the ICRC? Why are ICRC visits important? (*Cf.* Arts. 7 and 126 of Convention III.)

b. Can you imagine why Iran impeded ICRC visits to Iraqi prisoners of war? Why did Iran and Iraq try to hide certain categories of prisoners of war from the ICRC? Which categories? How may the ICRC have learned about the existence of those hidden prisoners?

c. Why does the ICRC insist on visiting prisoners and interviewing them without witnesses? Has the ICRC a right to insist on that modality? (*Cf.* Art. 126 of Convention III.) Should the ICRC renounce interviewing without witnesses if it heightens tension between different groups of prisoners?

4. a. Do efforts of a Detaining Power to indoctrinate prisoners of war - to put them under ideological and political pressure with the aim of turning them against their own government - violate IHL? Even if no prohibited means (*e.g.,* threats, intimidation, or deprivation of rights protected under Convention III) are used? Which provisions of Convention III are violated?

b. May a prisoner of war sever his allegiance towards the Power on which he depends? What are the risks and interests involved in answering this question? Does a severing of his allegiance deprive him of his prisoner-of-war status? May he renounce his status? (*Cf.* Art. 7 of Convention III.)

c. May a Detaining Power release prisoners of war who sever their allegiance towards the power on which they depend? (*Cf.* Arts. 16 and 21 of Convention III.)

d. May a prisoner of war voluntarily join the armed forces of the Detaining Power? Does he keep prisoner-of-war status if he does so? (*Cf.* Arts. 7, 23, 52 and 130 of Convention III.)

e. Has the Detaining Power a responsibility for the killing of prisoners who keep their allegiance by prisoners who severed their allegiance towards the Power on which they depend? For killings of the latter by the former? What action must the Detaining Power undertake to avoid such events? May it or must it separate these two categories of prisoners? What are the risks of such a separation? (*Cf.* Arts. 13, 16, 22, 121 and 122 of Convention III.)

5. a. By which means does IHL ensure that a family is informed about the capture and detention of a prisoner of war? May a prisoner of war renounce some or all of those means used to inform his family? What reasons could he have for such renunciation? (*Cf.* Arts. 69, 70, 122 and 123 of Convention III.)

b. Who must enable prisoners of war to fill out capture cards? Can capture cards be filled out even when the ICRC is impeded from visiting prisoners of war? Has the ICRC a right to register prisoners of war? Even those who do not wish to be registered? Why is the registration of prisoners of war important to the ICRC? (*Cf.* Arts. 70, 122, 123 and 126 of Convention III.)

c. Must death certificates indicate the cause of death for prisoners of war? For enemy soldiers found dead on the battlefield? (*Cf.* Art. 16 of Convention I, Art. 19 of Convention II and Art. 120 of Convention III.)

6. Had Iran to inform the ICRC about sentences passed against prisoners of war? (*Cf.* Art. 107 of Convention III.)

7. a. Must a detaining power repatriate seriously wounded and seriously sick prisoners during the hostilities? Why? Even if the enemy does not do so? (*Cf.* Arts. 13 (3), 109 and 110 of Convention III.)

b. Who decides whether a prisoner of war is seriously wounded or seriously sick? What happens if that body is unable to agree on who is seriously wounded or seriously sick? (*Cf.* Arts. 110-113 and Annex II of Convention III.)

8. a. Could Iraq detain Iranian civilians it found while its offensive advanced on Iranian territory? In which cases? Could Iraq evacuate Iranian civilians living in Iranian territories it controlled once Iraq had to retreat from those territories under the pressure of an Iranian counter-offensive? At least those among them who were lawfully detained? (*Cf.* Arts. 49 and 76-79 of Convention IV.)

b. May Iraq detain civilians in prisoner-of-war camps? If it respects all the provisions of Convention IV applicable to them? (*Cf.* Arts. 76 and 84 of Convention IV.)

c. Are Iraqi civilian refugees in Iran protected persons under Convention IV? Under which circumstances has the ICRC the right to assist them? (*Cf.* Arts. 4, 23 and 44 of Convention IV and Arts. 70 and 73 of Protocol I.)

9. a. How can the ICRC know about summary executions of captured soldiers? When is a party to the conflict responsible for executions of individual enemy

soldiers, immediately after their capture, by individual members of its armed forces who were not ordered to do so? Were such individual enemy soldiers prisoners of war? (*Cf.* Art. 3 of Hague Convention IV, Arts. 49/50/129/146 respectively of the four Conventions and Arts. 5 and 12 of Convention III.)

b. How can the ICRC know that wounded enemies were executed or abandoned on the battlefield?

10. a. Does the indiscriminate bombardment of towns and villages violate IHL, although neither Iran nor Iraq were parties to Protocol I? Does it make a difference for IHL that such towns were more than 200 kms away from the front-line? Is the concept of a "military objective" different on the front-line versus 200 kms away?

b. Were such bombardments even less admissible under IHL when they were announced as reprisals? (*Cf.* Art. 33 (3) of Convention IV and Arts. 51 (6) and 52 of Protocol I.) Under which conditions do reprisals amount to violations of IHL admissible under customary IHL?

11. Do the violations of IHL mentioned in the two Memoranda "discredit the rules of IHL"? Did those rules show no influence on the Parties? Did they have a protective effect for the victims of the conflict?

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law

THE CASE

A. UN Doc. S/15834

[**Source:** UN Doc. S/15834 (June 20, 1983).]

MISSION TO INSPECT CIVILIAN AREAS IN IRAN AND IRAQ WHICH HAVE BEEN SUBJECT TO MILITARY ATTACK

Report of the Secretary-General

1. On May 2, 1983, the Permanent Representative of the Islamic Republic of Iran called on me to convey his Government's request that I send a representative to visit civilian areas in Iran which have been subject to military attack by Iraq. He indicated that, should the Government of Iraq wish to invite the representative to visit Iraq, the Government of Iran would welcome it.

2. [...] On May 3, 1983, I discussed the matter with the Permanent Representative of Iraq, who, after consulting his Government, informed me on May 12, 1983 that Iraq would also wish the representative to visit civilian areas in Iraq which had been subject to military attack by Iran. [...]

3. I informed the Security Council on May 12, of my intention to dispatch a small mission [...]. As agreed with the two Governments, the task assigned to the mission was to survey and assess, as far as possible, the damage to civilian areas in the two countries said to have suffered war damage and to indicate, where possible, the types of munitions that could have caused the damage. The mission was not expected to ascertain the number of casualties or the value of the property damage in those areas. The mission was assigned the responsibility of presenting to me an objective report on its inspections and observations. [...]

8. The mission has reported to me that during discussions in the Ministry of Foreign Affairs of each State, there was mention of alleged violations of the Fourth Geneva Convention of 1949. [...]

9. The mission has reported to me that it met officials of the International Committee of the Red Cross (ICRC) in Geneva to discuss its findings as well as the relevant portions of the ICRC memorandum of May 7, 1983 circulated to States parties to the Geneva Conventions of 1949. [...]

11. The report that the mission has submitted to me is annexed.

Annex
Report of the mission
Introduction

1. The mission toured was [sic] zones in Iran from May 21 to May 26, 1983, and war zones in Iraq from May 28 to May 30, 1983. [...]

2. The mission was instructed (a) to determine whether civilian areas had been subject to damage or destruction by military means, such as air bombardment, artillery shelling, missile and rocket attacks or use of other explosives; (b) to assess the extent of such damage and destruction as far as possible; (c) to indicate, where possible, the types of munitions used. While the mission was not expected to ascertain the number of casualties, it kept in view the obvious correlation between the extent of damage to civilian areas and the probable extent of loss of life, taking into consideration the degree to which such areas were populated at the time the damage was inflicted. The statistics on casualties provided by the two Governments are mentioned in the report of the mission without comment. [...]

4. The mission wishes to place on record that, in the circumstances in which it worked, it was not in a position to verify the information given by the authorities concerned relating to the location of military units or installations, distances from lines of hostilities, situation of communications or economic installations of strategic or military significance etc. Therefore, the mission had to rely in that regard essentially on the information provided by the respective Governmend [sic] supplemented by whatever information it could ascertain by its own observations.

5. In accordance with its instructions, the members of the mission at no point discussed with any official of either Government or any other person the possible content of its report. Also, it made it a point not to discuss with one Government what it had observed or ascertained during its visit to the territory of the other State. The members of the mission did not make any substantive statement or comment to the press. [...]

I. TOUR OF WAR ZONES IN IRAN

7. The itinerary drawn up by the Government of Iran included visits to civilian areas which had suffered war damage relatively recently as well as in the past. The dates of its visits to the various sites are indicated in brackets. The times indicated are local times. Casualty figures relate to civilians.

A. Dezful
(May 21, 1983)

Information presented to the mission by the Iranian authorities

8. [...] The distance [of the city] to the border is approximately 80 km.

9. The authorities said that the city had been attacked on April 20, April 22 and May 12, 1983, on each occasion by a surface-to-surface missile from a westerly direction. Three sites of impact within the city were the Cholian area, the Afshar hospital area and the Siah-Poshan area, respectively. [...]

   Some buildings had had to be demolished by bulldozers to gain access to the third site to evacuate the dead and wounded, and many bodies were said to be still burried [sic] under the debris.

10. The distance to the lines of hostilities was not provided. A major air base is situated 8 km north-west of the city towards Andimeshk. There are no troops stationed in the city, and the nearest major area where combat troops were deployed was about 80 km away. There are air defence detachments deployed in the city. There are no factories of any military significance in the city.

11. The mission was also informed that there had been over 50 previous missile attacks from September 1980 to date. There had been, in the same period, over 6,000 impacts from aerial bombardment and shelling. Those had caused total casualties of 600 killed and more than 2,500 injured. There had been destruction of varying degree to 1,300 houses, 32 schools and 22 mosques.

Observations by the mission

12. Dezful if as sizeable city situated on the southern bank of the Dez River, which separates it from the air base area located to the north of the city. There is a dam about 20-25 km to the north-east. There are two bridges over the Dez River in the city. The city is not situated on any major communications route. Within the time available, the mission was unable

to determine whether there were installations of strategic or economic importance located in the city other than those indicated by the Iranian authorities. [...]

16. The observations by the mission and examination of the evidence presented to it support the claim that the first three sites were hit by surface-to-surface missiles, which the team identified as Scud-B missiles. Although the mission could not inspect all the damaged buildings, the extent of the property damage claimed appears to be plausible. [...]

D. Musian
(May 22, 1983)

Information presented to the mission by the Iranian authorities

32. The mission was informed that the town had a population of 5,000 people, mostly Arabic speaking. It is 6 km from the border. The area is mainly agricultural and is not in a military zone. However, there were oil installations nearby in Abu Ghareib and Biad. It was occupied on about October 8, 1980 after 15 days of fighting during which 60 persons were killed. The number of injured was not known, since most of the inhabitants had fled on the outbreak of hostilities. It was recaptured on March 22, 1982 after one week of fighting. The authorities further stated that the town had been largely destroyed before it was retaken and that many buildings had been blown up by explosives. Thirty-three outlying villages had also been destroyed. Five hundred and eighty families had been taken prisoner. Since its recapture, it had been under frequent bombardment until a month prior to the mission visit. The distance to the front line was not given.

Observations by the mission [...]

34. The mission formed the impression that the buildings still standing had been damaged by shelling and direct fire, and, in some cases, by planting high explosives. However, in the areas that had been razed to the ground the extent of destruction indicated that high-explosive charges and engineering equipment might have been used.

E. Dehloran
(May 22, 1983)

Information presented to the mission by the Iranian authorities

35. Dehloran is located about 25 km from the border. The mission was informed that it had been attacked more than 50 times by air since the outbreak of hostilities in September 1980 and that about 60 per cent of it had been destroyed. One hundred persons had been killed, and 500 others injured. The town had been occupied three times by Iraqi forces, and, in the course of the latest occupation, the power station and waterworks had been destroyed. Most of the inhabitants had fled the town during the first attack, and the population of 45,000 before then had dwindled to 5,000. There is no factory located within or near the town. No troops were stationed in the area

in 1980. The authorities stated that since March 1982, when the town was recaptured by Iranian troops, no military units have been deployed in the area. There are, however, a small air defence detachment, a gendarmerie unit and a reconstruction unit stationed in the town. The distance to the front line was not given.

Observations by the mission

36. [...] From what the mission could observe, more than half the town had been heavily damaged beyond repair. Almost all the buildings in the other areas were damaged to varying degrees. The damage appeared to have been caused by both shelling and aerial bombardment.

37. Apart from the air defence and the gendarmerie units located in the town, the mission observed a number of personnel in military uniform and military vehicles. It was informed that they belonged to reconstruction teams. [...]

39. The mission is of the view that the destruction described was caused by aerial bombardment and exchange of fire on the occasions when the town changed hands and by subsequent shelling.

F. Abadan
(May 23, 1983)

Information presented to the mission by the Iranian authorities

40. The population of the city before the hostilities was 400,000, with another 200,000 people in its suburbs. The authorities stated that soon after the town was attacked in September 1980 most of the population had been evacuated. The city remained subject to heavy shelling and aerial bombardment. Only about 70,000 inhabitants remained and were currently helping in the reconstruction of the city. Twelve hundred persons had been killed and 7,000 injured, of which 79 were maimed. Civilians taken prisoner numbered 2,228. The damage to 40,000 houses ranged from 20 per cent to 100 per cent. The city was still under shelling and direct fire, and daily casualties averaged 1 person killed and 6 or 7 injured. There was very little aerial bombardment. Before the hostilities, there had been one gendarmerie border post and no military units located in the city. The nearest military unit, one infantry battalion was stationed in Khorramshahr some 30 km away. After the city was attacked and the road to Ahvaz cut on October 20, military units to defend the city had had to be brought in by air and through the Bahmanshir River.

41. The mission was taken to one of the oldest and largest hospitals in the city, whose location was well known, and was informed that it had been hit the previous day by a 120-mm mortar shell which had caused no casualties. The mission was also later taken to a second hospital on the outskirts of the city which was said to have been bombed from the air at an early stage in the hostilities.

42. An oil refinery complex located near the city was said to have been almost destroyed and the remaining installations to be under constant attack. The mission was not taken to that area because, the Iranian authorities said, it was not a civilian area and could be considered an economic installation of military significance and, therefore, a legitimate target.

Observations by the mission [...]

44. On inspecting the first hospital, the mission was shown various points of past damage. It found shrapnel and glass fragments caused by one very recent impact of a shell which had made a gaping hole in the corner of one of the wards. The mission also observed that the roof of another ward, which was clearly marked with a red cross on both sides, had received several direct hits, four of which had penetrated the roof and caused damage inside. The mission was also shown a part of a canister of a bomb which was said to be one of the two found in the hospital grounds and was positively identified as belonging to a cluster bomb of the same type found in other cities, [...].

45. The second hospital building showed signs of considerable damage that had been repaired. [...]

46. [...] It is also evident that the city remains under fire.

47. During the visit to the first hospital, at about 0900 hours on May 23, 1983, the mission heard sounds of artillery or mortar fire. While in Khorramshahr, the mission was informed that three shells had hit the Abadan refinery, and one had dropped in the city a kilometre from the first hospital the team visited. That could not be verified by the mission.

48. From its observations, the mission is of the opinion that the evidence supports the claim that the city had been under a prolonged siege. It was clear that the destruction seen had been caused by aerial bombardment, artillery fire and direct fire.

G. Khorramshahr (May 23, 1983)

Information presented to the mission by the Iranian authorities

49. Before September 1980, the population of Khorramshahr had been 200,000. On September 22, 1980, it had been heavily bombarded and attacked by two army divisions. An infantry battalion stationed in the city, supported by civilians, had resisted for 40 days, after which the larger part of the city north of the Karun River was occupied by Iraqi forces and remained under occupation until late March 1982. Two hundred persons, including whole families, had been killed in the initial fighting. During the evacuation of the population several thousand civilians had been killed, and thousands more wounded, and a large number had been taken prisoner (no precise figures were given).

50. The Iranian authorities stated that their troops had recaptured the city in March 1982 without much fighting. Of about 23,000 residential and other

units, it was found that 8,000 buildings had been totally levelled, including 120 mosques and religious establishments, 100 schools, 2 colleges, 4 major hospitals and several clinics. Of about 15,000 residential units, 60 per cent had been destroyed and were beyond repair. A large number of shops had been looted and burned. From 50 to 60 vessels of foreign registration had been sunk or heavily damaged. Another 1,000 private vessels of Iranian registration, of all types and sizes, had also been destroyed or sunk. [...]

Observations by the mission [...]

55. The scene in the northern part of the city supported the version of events given by the authorities. Although the mission could not conduct detailed inspections, the nature and extent of the destruction gave the impression that, apart from air and artillery bombardment, high-explosive charges and engineering equipment had been used. [...] The mission was not in a position to determine whether the open spaces had been mined, and, if so, to what extent they had been cleared.

56. From what it could observe of the almost total devastation of the city, the mission is of the opinion that in those parts where buildings were still standing the destruction was the result of intensive shelling and bombardment in the course of the hostilities. However, in those areas of the city which were completely levelled, it was evident that other means, such as high-explosive demolition charges and engineering equipment, must have been deliberately employed. [...]

L. Baneh
(May 26, 1983)

Information presented to the mission by the Iranian authorities

73. Baneh has 13,000 inhabitants and is about 20 km from the border. The mission was informed that the town had been attacked on the day before its visit, that is, on May 25, at about 1015 hours by two of four aircraft coming from a westerly direction. Twenty-two bombs had been dropped in the north-eastern section of the town, of which some had landed outside the town limits. Five had failed to function. The rest had fallen in an area 300 m in diameter. The aircraft had also strafed the town with machine-guns. Eight persons had been killed, of whom 3 were women and 5 were children. Seventy-three had been injured, of whom about 70 per cent were children, 20 per cent women and 10 per cent men.

74. The authorities stated that, since the outbreak of hostilities, no military operations had been conducted in that part of the country by either side, except for the air attack the previous day. There is no major military installation in the area. There is a small supply depot of about 150 men solely in support of internal security operations. It is located about 1-1.5 km from the area of impact, to the north-east of the town. The town is on a very small side road, with no industry of military significance.

Observations by the mission

75. Baneh is a small town situated in mountainous terrain. [...] It is not near any major communication lines and has no industry of any significance, being mainly an agricultural town. The only military installation observed was the small supply depot already mentioned, which contained several large trucks.

76. The area affected is residential and showed a large number of fragment marks, but there was no major property damage. A large number of window panes had been broken.
[...]

77. Although the mission was not, in general, expected to estimate the number of casualties, it felt that, in the circumstances, it would be inappropriate not to take note of the evidence of an incident which had occurred only one day before its visit.

78. The mission was taken to the graveyard to see the bodies of the dead just before burial. There were the bodies of two women and five children in open coffins. The mission was informed that another woman who had been evacuated to a hospital in a nearby town had succumbed to her wounds.

79. The mission was then taken to a hospital where 56 of the wounded were said to be under care, the others having been sent to hospitals in nearby towns. Two doctors showed the mission 1 young boy, 8 women and 14 children of ages 2-12 who had suffered moderate to severe wounds the preceding day. One baby had been prematurely delivered by Caesarian operation, as its mother was severely wounded. Because of the time factor the mission could not visit the other wounded.
[...]

81. From its observations and examination of the evidence presented to it, the mission is of the view that the town had been subjected to aerial bombardments with cluster bombs. Such bombs are mainly effective against personnel, and this would explain the high number of casualties and the relatively low damage to property. The mission is therefore of the opinion that the details of the incident as reported were reasonably accurate. The mission is not in a position to judge whether the intended target could have been the supply depot. [...]

II. TOUR OF WAR ZONES IN IRAQ

83. The itinerary drawn up by the Government of Iraq included visits to civilian areas which had suffered war damage relatively recently as well as in the past. The dates of its visits to the various sites are indicated in brackets. The times indicated are local times. Casualty figures relate to civilians. [...]

C. Khanagin
(May 28, 1983)

Information presented to the mission by the Iraqi authorities

92. Khanagin is 8 km from the border. Its population was 52,000 before the hostilities began. The town and a nearby oil refinery had been shelled and bombarded by air even before September 4, 1980. Many residential areas had been evacuated. The authorities stated that on September 22, 1980, Iraqi forces had crossed the border in retaliation and subsequently advanced some 45-50 km beyond it. Between September 1980 and June 1982, the town had been beyond artillery range but had been attacked three times by air. On June 18, 1982, the Iraqi forces had started to withdraw from their advanced position and, by June 28, had withdrawn to the border. Since then, the town had been under rocket and artillery attack.

    Sites affected included hospitals and schools. About 4 per cent of the town had been damaged beyond repair. The distance to the front line was not given.

93. In an attack on a residential area on September 4, 1982, 8 women and children had been killed and 19 injured, and some houses had been destroyed. On December 18, 1982, a school had been hit, 20 children and 1 teacher had been killed and 50 children injured. About two months prior to the mission's visit a supermarket had been hit by rockets. Seven persons had been killed and 19 injured, including women and children. In all, 66 inhabitants had been killed and 455 injured, including 33 maimed. The last artillery attack, on May 16, 1983, had resulted in 1 person killed and 8 injured.

94. The authorities stated that no major military operations had been mounted from the town at any time. No military units were stationed in the city, except for air defence detachments comprising militia men. There were two supply routes 6-10 km from the town. An oil refinery is located at a distance of 2 km from the town.

Observations by the mission

95. The mission visited the school, the supermarket and the residential areas mentioned. On inspection, it saw that the schoolyard had been hit by two shells, many fragments of which had shattered windows and penetrated into two classrooms. There was one impact outside the supermarket entrance which had scattered fragments against the facade. In the residential area on the outskirts attacked in September 1980, four houses had been badly damaged and two more lightly damaged. The nearby refinery and its residential area had been heavily damaged. In that area a number of military emplacements were seen.

96. In the opinion of the mission, the oil refinery was the main targets of the attack, but a number of civilian targets at some distance from it had also been hit. The estimate of damage to the town appeared to be accurate.

97. During its visit to Khanaqin, the mission heard sounds of four rounds of artillery or mortar fire from the direction of the border. It was informed that these came from Iranian guns, but that claim could not be verified.

D. Kirkuk
(May 29, 1983)

Information presented to the mission by the Iraqi authorities

98. The population of the city was 200,000 before September 1982, and remains at the same level. The city is 140 km from the border and, thus, not within range of Iranian artillery. The nearest land operations were near the border 70 km north of Khanaqin. According to the authorities, the city had been heavily raided by air from September 23, 1980 until February 26, 1982. The raids, which were particularly intense in the first days of the hostilities, had been concentrated on residential areas, and targets hit included a hospital, a school, a market-place and a graveyard. There was a good civil defence system, and, therefore, casualties were limited. There had been a total of about 50 successful raids and a great number that were not successful. The authorities stated that cluster and fragmentation bombs, rockets and machine-guns were used, as were napalm and booby-traps in civilian areas.

99. There was heavy damage to residential areas, 120 units as well as 15 public buildings having been destroyed, of which nearly all had been rebuilt, as it was government policy to restore damaged property as quickly as possible. Such reconstruction work also was the target of attacks. Casualties since September 1980 had totalled 30 killed and 245 injured.

100. An air base and a training centre for logistic personnel were located about 25 km and 10 km respectively, from the city. Kirkuk is in an oil-producing area, and the nearest oil installation was 10 km away. There were numerous small factories and workshops of no military significance in the city, many of which had been destroyed by attacks and then rebuilt.

Observations by the mission

101. The mission was taken to five sites. At the first site, it was shown one house which had been destroyed in a residential area located about 200 m from an oil-storage area where four of seven storage tanks had also been destroyed. At the second site, in a residential area across from a railway station and bus terminal, a house had been destroyed and two other buildings damaged and rebuilt. At the third site, in another residential area, a local health centre had been destroyed and some houses damaged. In yet a fourth residential area, two houses had been destroyed and rebuilt. At the fifth site, a shopping area in the old part of the city had been destroyed [...]. The mission was informed that at that particular site, rockets had been used, resulting in 12 persons killed and 53 injured. The facade of a nearby mosque had been slightly damaged. The distances between the five sites averaged 1 km. The incidents were well documented, and, to support their claim, the authorities showed the mission photographs of the munitions allegedly used,

including cluster bombs, and of the damaged buildings before they were rebuilt. The mission was not shown parts of the munitions used, as those were said to have been sent to Baghdad. [...]

102. Since those events had taken place in an early stage of the hostilities, and most of the damage had been repaired, the mission was unable physically to inspect or verify the type of the munitions used in the various sites. However, the mission is of the view that the evidence, i.e., photographs and still visible damage, supports the claims concerning damage to property. [...]

F. Al-Faw
(May 30, 1983)

Information presented to the mission by the Iraqi authorities

106. The town had 42,000 inhabitants before the hostilities started. The current population is about 3,000 most of its inhabitants having abandoned the town by mid-1981, since it had come under almost daily bombardment from September 1980. It is located on the border about 500 m from the mouth of the Shatt-al-Arab, which is about 800 m wide. At this time, it is the only station in Iraq used for off-shore loading of oil in the Gulf. There is no oil refinery.

107. According to the authorities, between September 1980 and December 1981, there had been 136 air raids, the last having taken place in December 1981. Since the outbreak of hostilities, the town had been under daily shelling, with an average of 20-30 shells every day. The town was also under direct fire from tanks and machine-guns from across the river. Total casualties to date were 96 killed and 236 injured, of whom many were maimed. Eighty per cent of the casualties were from shelling, 10 per cent from air attacks and 10 per cent from other means. Three thousand houses had been hit, of which 50 per cent had been totally destroyed, and 30-40 per cent were beyond repair. No repairs had been attempted because of the constant threat from shellings. There are no military units located near the town, but Iraqi artillery deployed about 10 km from the town had been used to return fire from the other side. The town had not been used at any time for launching military operations, and the river had not been crossed in either direction during the hostilities. There were no military units in the city, except for border forces along the Shatt-al-Arab.

Observations by the mission

108. The mission was taken to visit six sites. At the first, it was shown an unoccupied house which, it was told, had been hit two days earlier by a shell. One wall of the house had collapsed, but no point of impact or shell fragments were found. At the second, a power plant on the edge of the town towards the river and several workshops in the vicinity had been hit on May 20, 1983, and three people were said to have died, but the plant was still functioning. At the third site, 8 houses, 400 m from a transformer, had been destroyed by an air raid in early 1981. At the fourth site, near some oil-storage tanks 8-10 prefabricated houses had been destroyed, as had most

of the tanks. At the fifth site, in a residential area, two houses had been completely destroyed and several more damaged to varying degrees evidently by artillery. The sixth site was five km outside the town, where water-storage tanks had been destroyed at the start of the hostilities.

109. During its tour, the mission saw about 40 large oil-storage tanks grouped in various parts of the town. Most of the tanks had been destroyed or damaged.

110. The mission is of the opinion that the oil installations were the main target of the attacks. The power station could have been another target. However, it was clear that in the course of the shelling, a large number of residential and other buildings had been hit and heavily damaged. [...]

B. Security Council Resolution 540 (1983)

[**Source:** UN Doc. S/RES/540 (October 31, 1983).]

The Security Council,

Having considered again the question entitled "The situation between Iran and Iraq", [...]

Recalling the report of the Secretary-General of June 20, 1983 (S/15834) on the mission appointed by him to inspect civilian areas in Iran and Iraq which have been subject to military attacks, and expressing its appreciation to the Secretary-General for presenting a factual, balanced and objective account, [...]

Deploring once again the conflict between the two countries, resulting in heavy losses of civilian lives and extensive damage caused to cities, property and economic infrastructures,

Affirming the desirability of an objective examination of the causes of the war, [...]

2. *Condemns* all violations of international humanitarian law, in particular, the provisions of the Geneva Conventions of 1949 in all their aspects, and calls for the immediate cessation of all military operations against civilian targets, including city and residential areas; [...]

C. Letter of June 28, 1984 from Iraq to the Secretary-General

[**Source:** UN Doc. S/16649 (June 28, 1984).]

Letter dated June 28, 1984 from the deputy permanent representative of Iraq to the United Nations addressed to the Secretary-General

I wish to refer once again to what was stated in the letter from His Excellency President Saddam Hussein, President of the Republic of Iraq, which he addressed to you on June 10, 1984 in reply to your appeal addressed to both Iraq and Iran to end the bombardment of purely civilian centres and in which he affirms that it was essential for both sides to refrain from concentrating their military forces in or near civilian centres, so that there would be no intermingling

during military operations. I wish also to refer to my letter addressed to you on May 21, 1984, in which I explained to you that the Iranian side was using the town near the Iraqi frontier as centres for concentrating its forces and making them point of departure for the attack which it intended to launch against Iraqi territory and towns.

I wish to refer also to the note sent to you by the Permanent Representative of Iraq on June 23, 1984. We have ascertained that the Iranian authorities have actually assembled numerous military units in the following Iranian cities: Abandan, Mohammarah, Khosrowabad, Ahvaz, Hoveyzeh, Bisitin, and Andimeshk. The Iranian authorities' use of purely civilian centres for military purposes in order to prepare fresh aggression against Iraq is a clear violation of the agreement reached through you to avoid the bombardment of civilian centres, as well as being a violation of article 28 of the Fourth Geneva Convention, signed on August 12, 1949, relative to the protection of civilian persons in time of war, which prohibits the use of the presence of protected persons to render certain points or areas immune from military operations and to turn such towns into military centres. This prohibition was reaffirmed clearly in Protocol I, signed in Geneva in 1977. Article 58, paragraph (b), states the necessity of avoiding the establishment of military targets in or near densely populated areas. In stressing once again the necessity of taking swift and appropriate measures to verify that and the necessity of the Iranian side's abiding by its commitments, we confirm what we warned of at the start, namely, that the Iranian rgime intends to use the agreement to conceal its aggressive, expansionist intentions for the purpose of low duplicity, which places such situations outside the scope of what was stated in your letter of June 9, 1984 concerning the avoidance of the bombardment of purely population centres.

We emphasize our strong desire for faithful implementation of the agreement and for United Nations bodies to perform their duties well. We enclose a list containing information about the Iranian military forces present in the above-mentioned towns.

(*Signed*) Tariq Aziz
Deputy Minister and
Minister for Foreign Affairs

D. Letter of June 29, 1984 from the Secretary-General to Iran and Iraq

[Source: UN Doc. S/16663 (July 6, 1984).]

Text of messages dated June 29, 1984 from the Secretary-General addressed to the President of the Islamic Republic of Iran and to the President of the Republic of Iraq

I am deeply gratified and encouraged that the Governments of Iran and Iraq are implementing in good faith their undertakings to refrain from military attacks on purely civilian areas. While there have been reports of civilian casualties, I have reason to believe that both Governments are determined to honour the

commitments made in response to my appeal. This is to be commended by the international community.

I feel I should underline once again, now that the inspection arrangements are in place, that compliance with the undertakings is principally the responsibility of the two Governments. In this respect I must point out that, inasmuch as my appeal as well as the responses of the two Governments were motivated by a desire to spare innocent civilian lives, I am deeply concerned that allegations have been made that civilian population centres are being used for concentration of military forces. If this were indeed the case, such actions would constitute a violation of the spirit of my appeal and of basic standards of warfare that the international community expects to be observed.

I am sure you will understand that, until this ruinous conflict can be stopped, I have a special responsibility to make every effort to mitigate the suffering it causes.

DISCUSSION

1. a. May a Party to a conflict deliberately attack a hospital as described, *e.g.*, in Abadan or Khorramshahr, Iran or Khanagin, Iraq? A mosque? A school? Is a power station in a modern society an object necessary for the survival of the civilian population? (*Cf.* Art. 25 of the Hague Regulations, Arts. 48, 51 (2)-(3), 52 and 54 of Protocol I and Arts. 13 and 14 of Protocol II.) How would the fact that troops were stationed in each of these locations affect these determinations? (*Cf.* Art. 19 of Convention IV and Arts. 51 (7) and 52 (2) of Protocol I.)

   b. Are civilians not also further protected by IHL? For example, from indiscriminate attacks? (*Cf.* Art. 51 (4)-(5) of Protocol I.) What constitutes an indiscriminate attack? The aerial bombardment with cluster bombs in Baneh, Iran (para. 81 of the UN Mission report)? Are women and children not granted special protection under IHL? (*Cf., e.g.,* Art. 12 (4) of Convention I, Art. 12 (4) of Convention II, Art. 14 of Convention III, Arts. 14 and 27 of Convention IV and Arts. 76 and 77 of Protocol I.) Did the described attacks violate those provisions?

   c. Are oil wells or refineries considered military objectives under IHL, such that they may be attacked? Power plants? (*Cf.* Arts. 25 and 27 of the Hague Regulations and Arts. 48, 52 and 85 (3) of Protocol I.) If when attacking a military objective, a Party to the conflict knows that a civilian object might be touched by this attack what, if any, prior action must be taken? (*Cf.* Art. 19 of Convention IV and Art. 57 (2) (c) of Protocol I.) If determined to be a military objective, may any means be used to disable it or subdue the opposing forces? Including the use of cluster and fragmentation bombs, rockets, machine-guns, napalm, and booby-traps in civilian areas, as Iraqi authorities claimed were used in Kirkuk? (*Cf.* Art. 22 of the Hague Regulations.) Are a certain number of civilian casualties permitted in an attack on military objectives under IHL? If so, how many constitute a permissible loss? (*Cf.* Art. 57 (2) (a) (ii)-(iii) of Protocol I.)

2. a. Is Security Council Resolution 540, para. 2, referring to violations of any of the above mentioned IHL provisions? Which attacks and what destruction described in the report fall under "the Geneva Conventions"?

   b. Was the destruction of the areas of Khorramshahr which were completely levelled by high explosive demolition charges and engineering equipment while under Iraqi control a clear violation of Convention IV? Even if the destruction happened just before those areas were retaken by Iranian forces? Even if the destruction occurred while fighting was going on in Khorramshahr? Under which conditions could such destruction be compatible with IHL? (*Cf.* Art. 53 of Convention IV.)

3. a. Is it clear that such violations actually occurred in the towns visited by the UN Mission? In all cases? Are such violations of IHL easy to determine? Are some IHL violations, for example, torture, easier than others to assess? Is it easier to establish violations of the law of Geneva than of the law of the Hague? Did or could the UN Mission provide clear conclusions? What explains the vague language found in the report of the UN Mission, *e.g.,* such events "appear plausible" or "the extent of destruction gave the impression that ... "?

   b. What factors make a "fact-finding" mission so difficult in these situations? Is it not particularly difficult as such facts must be assessed subsequent to events (sometimes even years later)? And due to the standards used in evaluating those facts? (*Cf.* Art. 52 of Protocol I.) How does one really know or determine whether or not a military objective was actually located nearby at the time of attack? And then whether the attack was proportional to the significance of that military objective at that time? Or whether or not the attack was a mistake? Or whether the casualties were really part of the civilian population? On what elements should the fact-finding mission rely to assess the concept of proportionality? To assess the objective importance of the military objective attacked? The exact extent of the civilian losses? The military plans of the attacker? (*Cf.* Arts. 51 (5) (b) and 57 (2) (a) (iii) of Protocol I.)

   c. Can one draw general conclusions from this mission for the possibilities and difficulties of fact-finding in the field of IHL on the conduct of hostilities?

4. a. If the facts are accurately stated in Document C, has Iran violated Art. 58 (b) of Protocol I? Art. 28 of Convention IV? Are the inhabitants of the mentioned Iranian towns protected persons under Convention IV? (*Cf.* Art. 4 of Convention IV.)

   b. Is the UN Secretary-General right in stating in Document D that the use of civilian population centres for the concentration of military forces constitute a violation of basic standards of warfare? (Cf. Arts. 51 (7) and 58 of Protocol I.)

   c. If the Iranian government used civilian centres as cover for its military forces, is the Iraqi government entitled to bomb the area? Or at least the military forces situated in the area? What precautionary measures must Iraq then take? (*Cf.* Art. 50 (3), 51 (7) and (8), 57 and 58 of Protocol I.) Are Iran and Iraq bound by these provisions of Protocol I although they are not parties to the

Protocol? Which of these provisions can be considered customary international law and hence applicable to both parties?

5. If civilians and civilian objectives in Iran and Iraq were attacked, what obligations do States party to the Conventions have with regard to such violations of IHL? Does the UN action fulfil the obligations of the States Parties? (*Cf.* Art. 1 common to the Conventions, Arts. 49/50/129/146 respectively of the four Conventions and Art. 86 of Protocol I.)

Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated

THE CASE

A. UN Security Council Resolution 598 (1987)

[Source: UN Doc. S/RES/598 (July 20, 1987).]

The Security Council,

[...]

Deeply concerned that, despite its calls for a cease-fire, the conflict between Iran and Iraq continues unabated, with further heavy loss of human life and material destruction, [...]

Determining that there exists a breach of the peace as regards the conflict between Iran and Iraq,

Acting under Articles 39 and 40 of the Charter of the United Nations,

1. *Demands* that, as a first step towards a negotiated settlement, Iran and Iraq observe an immediate cease-fire, discontinue all military actions on land, at sea and in the air, and withdraw all forces to the internationally recognized boundaries without delay;

2. *Requests* the Secretary-General to dispatch a team of United Nations Observers to verify, confirm and supervise the cease-fire and withdrawal and further requests the Secretary-General to make the necessary arrangements in consultation with the Parties and to submit a report thereon to the Security Council;

3. *Urges* that prisoners of war be released and repatriated without delay after the cessation of active hostilities in accordance with the Third Geneva Convention of 12 August 1949;

4. *Calls* upon Iran and Iraq to cooperate with the Secretary-General in implementing this resolution and in mediation efforts to achieve a comprehensive, just and honourable settlement, acceptable to both sides,

of all outstanding issues in accordance with the principles contained in the Charter of the United Nations; [...]

6. *Requests* the Secretary-General to explore, in consultation with Iran and Iraq, the question of entrusting an impartial body with inquiring into responsibility for the conflict and to report to the Security Council as soon as possible; [...]

B. Letter of July 17, 1989 from Iran

[**Source:** UN Doc. S/20740 (July 19, 1989).]

ANNEX

Statement dated July 17, 1989 by the Foreign Ministry of the Islamic Republic of Iran

Exactly one year ago, on July 17, 1988, the Islamic Republic of Iran removed the only remaining excuse concocted by Iraq to prevent the implementation of Security Council resolution 598 (1987). The highest authority of the Islamic Republic of Iran officially and unconditionally accepted resolution 598 (1987), and, in response to the invitation of the United Nations Secretary-General, a high-level delegation was dispatched to New York to consult with the Secretary-General about the procedures for the full and rapid implementation of the resolution.

Unfortunately, what the Islamic Republic of Iran had always warned the international community about materialized. Iraq, which had declared, time and again, that the only obstacle for the implementation of the resolution was lack of official acceptance by the Islamic Republic of Iran - refused to implement the resolution by insisting on pre-conditions which were illogical, unacceptable and contradictory to the letter and spirit of resolution 598 (1987) and the plans of the Secretary-General. [...]

The legal and practical prominence and priority of withdrawal to the internationally recognized boundaries is also manifested in Security Council resolution 598 (1987). Acting under Articles 39 and 40 of Chapter VII of the Charter of the United Nations, the Security Council, in paragraph 1 of resolution 598 (1987), demanded the cease-fire followed by withdrawal of forces to the internationally recognized boundaries without delay as a "first step towards a negotiated settlement". Therefore, withdrawal, which is an inseparable part of this mandatory first step, is prior to and independent of any negotiation.

However, since the beginning of direct talks on 25 August 1988, Iraq has used every conceivable method to evade its commitment under the resolution as well as those under general principles of international law. The introduction of pre-conditions for the implementation of the resolution started with direct talks as a pre-condition for cease-fire and developed into continuously evolving conditions for implementation of other provisions, the most prominent and urgent of which is withdrawal. [...]

[...]

However, from the very first meeting of direct talks, the Foreign Minister of Iraq called for the necessity of reaching a common understanding with regard to the cease-fire itself, and used this pretext to introduce extraneous elements which by no extension of logic could be considered as a part of regulations for cease-fire.

It is interesting to note that both the Secretary-General [...] and Iraq [...] had excluded a cease-fire from the agenda of direct talks. The statement of the President of Iraq is even more direct than that of the Secretary-General in doing so. [...]

It is clear that the President of Iraq not only excludes all issues related to the cease-fire from direct talks, but also concedes that withdrawal is the first subject on the agenda of direct talks. Yet, to this date Iraq has refused even to comment on what it itself considered the first agenda item, and has prevented the implementation of the resolution by introducing elements which it claimed related to the observance of the cease-fire. [...]

[...]

While Iraq has failed to comply with the prominent element of the resolution and withdraw to the internationally recognized boundaries and refused to accept any proposal of the Secretary-General, it has selected one element of the resolution - namely the question of prisoners of war (POWs) - and with a view to undermining the resolution itself, has called for its implementation outside the framework of the resolution. However, what has actually occurred in the past year proves the lack of good will on the part of Iraq even regarding this issue. The timetable presented by the Secretary-General and accepted by the Islamic Republic of Iran called for the release and repatriation of all prisoners of war within 90 days. Had Iraq accepted that proposal, all POWs would have been released and repatriated by November 20, 1988. Likewise, had Iraq accepted - like the Islamic Republic of Iran - the four-point plan of October 1, 1988, all POWs would have been released and repatriated by the end of 1988. It is clear, therefore, that Iraq does not seek the release and repatriation of POWs; rather it endeavours to undermine and disintegrate resolution 598 (1987) and sabotage the efforts of the Secretary-General.

Another illustration of the real intention of Iraq with regard to POWs is the number of registered Iranian POWs in Iraq. Iraqi officials claimed during the last days of the war that the number of POWs on two sides had become balanced. Recently, the Governor of Basra claimed that only during the last year of the war did Iraq capture more than 25,000 Iranian prisoners. None of these prisoners have been registered. In fact, while close to 50,000 Iraqi POWs have been registered in the Islamic Republic of Iran by the International Committee of the Red Cross, Iraq has allowed the registration of only about 18,000 prisoners. Therefore, if Iraq has any real humanitarian concern for POWs, it has to bring the number of registered prisoners to a balance, since proportionality with regard to POWs has always been the Iraqi line. The International Committee of the Red Cross bears special responsibility to convince and compel Iraq to register these prisoners and bring the number of registered POWs on the two sides to a balance.

Close to one year after the establishment of the cease-fire, nothing has been achieved in the road to peace between Iran and Iraq. This brief assessment of

the underlying reasons behind the stalemate clearly illustrates the fact that Iraq has failed to comply with a mandatory resolution of the Security Council adopted under Articles 39 and 40 of Chapter VII. The Security Council has committed itself [...] [in] resolution 598 (1987) - to take appropriate measures to ensure compliance with the resolution. Failure to do so will not only be a violation of the resolution by its authors, it will also be a violation of the trust the United Nations has placed on the Security Council as the primary organ responsible for maintenance of international peace and security. The institutional implications of political expediency on the part of some members of the Council who have confused bilateral relations with their official function as members of the Security Council are grave, and the precedent it creates is disastrous. If the Security Council fails to take resolute measures to ensure compliance with a resolution it adopted with massive international fanfare, it cannot expect other Member States to entrust to the Council and United Nations the resolution of conflicts [...].

C. Letter of July 21, 1989 from Iraq

[**Source:** UN Doc. S/20744 (July 21, 1989).]

ANNEX

Commenting on the communiqué issued by the Iranian Military of Foreign Affairs on July 17, 1989, a spokesman for the Permanent Mission of Iraq in New York stated as follows:

"On 17 July the Iranian Ministry of Foreign Affairs issued a communiqué concerning the situation between Iraq and Iran and the progress of the negotiations that was full of fallacies and lies. For purposes of clarification, we should like to set forth the following facts:

"1. The communiqué of the Iranian Ministry of Foreign Affairs made it appear that Iran accepted resolution 598 (1987) officially on July 18, 1988 as a diplomatic step taken by the Iranian Government to facilitate the implementation of resolution 598 (1987). The truth, as the members of the international community know, is that Iran did not accept resolution 598 (1987), which was binding after its adoption, but used in dealing with its various kind of stratagems and manoeuvres in an attempt to prolong the war and win time in the hope of achieving its aggressive expansionist goals. [...]

[...]

"3. The agreement reached between Iraq and Iran on 8 August 1988 through the Secretary-General of the United Nations removes all doubts about the topics to be dealt with in the direct negotiations under the auspices of the Secretary-General. These topics are all the provisions of the resolution that have not been implemented so far. [...]

"The one topic that actually does lie outside the scope of the negotiations is the topic of the release of prisoners. Paragraph 3 of resolution 598 (1987) and article 118 of the Geneva Convention relative to the Treatment of Prisoners of War of 1949 and precedents throughout the international community all affirm in

a way that admits of no other interpretation the binding obligation to release and exchange prisoners without delay after the cessation of active hostilities and entrust the supervision of this process to the International Committee of the Red Cross. The Iranian side's insistence on not proceeding to release and exchange prisoners after a year has elapsed since the cessation of active hostilities fully demonstrates how incompatible this rgime's position is with international law and international humanitarian law and its readiness to gamble with the lives and suffering of tens of thousands of Iraqi and Iranian human beings in order to achieve political ends. It shows once again the selective approach adopted by this rgime throughout the years of conflict with regard to Security Council resolutions and the provisions of international law, taking from them what it will and refusing to be bound by the obligations which they create for it.

"The fallacies contained in the communiqué of the Iranian Foreign Ministry regarding the question of the registration of the prisoners is another proof of the bad intentions of the Iranian rgime and its constant inclination to trickery and plays on words at the expense of human beings. The question of the registration of the prisoners is clear and unambiguous in international law; it is incumbent on the parties to the dispute to inform the Red Cross promptly of the number of prisoners and to provide the necessary information concerning them without delay.

"We informed the President of the International Committee of the Red Cross and the Secretary-General of the United Nations officially of our readiness to register all Iranian prisoners who were not registered when the Iranian side showed the same readiness, and the Security Council is cognizant of this. Resorting to percentages on this question is a contravention of international law and a ruse. Indeed, it is an unethical procedure, making human beings into numbers. Iraq rejects it on ethical and legal grounds and reaffirms the obligation on both parties to inform the International Committee of the Red Cross at the same time of the names of all non-registered prisoners. [...]

5. Iraq once again affirm its will to continue the negotiation process under the auspices of the Secretary-General of the United Nations. if the Iranian side is serious about arriving at a comprehensive and lasting peaceful settlement, it has only to respond to the Secretary-General's invitation and concur with Iraq's wish to sit down at the negotiating table under the auspices of the Secretary-General and enter into genuine direct negotiations with a view to arriving at a common understanding of the peace plan and the positioning of the necessary mechanisms for its implementation. [...]

D. Iran/Iraq: more than 70,000 POWs repatriated

[**Source:** *ICRC Bulletin*, No. 177, October 1990, p. 1.]

By 14 September, over 70,000 prisoners had returned home in the operation launched on 17 August to repatriate all prisoners of war captured during the conflict between Iraq and Iran. As reported in the last Bulletin (No. 176, September 1990), about 60 delegates had been sent out from Geneva as of

18 August to reinforce the two ICRC delegations in Baghdad and Teheran. By the end of the month, 77 delegates were at work in the two countries.

During the period from 17 to 31 August, more than 2,000 prisoners of war were released daily overland via the border post at Qasr-e-Shirin, air shuttles were organized as from 22 August. A total of 798 Iranian prisoners of war and 1,193 Iraqi prisoners of war were flown back to their respective countries on three flights by Iran Air Jumbo jet, while the ICRC chartered an aircraft to repatriate (on four flights) some 500 wounded and sick prisoners (221 Iranians and 257 Iraqis). Two more flights under ICRC auspices were made on 13 September to repatriate another 210 wounded and sick Iranian prisoners of war.

From the end of August, overland operations continued, with a daily flow of 900 prisoners in each direction, rising to a daily figure of 2,000 men both ways from 10 September.

ICRC delegates record each prisoner's identity and make sure they are returning to their countries of their own free will.

The prisoners repatriated include captives whom the ICRC had been unable, both in Iraq and in Iran, to visit during their detention. The delegates took this opportunity to register them.

Throughout the past weeks, the ICRC has maintained a constant dialogue with the Iraqi and Iranian authorities, in order to plan the remaining repatriations as efficiently as possible and arrange for all prisoners of war on both sides to be back home again soon.

DISCUSSION

1. a. What do the provisions of IHL dictate regarding the repatriation of prisoners of war "after the cessation of active hostilities"? (*Cf.* Art. 118 of Convention III.)

   b. When are active hostilities considered to have ceased? After the establishment of a cease-fire? Only after the withdrawal of all military forces to the internationally recognised boundaries? Only after Iran and Iraq have reached a final peace treaty? Had active hostilities ceased in summer 1989 between Iran and Iraq such that prisoners of war should have been repatriated?

   c. Does the fact that Security Council Resolution 598 (1987) provide for the repatriation of prisoners of war in its operative para. (3) mean that the prisoners of war have to be repatriated only once operative paras. (1) and (2) have been complied with? If this implication was correct, would it be compatible with IHL? If the Security Council Resolution contradicts IHL, does it take precedence under Art. 103 of the UN Charter? (*Cf.* Arts. 1 and 118 of Convention III.) [Article 103 of the UN Charter available on http://www.un.org/aboutun/charter/ reads: "In the event of a conflict between the obligations [...] under the present Charter and [...] obligations under any other international agreement, [...] obligations under the present Charter shall prevail".]

d. Is the Iraqi position correct that the repatriation of prisoners of war lies "outside the scope of the negotiations" between the parties? (*Cf.* Arts. 6 and 118 of Convention III.)

e. Is Iraq correct in stating that IHL foresees the "binding obligation to release and exchange prisoners of war after the cessation of hostilities"? Does Iraq have an obligation to repatriate them even though Iran does not? Has Iraq complied with that obligation? (*Cf.* Arts. 1, 13 (3) and 118 of Convention III and Art. 60 (5) of the Vienna Convention on the Law of Treaties *see* quotation on p. 301.)

2. a. What are the responsibilities of the Parties to the conflict regarding the registration of prisoners of war? (*Cf.* Arts. 70 and 122 of Convention III.)

b. Are a Party's responsibilities towards its prisoners of war applicable solely on the principle of reciprocity? Is Iran correct in stating that the ICRC has a responsibility to compel Iraq to register prisoners of war? And also that it has "to bring the number of registered POWs, on the two sides to a balance? (*Cf.* Arts. 13 (3), 70, 122, 123 and 126 of Convention III.)

c. Is Iraq correct in stating that "it is incumbent on the parties [...] to inform the Red Cross promptly of the number of prisoners and to provide the necessary information"? Is the Iraqi position indicating its "readiness to register all Iranian prisoners [...] when the Iranian side showed the same readiness" acceptable under IHL? (*Cf.* Arts. 13 (3), 70 and 122 of Convention III.)

3. Who has to determine whether a POW objects to his/her repatriation? The ICRC? Is that foreseen in IHL? Why does the ICRC insist on visiting prisoners and interviewing them without witnesses? Does the ICRC have a right to insist on that modality? (*Cf.* Art. 126 of Convention III.)

4. Do you agree with Iran's statement in the letter's last paragraph concerning the credibility of the Security Council? Can such a conclusion not also extend to the credibility of IHL? Does this situation between Iran and Iraq demonstrate the ineffectiveness of IHL? (*Cf.* Art. 1 common to the Conventions.)

5. Security Council Resolution 598 (1987) addresses both political and humanitarian issues; what kind of problems does such a mixture of elements raise? Should the Security Council have omitted any reference to IHL and prisoners of war? Would that have improved the situation?

Case No. 145, UN/ICRC, The Use of Chemical Weapons

THE CASE

A. Security Council Resolution 620 (1988)

[**Source:** UN Doc. S/RES/620 (August 26, 1988).]

The Security Council

Recalling its resolution 612 (1988),

Having considered the reports of July 20 and 25 and August 19, 1988 (S/20060 and Add.1, S/20063 and Add.1, S/20134) of the missions dispatched by the Secretary-General to investigate allegations of the use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq,

Deeply dismayed by the missions' conclusions that there had been continued use of chemical weapons in the conflict between Iran and Iraq and that such use against Iranians had become more intense and frequent,

Profoundly concerned by the danger of possible use of chemical weapons in the future,

Bearing in mind the current negotiations in the Conference on Disarmament on the complete and effective prohibition of the development, production and stockpiling of chemical weapons and on their destruction,

Determined to intensify its efforts to end all use of chemical weapons in violation of international obligations now and in the future,

1. *Condemns resolutely* the use of chemical weapons in the conflict between Iran and Iraq, in violation of obligations under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925, and in defiance of its resolution 612 (1988);

2. *Encourages* the Secretary-General to carry out promptly investigations, in response to allegations brought to his attention by any Member State concerning the possible use of chemical and bacteriological (biological) or toxin weapons that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law, in order to ascertain the facts of the matter, and to report the results;

3. *Calls* upon all States to continue to apply, to establish or to strengthen strict control of the export of chemical products serving for the production of chemical weapons, in particular to parties to a conflict, when it is established or when there is substantial reason to believe that they have used chemical weapons in violation of international obligations;

4. *Decides* to consider immediately, taking into account the investigations of the Secretary-General, appropriate and effective measures in accordance

with the Charter of the United Nations, should there be any future use of chemical weapons in violation of international law, wherever and by whomever committed.

B. ICRC Press Release of March 23, 1988

[**Source:** *ICRC Press Release*, No. 1567, March 23, 1988.]

IRAN-IRAK CONFLICT: THE ICRC CONDEMNS THE USE OF CHEMICAL WEAPONS

Geneva (ICRC) - In a new and tragic escalation of the Iran-Iraq conflict chemical weapons have been used, killing a great number of civilians in the province of Sulaymaniyah.

The use of chemical weapons, whether against military personnel or civilians, is absolutely forbidden by international law and is to be condemned at all times.

The ICRC has therefore once again taken urgent steps to bring to an immediate end the use of chemical weapons. It has also informed the Islamic Republic of Iran of its readiness to provide emergency assistance for the victims.

DISCUSSION

1. a. Is the absolute prohibition by international law on the use of chemical weapons mentioned above derived from customary international law or purely through conventional law? [The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare *see* **Document No. 2**, p. 524, was accepted by Iraq and many other States under condition that they will cease to be bound by it towards any Power not respecting the Protocol.]

   b. Does IHL of international armed conflicts specifically prohibit the use of chemical weapons? Does IHL of non-international conflicts prohibit their use? (*Cf.* Art. 23 (a) and (e) of the Hague Regulations, Arts. 35 and 51 of Protocol I and **Document No. 2**, The 1925 Geneva Chemical Weapons Protocol. p. 524.)

   c. Why is IHL of non-international conflicts so vague regarding prohibited weapons? Is it because customary IHL prohibits such weapons? Or is it because this prohibition can be derived from the "Martens clause"? Or does Protocol II expect reference to be made to IHL of international armed conflicts? To all aspects? If only some aspects, which ones? (*Cf.* Paras. 8-9 of Hague Convention IV, Art. 23 (a) and (e) of the Hague Regulations, Arts. 63(4)/62 (4)/142 (4)/158 (4) respectively of the four Conventions, Arts. 1 (2) and 35 (2) of Protocol I and para. 4 of the Preamble to Protocol II.)

2. If customary and/or conventional IHL prohibits the use of chemical weapons, was the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 1993 necessary? (*See* **Document No. 13**, Convention on the Prohibition of the

Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, January 13, 1993. p. 592.) If it was, does it demonstrate that chemical weapons in fact were not prohibited by customary law?

3. Is the statement in the press release correct that the use of chemical weapons is prohibited at all times? Or do many States interpret the prohibition as applying only on a basis of reciprocity? Would this explain the existence of additional treaties expanding prohibitions beyond solely the use of chemical weapons?

4. Who used chemical weapons in this case? Why does neither the UN nor the ICRC mention who used chemical weapons? Do the UN Security Council Resolution and the ICRC press release indirectly clarify whether it was Iraq or Iran which used chemical weapons? Do the principles of neutrality and impartiality bar the ICRC from directly designating who used chemical weapons?

XXIII. SECOND GULF WAR (1990-1991)

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq

THE CASE

A. Security Council Resolution 661 (1990)

[**Source:** UN Doc. S/RES/661 (August 6, 1990).]

The Security Council,

Reaffirming its resolution 660 (1990) of August 2, 1990,

Deeply concerned that that resolution has not been implemented and that the invasion by Iraq of Kuwait continues with further loss of human life and material destruction, [...]

Acting under Chapter VII of the Charter of the United Nations,

1. *Determines* that Iraq so far has failed to comply with paragraph 2 of resolution 660 (1990) and has usurped the authority of the legitimate Government of Kuwait; [...]

3. *Decides* that all States shall prevent:
   (a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;
   (b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products from Iraq or Kuwait; and any dealings by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Iraq or Kuwait for the purposes of such activities or dealings;
   (c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;

4. *Decides* that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs;

5. *Calls* upon all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution; [...]

9. *Decides* that, notwithstanding paragraphs 4 through 8 above, nothing in the present resolution shall prohibit assistance to the legitimate Government of Kuwait, and calls upon all States:
   (a) To take appropriate measures to protect assets of the legitimate Government of Kuwait and its agencies;
   (b) Not to recognize any regime set up by the occupying Power; [...]

B. Security Council Resolution 665 (1990)

[**Source:** UN Doc. S/RES/665 (August 25, 1990). Available on http://www.un.org/documents/scres.htm]

The Security Council,

[...],

Having decided in resolution 661 (1990) to impose economic sanctions under Chapter VII of the Charter of the United Nations, [...]

Deploring the loss of innocent life stemming from the Iraqi invasion of Kuwait and determined to prevent further such losses,

Gravely alarmed that Iraq continues to refuse to comply with resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and in particular at the conduct of the Government of Iraq in using Iraqi flag vessels to export oil,

1. *Calls upon* those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990);

2. *Invites* Member States accordingly to co-operate as may be necessary to ensure compliance with the provisions of resolution 661 (1990) with maximum use of political and diplomatic measures, in accordance with paragraph 1 above; [...]

C. Security Council Resolution 666 (1990)

[**Source:** UN Doc. S/RES/666 (September 13, 1990). Available on http://www.un.org/documents/scres.htm]

The Security Council,

Recalling its resolution 661 (1990), paragraphs 3 (c) and 4 of which apply, except in humanitarian circumstances, to foodstuffs,

Recognizing that circumstances may arise in which it will be necessary for foodstuffs to be supplied to the civilian population in Iraq or Kuwait in order to relieve human suffering,

Noting that in this respect the Committee established under paragraph 6 of that resolution has received communications from several Member States,

Emphasizing that it is for the Security Council, alone or acting through the Committee, to determine whether humanitarian circumstances have arisen, [...]

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that in order to make the necessary determination whether or not for the purposes of paragraph 3 (c) and paragraph 4 of resolution 661 (1990) humanitarian circumstances have arisen, the Committee shall keep the situation regarding foodstuffs in Iraq and Kuwait under constant review; [...]
3. *Requests*, for the purposes of paragraphs 1 and 2 of this resolution, that the Secretary-General seek urgently, and on a continuing basis, information from relevant United Nations and other appropriate humanitarian agencies and all other sources on the availability of food in Iraq and Kuwait, such information to be communicated by the Secretary-General to the Committee regularly;
4. *Requests further* that in seeking and supplying such information particular attention will be paid to such categories of persons who might suffer specially, such as children under 15 years of age, expectant mothers, maternity cases, the sick and the elderly;
5. *Decides* that if the Committee, after receiving the reports from the Secretary-General, determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such need should be met;
6. *Directs* the Committee that in formulating its decisions it should bear in mind that foodstuffs should be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries;
7. *Requests* the Secretary-General to use his good offices to facilitate the delivery and distribution of foodstuffs to Kuwait and Iraq in accordance with the provisions of this and other relevant resolutions;
8. *Recalls* that resolution 661 (1990) does not apply to supplies intended strictly for medical purposes, but in this connection recommends that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies."

DISCUSSION

1. a. Is the UN Security Council bound to respect IHL?

   b. As it is the individual UN Member States that carry out UN Security Council decisions, are not those individual States party to the Conventions and Protocols bound to respect IHL? Or is obedience first owed to UN Security Council decisions?

   [*Cf.* UN Charter (available on http://www.un.org/aboutun/charter), Art. 25: "The Members of the United Nations agree to accept and to carry out the decisions of the Security Council in accordance with the present Charter."]

   Do the obligations under the UN Charter not take precedence?

   [*Cf.* UN Charter, Art. 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail."]

   Yet, must measures under the UN Charter as part of *ius ad bellum* not also be presumed to be implemented consistently with *ius in bello*?

2. Does an armed conflict even exist such that IHL applies? Who are the parties to the conflict? Is the UN a party to the conflict?

3. a. Does international law regulate the imposition of sanctions? Assuming IHL applies, does it place limitations upon the utilization of sanctions? (*Cf.* Art. 23 of Convention IV and Art. 70 of Protocol I.)

   b. Are the sanctions here consistent with IHL? Is your response the same if, as a result of the long-term imposition, the sanctions financially weaken the State to such a degree that it cannot provide for the dietary and medical needs of its people?

   c. Should not an attempt be made to first interpret Security Council resolutions in a manner consistent with IHL? Was the language of Resolution 661 sufficiently clear and comprehensive such that IHL is not violated? Was the clarification in Resolution 666 necessary?

4. a. Are such sanctions an effective means of achieving the objectives of the UN Security Council? Will it influence the authorities? What are the advantages and drawbacks of such sanctions?

   b. Even if effective, are the sanctions not a form of collective punishment imposed upon innocent people? Does IHL prohibit such collective punishment? (*Cf.* Art. 33 of Convention IV.) Should such types of collective punishment be prohibited? Yet, are not individuals always going to be affected when action is taken at the international level, *i.e.*, between States? Does the implementation of *ius ad bellum* not necessarily occur at inter-State level? Which alternatives would you propose?

5. a. Are the restrictions on shipping imposed by the UN Security Council Resolution 665 permitted under international law? Under, specifically, IHL? (*Cf.* Art. 23 of Convention IV, Art. 70 of Protocol I, Arts. 93-104 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, *see* **Document No. 68**. p. 994.)

   b. Does the UN Security Council Resolution 665 create a blockade? If so, what limitations to blockades exist? Do the UN Security Council directives in the above resolutions violate these limitations? (*Cf., e.g.,* Arts. 103-104 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, *see* **Document No. 68**. p. 994.)

   c. Is the proportionality referred to in para. 1 of Resolution 665 the same as understood in *ius in bello*? In *ius ad bellum?* Or as a mixture of both?

6. a. Should humanitarian organizations such as the ICRC provide the information requested in para. 3 of Resolution 666?

   b. Under IHL should "foodstuffs ... be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries," as stated in para. 6 of Resolution 666? (*Cf.* Art. 23 of Convention IV and Art. 70 of Protocol I.)

Case No. 147, UN, Detention of Foreigners

THE CASE

[**Source:** UN Doc. S/RES/664 (August 18, 1990). Available on http://www.un.org/documents/scres.htm]

The Security Council,

Recalling the Iraqi invasion and purported annexation of Kuwait and resolutions 660, 661 and 662,

Deeply concerned for the safety and well being of third state nationals in Iraq and Kuwait,

Recalling the obligations of Iraq in this regard under international law,

Welcoming the efforts of the Secretary-General to pursue urgent consultations with the Government of Iraq following the concern and anxiety expressed by the members of the Council on August 17, 1990,

Acting under Chapter VII of the United Nations Charter:

1. *Demands* that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries and grant immediate and continuing access of consular officials to such nationals;

2. *Further demands* that Iraq take no action to jeopardize the safety, security or health of such nationals;

3. *Reaffirms* its decision in resolution 662 (1990) that annexation of Kuwait by Iraq is null and void, and therefore demands that the Government of Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel, and refrain from any such actions in the future; [...].

DISCUSSION

1. a. According to IHL which individuals and under which conditions have the right to leave Kuwait? Iraq? (*Cf.* Arts. 35 and 48 of Convention IV.) Do those nationals mentioned in para. 1 of the Resolution have the right to leave?

   b. Who are protected persons under IHL of international armed conflicts? Are the individuals mentioned in para. 1 of the Resolution protected persons as defined by IHL? In making such a determination is it necessary to know whether the nationals referred to in this resolution are from a neutral State or a co-belligerent State? Why or why not? Does an Iraqi decision to close diplomatic and consular missions in Kuwait impact the status of these nationals as protected persons under Convention IV? Of what significance is it whether the States of these nationals continue normal diplomatic relations with Iraq? (*Cf.* Art. 4 of Convention IV.)

2. Must Iraq allow all protected persons to leave? If not, why may their departure be prohibited? Who assesses the validity of the justifications for prohibiting departure? What means "contrary to the national interests of the State"? (*Cf.* Art. 35 of Convention IV.)

3. Which rules of IHL fill out para. 2 of the Resolution?

Case No. 148, Saudi Arabia, Use of the Red Cross Emblem by US Forces

THE CASE

[**Source:** Tisdall, S. with the 44th US Medical Brigade, Saudi Arabia, *The Guardian,* September 8, 1990.]

Hospitals Appear on Desert Sands

US FORCES in eastern Saudi Arabia are rapidly establishing an elaborate network of field hospitals, forward clearing stations and mobile medical evacuation units capable of dealing with thousands of American casualties in the event of war with Iraq. [...]

The Saudi government is providing separate medical facilities for its troops. The US hospitals are not allowed to display the Red Cross to signify their presence to an enemy. In a country where Christian emblems are banned, they have been asked to use the Red Crescent.

DISCUSSION

1. Who may use the emblem? In which circumstances and under what conditions? What is the purpose of the emblem? May military forces use it? (*Cf.* Arts. 42 and 44 of Convention I, Art. 44 of Convention II and Art. 18 of Protocol I.)

2. a. Are emblems, other than the red cross, protected by the Geneva Conventions and the Additional Protocols? Which ones? Who may use these other emblems? (*Cf.* Art. 38 of Convention I, Art. 41 of Convention II, Art. 8 (l) of Protocol I, Arts. 4-5 of Annex I of Protocol I and Art. 12 of Protocol II.)

   b. May US military medical facilities lawfully use the red crescent emblem? May they use the red cross even in a country using the red crescent? Only with the permission of that country? May US medical facilities, if in service of Saudi Arabia, then use the red crescent emblem? (*Cf., e.g.,* Arts. 27, 38, 42 (4) and 43 of Convention I and Art. 12 of Protocol II.)

   c. If the US military medical facilities here are prohibited from displaying either emblem, how are they to designate their presence to an enemy? If they do not display the emblem, do the medical facilities still retain their protected status under IHL?

3. a. Why has the International Red Cross and Red Crescent Movement encountered problems arising from a plurality of protective emblems? Is it related to an interpretation of the red cross emblem as a Christian symbol? Is the non-religious connotation of the red cross emblem harder to claim since acceptance of the second emblem, the red crescent? How does this impact the principle of universality? (*See* **Case No. 31**, ICRC, The Question of the Emblem. p. 761.)

   b. What dangers to the emblem's authority arise with use of a plurality of emblems? Could a plurality of emblems not undermine the protection that it provides? Particularly, its essential neutrality?

Case No. 149, UN, Security Council Resolution 688 on Northern Iraq

THE CASE

[**Source:** UN Doc. S/RES/688 (April 5, 1991). Available on http://www.un.org/documents/scres.htm]

The Security Council,

Mindful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

Recalling of Article 2, paragraph 7, of the Charter of the United Nations,

Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a

massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region,

Deeply disturbed by the magnitude of the human suffering involved, [...]

Reaffirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Iraq and of all States in the area,

Bearing in mind the Secretary-General's report of March 20, 1991 (S/22366),

1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;

2. *Demands* that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression and express the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;

3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations; [...]

6. *Appeals* to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;

7. *Demands* that Iraq cooperate with the Secretary-General to these ends; [...].

DISCUSSION

1. a. Was the situation referred to in the case an armed conflict? A non-international armed conflict? Is the repression of the Iraqi civilian population a violation of IHL?

   b. Is the Council of the opinion that the non-international armed conflict or violations of IHL threaten international peace and security?

2. Has Iraq under IHL an obligation to allow access by international humanitarian organizations to all those in need? Under which conditions? (*Cf.* Art. 23 of Convention IV, Art. 70 of Protocol I and Art. 18 of Protocol II.)

3. Is the resolution binding on Iraq? Is it based on Chapter VII of the UN Charter?

4. Was this resolution a sufficient legal basis for "Operation Provide Comfort" in which American, British, and French armed forces established "safe havens" in Northern Iraq over which military flights were forbidden and where Kurds could remain without fear of attack by Iraqi forces? Was this operation based on *ius ad bellum* or on IHL? Were those "safe havens" protected zones under IHL?

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War

THE CASE

A. Department of Defense Report to Congress on the Conduct of the Persian Gulf War

[**Source:** *ILM*, vol. 31 (3), 1992, pp. 612-644. Available on http://www.globalsecurity.org/military/library/report/1992]

[...]

TARGETING, COLLATERAL DAMAGE AND CIVILIAN CASUALTIES

The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects. Although this is a major part of the foundation on which the law of war is built, it is one of the least codified portions of that law.

As a general principle, the law of war prohibits the intentional destruction of civilian objects not imperatively required by military necessity and the direct, intentional attack of civilians not taking part in hostilities. The United States takes these proscriptions into account in developing and acquiring weapons systems, and in using them in combat. Central Command (CENTCOM) forces adhered to these fundamental law of war proscriptions in conducting military operations during Operation Desert Storm through discriminating target selection and careful matching of available forces and weapons systems to selected targets and Iraqi defenses, without regard to Iraqi violations of its law of war obligations toward the civilian population and civilian objects.

Several treaty provisions specifically address the responsibility to minimize collateral damage to civilian objects and injury to civilians. Article 23(g) of the Annex to Hague IV prohibits destruction not "imperatively demanded by the necessities of war," while Article 27 of that same annex offers protection from intentional attack to "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." Similar language is contained in Article 5 of Hague IX, while [...] in the 1954 Hague Cultural Property Convention [...] cultural and civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack.

While the prohibition contained in Article 23(g) generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below. As previously indicated, Hague IV was found to be part of customary international

law in the course of war crimes trials following World War II, and continues to be so regarded.

An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives. CENTCOM conducted its campaign with a focus on minimizing collateral civilian casualties and damage to civilian objects. Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.

Coalition forces took several steps to minimize the risk of injury to noncombatants. To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population. Where required, attacking aircraft were accompanied by support mission aircraft to minimize attacking aircraft aircrew distraction from their assigned mission. Aircrews attacking targets in populated areas were directed not to expend their munitions if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons.

One reason for the maneuver plan adopted for the ground campaign was that it avoided populated areas, where Coalition and Iraqi civilian casualties and damage to civilian objects necessarily would have been high. This was a factor in deciding against an amphibious assault into Kuwait City.

The principle of proportionality acknowledges the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects when noncombatants and civilian objects are mingled with combatants and targets, even with reasonable efforts by the parties to a conflict to minimize collateral injury and damage.

This proved to be the case in the air campaign. Despite conducting the most discriminate air campaign in history, including extraordinary measures by Coalition aircrews to minimize collateral civilian casualties, the Coalition could not avoid causing some collateral damage and injury.

There are several reasons for this. One is the fact that in any modern society, many objects intended for civilian use also may be used for military purposes. A bridge or highway vital to daily commuter and business traffic can be equally crucial to military traffic, or support for a nation's war effort. Railroads, airports, seaports, and the interstate highway system in the United States have been funded by the Congress in part because of US national security concerns, for example; each proved invaluable to the movement of US military units to various ports for deployment to Southwest Asia (SWA) for Operations Desert Shield and Desert Storm. Destruction of a bridge, airport, or port facility, or interdiction of a highway can be equally important in impeding an enemy's war effort.

The same is true with regard to major utilities; for example, microwave towers for everyday, peacetime civilian communications can constitute a vital part of a military command and control (C2) system, while electric power grids can be used simultaneously for military and civilian purposes. Some Iraqi military installations had separate electrical generators; others did not. Industries essential to the manufacturing of CW, BW and conventional weapons depended on the national electric power grid.

Experience in its 1980-1988 war with Iran caused the Government of Iraq to develop a substantial and comprehensive degree of redundancy in its normal, civilian utilities as back-up for its national defense. Much of this redundancy, by necessity, was in urban areas. Attack of these targets necessarily placed the civilian population at risk, unless civilians were evacuated from the surrounding area. Iraqi authorities elected not to move civilians away from objects they knew were legitimate military targets, thereby placing those civilians at risk of injury incidental to Coalition attacks against these targets, notwithstanding efforts by the Coalition to minimize risk to innocent civilians.

When objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack. ("Military advantage" is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait.)

Attack of all segments of the Iraqi communications system was essential to destruction of Iraqi military C2. C2 was crucial to Iraq's integrated air defense system; it was of equal importance for Iraqi ground forces. Iraqi C2 was highly centralized. With Saddam Hussein's fear of internal threats to his rule, he has discouraged individual initiative while emphasizing positive control. Iraqi military commanders were authorized to do only that which was directed by highest authority. Destruction of its C2 capabilities would make Iraqi combat forces unable to respond quickly to Coalition initiatives.

Baghdad bridges crossing the Euphrates River contained the multiple fiber-optic links that provided Saddam Hussein with secure communications to his southern group of forces. Attack of these bridges severed those secure communication links, while restricting movement of Iraqi military forces and deployment of CW and BW warfare capabilities. Civilians using those bridges or near other targets at the time of their attack were at risk of injury incidental to the legitimate attack of those targets.

Another reason for collateral damage to civilian objects and injury to civilians during Operation Desert Storm lay in the policy of the Government of Iraq, which purposely used both Iraqi and Kuwaiti civilian populations and civilian objects as shields for military objects. Contrary to the admonishment against such conduct contained in Article 19, GWS, Articles 18 and 28, GC, Article 4(1), 1954 Hague, and certain principles of customary law codified in Protocol I (discussed below), the Government of Iraq placed military assets (personnel, weapons, and equipment) in civilian populated areas and next to protected objects (mosques, medical facilities, and cultural sites) in an effort to protect them from attack. For this purpose, Iraqi military helicopters were dispersed into residential areas; and

military supplies were stored in mosques, schools, and hospitals in Iraq and Kuwait. Similarly, a cache of Iraqi Silkworm surface-to-surface missiles was found inside a school in a populated area in Kuwait City. UN inspectors uncovered chemical bomb production equipment while inspecting a sugar factory in Iraq. The equipment had been moved to the site to escape Coalition air strikes. This intentional mingling of military objects with civilian objects naturally placed the civilian population living nearby, working within, or using those civilian objects at risk from legitimate military attacks on those military objects.

The Coalition targeted specific military objects in populated areas, which the law of war permits; at no time were civilian areas as such attacked. Coalition forces also chose not to attack many military targets in populated areas or in or adjacent to cultural (archaeological) sites, even though attack of those military targets is authorized by the law of war. The attack of legitimate Iraqi military targets, notwithstanding the fact it resulted in collateral injury to civilians and damage to civilian objects, was consistent with the customary practice of nations and the law of war.

The Government of Iraq sought to convey a highly inaccurate image of indiscriminate bombing by the Coalition through a deliberate disinformation campaign. Iraq utilized any collateral damage that occurred including damage or injury caused by Iraqi surface-to-air missiles and antiaircraft munitions falling to earth in populated areas in its campaign to convey the misimpression that the Coalition was targeting populated areas and civilian objects. This disinformation campaign was factually incorrect, and did not accurately reflect the high degree of care exercised by the Coalition in attack of Iraqi targets.

For example, on February 11, a mosque at Al-Basrah was dismantled by Iraqi authorities to feign bomb damage; the dome was removed and the building dismantled. US authorities noted there was no damage to the minaret, courtyard building, or dome foundation which would have been present had the building been struck by Coalition munitions. The nearest bomb crater was outside the facility, the result of an air strike directed against a nearby military target on 30 January. Other examples include use of photographs of damage that occurred during Iraq's war with Iran, as well as of prewar earthquake damage, which were offered by Iraqi officials as proof of bomb damage caused by Coalition air raids.

Minimizing collateral damage and injury is a responsibility shared by attacker and defender. Article 48 of the 1977 Protocol I provides that:

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

Paragraph one of Article 49 of Protocol I states that "'Attacks' means acts of violence against the adversary, whether in offense or defense." Use of the word "attacks" in this manner is etymologically inconsistent with its customary use in any of the six official languages of Protocol I. Conversely, the word "attack" or "attacks" historically has referred to and today refers to offensive operations only.

Article 49 (1) otherwise reflects the applicability of the law of war to actions of both attacker and defender, including the obligation to take appropriate measures to minimize injury to civilians not participating in hostilities.

As previously indicated, the United States in 1987 declined to become a party to Protocol I; nor was Protocol I in effect during the Persian Gulf War, since Iraq is not a party to that treaty. However, the language of Articles 48 and 49 (1) (except for the erroneous use of the word "attacks") is generally regarded as a codification of the customary practice of nations, and therefore binding on all.

In the effort to minimize collateral civilian casualties, a substantial responsibility for protection of the civilian population rests with the party controlling the civilian population. Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and the responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population, evacuation of the civilian population from near immovable military objects, and development of air raid precautions. Throughout World War II, for example, both Axis and Allied nations took each of these steps to protect their respective civilian populations from the effects of military operations.

The Government of Iraq elected not to take routine air-raid precautions to protect its civilian population. Civilians were not evacuated in any significant numbers from Baghdad, nor were they removed from proximity to legitimate military targets. There were air raid shelters for less than 1 percent of the civilian population of Baghdad. The Government of Iraq chose instead to use its civilians to shield legitimate military targets from attack, exploiting collateral civilian casualties and damage to civilian objects in its disinformation campaign to erode international and US domestic support for the Coalition effort to liberate Kuwait.

The presence of civilians will not render a target immune from attack; legitimate targets may be attacked wherever located (outside neutral territory and waters). An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces. The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population. As previously indicated, a defender is expressly prohibited from using the civilian population or civilian objects (including cultural property) to shield legitimate targets from attack.

The Government of Iraq was aware of its law of war obligations. In the month preceding the Coalition air campaign, for example, a civil defense exercise was conducted, during which more than one million civilians were evacuated from Baghdad. No government evacuation program was undertaken during the Coalition air campaign. As previously indicated, the Government of Iraq elected instead to mix military objects with the civilian population. Pronouncements that Coalition air forces would not attack populated areas increased Iraqi movement of military objects into populated areas in Iraq and Kuwait to shield them from

attack, in callous disregard of its law of war obigations and the safety of its own civilians and Kuwaiti civilians.

Similar actions were taken by the Government of Iraq to use cultural property to protect legitimate targets from attack; a classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur as depicted in the photograph in Volume II, Chapter VI, "Off Limits Targets" section on the theory that Coalition respect for the protection of cultural property would preclude the attack of those aircraft. While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.

Undoubtedly, the most tragic result at this intentional commingling of military objects with the civilian population occurred in the February 13 attack on the Al-Firdus Bunker (also sometimes referred to as the Al-'Amariyah bunker) in Baghdad. Originally constructed during the Iran-Iraq War as an air raid shelter, it had been converted to a military C2 bunker in the middle of a populated area. While the entrance(s) to a bomb shelter permit easy and rapid entrance and exit, barbed wire had been placed around the Al-Firdus bunker, its entrances had been secured to prevent unauthorized access, and armed guards had been posted. It also had been camouflaged. Knowing Coalition air attacks on targets in Baghdad took advantage of the cover of darkness, Iraqi authorities permitted selected civilians apparently the families of officer personnel working in the bunker to enter the Al-'Amariyah Bunker at night to use the former air raid shelter part of the bunker, on a level above the C2 center. Coalition authorities were unaware of the presence of these civilians in the bunker complex. The February 13 attack of the Al-'Amariyah bunker a legitimate military target resulted in the unfortunate deaths of those Iraqi civilians who had taken refuge above the C2 center.

An attacker operating in the fog of war may make decisions that will lead to innocent civilians' deaths. The death of civilians always is regrettable, but inevitable when a defender fails to honor his own law of war obligations or callously disregards them, as was the case with Saddam Hussein. In reviewing an incident such as the attack of the Al-'Amariyah bunker, the law of war recognizes the difficulty of decision making amid the confusion of war. Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.

Protocol I establishes similar legal requirements. Articles 51(7) and 58 of the 1977 Protocol I expressly prohibit a defender from using the civilian population or individual civilians to render certain points or areas immune from military

operations, in particular in an attempt to shield military objectives from attack or to shield, favor or impede military operations; obligate a defender to remove the civilian population, individual civilians and civilian objects under the defender's control from near military objectives; avoid locating military objectives within or near densely populated areas; and to take other necessary precautions to protect the civilian population, individual civilians and civilian objects under its control against the dangers resulting from military operations.

It is in this area that deficiencies of the 1977 Protocol I become apparent. As correctly stated in Article 51(8) to Protocol I, a nation confronted with callous actions by its opponent (such as the use of "human shields") is not released from its obligation to exercise reasonable precaution to minimize collateral injury to the civilian population or damage to civilian objects. This obligation was recognized by Coalition forces in the conduct of their operations. In practice, this concept tends to facilitate the disinformation campaign of a callous opponent by focusing international public opinion upon the obligation of the attacking force to minimize collateral civilian casualties and damage to civilian objects a result fully consistent with Iraq's strategy in this regard. This inherent problem is worsened by the language of Article 52(3) of Protocol I, which states:

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

This language, which is not a codification of the customary practice of nations, causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e., from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.

In the case of the Al-Firdus bunker, for example repeatedly and incorrectly referred to by the Government of Iraq and some media representatives as a "civilian bomb shelter" the Coalition forces had evidence the bunker was being used as an Iraqi command and control center and had no knowledge it was concurrently being used as a bomb shelter for civilians. Under the rule of international law known as military necessity, which permits the attack of structures used to further an enemy's prosecution of a war, this was a legitimate military target. Coalition forces had no obligation to refrain from attacking it. If Coalition forces had known that Iraqi civilians were occupying it as a shelter, they may have withheld an attack until the civilians had removed themselves (although the law of war does not require such restraint). Iraq had an obligation under the law of war to refrain from commingling its civilian population with what was an obviously military target. Alternatively, Iraq could have designated the location as a hospital, safety zone, or a neutral zone, as provided for in Articles 14 and 15, GC. [...]

B. Minutes of evidence taken before the Defence Committee - House of Commons UK - on Wednesday, March 6, 1991

[**Source:** House of Commons Defence Committee Report on "Preliminary Lessons of Operation Granby", Minutes of evidence taken before the Defence Committee, March 6, 1991, p. 38.]

Mr Home Robertson (Former Secretary of State for Defence)

274. Can I come back to a question which I should have asked at the very beginning when we were talking about joint command structure? I apologize for coming back at the fag end on this important question of the allocation of missions and selection of targets. Was there always consensus between yourself and your counterparts on that subject or was there any occasion when you decided, for whatever reason, that it would not be appropriate for the Royal Air Force to attack a particular target?

Air Vice Marshal Wratten (Air Vice Marshal W. J. Wratten, CB, CBE)

Yes, there were such occasions. In particular, when we were experiencing collateral damage, such as it was, and some of the targets were in locations where with any weapon system malfunction severe collateral damage would have resulted inevitably, then there were one or two occasions but I chose not to go against those targets, but they were very few and far between and they were not - and this is the most important issue - in my judgment and in the judgment of the Americans of a critical nature, that is to say, they were not fundamental to the timely achievement of the victory. Had that been the case, then regrettably, irrespective of what collateral damage might have resulted, one would have been responsible and had a responsibility for accepting those targets and for going against them. But towards the end there were, I think, two occasions when I chose not to, when I chose to go against alternative targets. [...]

DISCUSSION

1. Do you accept the US definition regarding targeting?
2. Which measures allegedly taken by the US correspond to Protocol I? Which ones go beyond what is required by Protocol I? And which ones fall below the standards set by Protocol I?
3. Which reasons given by the Report in relation to collateral damage and injury are pertinent under IHL? And which one is unacceptable according to IHL? (*Cf.* Arts. 51, 52 and 57 of Protocol I.)
4. a. Neither the Conventions nor the Protocols mention the principle of proportionality as such: From which *source* is this principle derived? Are the consequences of the principle of proportionality codified in IHL? Does this concept allow some attacks which would be normally prohibited by IHL? Could the concept of military necessity be used by one party of the conflict to justify collateral damage? (*Cf.* Arts. 51 (5) b and 57 (2) (a) (iii) of Protocol I.)

b. Is the Report correct when it states that IHL "precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives"? (*Cf.* Arts. 51 (5) (b) and 57 (2) (a) (iiii) of Protocol I.)

c. Can a factor weighed in the proportionality test be, as it is stated in the Report, the overall campaign objective, such as the liberation of Kuwait? (*Cf.* Arts. 51 (5) (b) and 57 (2) (a) (iii) of Protocol I.)

5. Which precautionary measures must be taken in international armed conflict by the parties before launching an attack? (*Cf.* Arts. 48, 50, 51, 57 and 58 of Protocol I.)

6. In the event a military objective is situated among the civilian population, does the military objective become immune from attack? (*Cf.* Art. 57 Protocol I.) According to US officials, Iraq systematically used this tactic. What was the reaction of the Coalition towards this situation? Did the Coalition Forces target some military objectives although they expected disproportionate civilian losses? Did the Coalition Forces always reach a consensus regarding the targets chosen for attack in Iraq?

7. a. Can it be rightly argued that the Iraqi electric power grid was a legitimate military objective? (*Cf.* Preamble para. 5 and Art. 52 (2) of Protocol I.)

b. Does the concept of military advantage allow the Coalition Forces to determine if an object is a military objective for the sole purpose of the Coalition war plan, namely the liberation of Kuwait? Would the advantage be assessed differently if the aim of the Coalition Forces was not to liberate Kuwait, but to occupy a territory in violation of the UN Charter? (*Cf.* Art. 52 (2) of Protocol I.)

c. Would an attack on the two fighter aircraft located next to the Ur's temple have been licit even though the temple risked to be destroyed? (*Cf.* Arts. 52 (2) and 53 of Protocol I.)

d. Was the Al-'Amariyah bunker a legitimate military objective if its description in the Report is accurate? What should the US Forces have done if they had known that civilians were present in the bunker? (*Cf.* Arts. 52 (2) and 57 of Protocol I.)

8. a. Is the alleged commingling of military objectives and civilian objects by Iraq a violation of Protocol I? Which examples of commingling of military objectives and civilian objects violate IHL and which ones do not? Does the reference to Art. 28 of Convention IV in the Report concern attacks on Iraq, Kuwait, or both? Are Kuwaiti civilians or also Iraqi civilians protected persons under Arts. 4 and 28 of Convention IV? What are the legal responsibilities for the attacker if the defender uses civilians or civilian objects to shield military objectives? When is the attack prohibited? Which additional precautionary measures have to be taken? (*Cf.* Arts. 18 (6) and 28 of Convention IV and Art. 51 (7) and (8) of Protocol I.)

b. Is "minimizing collateral damage and injury" a responsibility shared by the attacker and the defender? Do the defender and the attacker have a

responsibility not to place military objectives among the civilian population? In the event that military objectives are among the civilian population do they have to build air shelters for the civilian population? Should the Iraqi government have evacuated the inhabitants of Baghdad to protect the civilian population? (*Cf.* Arts. 48, 51, 57 and 58 of Protocol I.)

c. Are Arts. 51 (7) and 58 of Protocol I customary international law? Do these two provisions provide the same level of obligations?

d. Does Art. 58 of Protocol I compel the defender to remove the civilian population away from nearby military objectives?

9. If the presumption in Art. 52 (3) of Protocol I did not exist, what would an attacker do in case of doubt regarding a military objective? In such a situation, may he attack this objective? Does the defender have "the burden for determining the precise use of the objective"? If one disguises military objectives as civilian objects, would it be a violation of IHL? Which forms of camouflage are unlawful? (*Cf.* Arts. 52 (1) and (2) and 57 of Protocol I.)

10. If the targets discarded by Air Vice Marshall Wratten had been "fundamental to the timely achievement of victory" could he really have accepted them, as he stated, "irrespective of what collateral damage might have resulted"? (*Cf.* Arts. 51 (4) and (5), 52 (2) and 57 of Protocol I.)

11. Having in mind that neither the US nor Iraq have ratified Additional Protocol I, does it imply that its provisions referred to above were irrelevant? Did the US and UK simply apply pre-existing customary law? Or was their assessment of customary law influenced by Protocol I?

Case No. 151, US, Surrendering in the Persian Gulf War

THE CASE

[**Source:** "United States: Defense Department Report to Congress on the Conduct of the Persian Gulf War-Appendix O on the Role of the Law of War" (April 10, 1992) in *ILM*, vol. 31, 1992, p. 612, pp. 641-44. Available on http://www.ndu.edu/library/epubs/cpgw.pdf]

THE CONCEPT OF "SURRENDER" IN THE CONDUCT OF COMBAT OPERATIONS

The law of war obligates a party to a conflict to accept the surrender of enemy personnel and thereafter treat them in accordance with the provisions of the 1949 Geneva Conventions for the Protection of War Victims. Article 23 (d) of Hague IV prohibits the denial of quarter, that is the refusal to accept an enemy's surrender, while other provisions in that treaty address the use of flags of truce and capitulation.

However, there is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to

accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

A combatant force involved in an armed conflict is not obligated to offer its opponent an opportunity to surrender before carrying out an attack. To minimize Iraqi and Coalition casualties, however, the Coalition engaged in a major psychological operations campaign to encourage Iraqi soldiers to surrender before the Coalition ground offensive. Once that offensive began, the Coalition effort was to defeat Iraqi forces as quickly as possible to minimize the loss of Coalition lives. In the process, Coalition forces continued to accept legitimate Iraqi offers of surrender in a manner consistent with the law of war. The large number of Iraqi prisoners of war is evidence of Coalition compliance with its law of war obligations with regard to surrendering forces.

Situations arose in the course of Operation Desert Storm that have been questioned by some in the post-conflict environment. Two specific cases involve the Coalition's breach of the Iraqi defensive line and attack of Iraqi military forces leaving Kuwait City. Neither situation involved an offer of surrender by Iraqi forces, but it is necessary to discuss each in the context of the law of war concept of surrender.

[R]apid breach of the Iraqi defense in depth was crucial to the success of the Coalition ground campaign. When the ground campaign began, Iraq had not yet used its air force or extensive helicopter fleet in combat operations, the Iraqi Scud capability had not been eliminated, and most importantly, chemical warfare by Iraq remained a distinct possibility. It was uncertain whether the Coalition deception plan had worked or whether the Coalition effort had lost the element of surprise and there was also no definitive information about the strength and morale of the defending Iraqi soldiers. Because of these uncertainties, and the need to minimize loss of US and other Coalition lives, military necessity required that the assault through the forward Iraqi defensive line be conducted with maximum speed and violence.

The VII Corps main effort was the initial breaching operation through Iraqi defensive fortifications. This crucial mission was assigned to the 1st Infantry Division (Mecanized). The Division's mission was to conduct a deliberate breach of the Iraqi defensive positions as quickly as possible to expand and secure the breach site, and to pass the 1st UK Armored Division through the lines to continue the attack against the Iraqi forces.

To accomplish the deliberate breaching operation, the 1st Infantry Division (Mecanized) moved forward and plowed through the berms and mine fields erected by the Iraqis. Many Iraqis surrendered during this phase of the attack and were taken prisoner. The division then assaulted the trenches containing other Iraqi soldiers. Once astride the trench lines, the division turned the plow blades of its tanks and combat earthmovers along the Iraqi defense line and, covered by fire from its M-2/-3 armored infantry fighting vehicles, began to fill in the trench line and its heavily bunkered, mutually supporting fighting positions.

In the process, many more Iraqi soldiers surrendered to division personnel; others died in the course of the attack and destruction or bulldozing of their defensive positions.

By nightfall, the division had breached the Iraqi defenses, consolidated its position, and prepared to pass the 1st UK Armoured Division through the lines. Hundreds of Iraqi soldiers had been taken prisoner; US casualties were extremely light.

The tactic, used by the 1st Infantry Division (Mechanized) resulted in a number of Iraqi soldiers dying in their defensive positions as those positions were bulldozed. Marine Corps breaching operations along its axis of attack into Kuwait used different, but also legally acceptable, techniques of assault by fire, bayonet, and the blasting of enemy defensive positions. Both tactics were entirely consistent with the law of war.

Tactics involving the use of armored vehicles against dug-in infantry forces have been common since the first use of armored vehicles in combat. The tactic of using armored vehicles to crush or bury enemy soldiers was briefly discussed in the course of the UN Conference on Certain Conventional Weapons, conducted in Geneva from 1978 to 1980 and attended by the United States and more than 100 other nations. It was left unregulated, however, as it was recognized by the participants to be a common long-standing tactic entirely consistent with the law of war.

In the case in point, military necessity required violent, rapid attack. Had the breaching operation stalled, the VII Corps main effort would have been delayed or, at worst, blunted. This would have had an adverse effect on the entire ground campaign, lengthening the time required to liberate Kuwait, and increasing overall Coalition casualties.

As first stated in US Army General Orders No. 100 (1863), otherwise known as the Lieber Code, military necessity "consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war...[It] admits of all direct destruction of life or limb of armed enemies." As developed by the practice of nations since that time, the law of war has placed restrictions on the application of force against enemy combatants in very few circumstances (e.g., the first use of chemical or biological weapons). None of these restrictions were at issue during the breaching operations during Operation Desert Storm.

The law of war principle complementary to military necessity is that of unnecessary suffering (or superfluous injury). That principle does not preclude combat actions that otherwise are lawful, such as that used by the 1st Infantry Division (Mechanized).

In the course of the breaching operations, the Iraqi defenders were given the opportunity to surrender, as indicated by the large number of EPWs taken by the division. However, soldiers must make their intent to surrender clear and unequivocal, and do so rapidly. Fighting from fortified emplacements is not a manifestation of an intent to surrender, and a soldier who fights until the very last possible moment assumes certain risks. His opponent either may not see his surrender, may not recognize his actions as an attempt to surrender in the heat

and confusion of battle, or may find it difficult (if not impossible) to halt an onrushing assault to accept a soldier's last-minute effort at surrender.

It was in this context that the breach of the Iraqi defense line occurred. The scenario Coalition forces faced and described herein illustrates the difficulty of defining or effecting "surrender." Nonetheless, the breaching tactics used by US Army and Marine Corps forces assigned this assault mission were entirely consistent with US law of war obligations.

In the early hours of 27 February, CENTCOM received a report that a concentration of vehicles was forming in Kuwait City. It was surmised that Iraqi forces were preparing to depart under the cover of darkness. CINCCENT was concerned about the redeployment of Iraqi forces in Kuwait City, fearing they could join with and provide reinforcements for Republican Guard units west of Kuwait City in an effort to stop the Coalition advance or otherwise endanger Coalition forces.

The concentration of Iraqi military personnel and vehicles, including tanks, invited attack. CINCCENT decided against attack of the Iraqi forces in Kuwait City, since it could lead to substantial collateral damage to Kuwaiti civilian property and could cause surviving Iraqi units to decide to mount a defense from Kuwait City rather than depart. Iraqi units remaining in Kuwait City would cause the Coalition to engage in military operations in urban terrain, a form of fighting that is costly to attacker, defender, innocent civilians, and civilian objects.

The decision was made to permit Iraqi forces to leave Kuwait City and engage them in the unpopulated area to the north. Once departed, the Iraqi force was stopped by barricades of mines deployed across the highway in front of and behind the column. Air attacks on the trapped vehicles began about 0200. The following morning, CENTCOM leadership viewed the resulting damage. More than two hundred Iraqi tanks had been trapped and destroyed in the ambush, along with hundreds of other military vehicles and various forms of civilian transportation confiscated or seized by Iraqi forces for the redeployment. The vehicles in turn were full of property pillaged from Kuwaiti civilians: appliances, clothing, jewelry, compact disc players, tape recorders, and money, the last step in the Iraqi looting of Kuwait.

Throughout the ground campaign Coalition leaflets had warned Iraqi soldiers that their tanks and other vehicles were subject to attack, but that Iraqi soldiers would not be attacked if they abandoned their vehicles yet another way in which the Coalition endeavored to minimize Iraqi casualties while encouraging their defection and/or surrender. When the convoy was stopped by the mining operations that blocked the Iraqi axis of advance, most Iraqi soldiers in the vehicles immediately abandoned their vehicles and fled into the desert to avoid attack.

In the aftermath of Operation Desert Storm, some questions were raised regarding this attack, apparently on the supposition that the Iraqi force was retreating. The attack was entirely consistent with military doctrine and the law of war. The law of war permits the attack of enemy combatants and enemy equipment at any time, wherever located, whether advancing, retreating, or standing still. Retreat does not prevent further attack. At the small-unit level, for

example, once an objective has been seized and the position consolidated, an attacking force is trained to fire upon the retreating enemy to discourage or prevent a counterattack.

Attacks on retreating enemy forces have been common throughout history. Napoleon suffered some of his worst losses in his retreat from Russia, as did the German Wermacht more than a century later. It is recognized by military professionals that a retreating force remains dangerous. The 1st Marine Division and its 4,000 attached US Army forces and British Royal Marines, in the famous 1950 march out of the Chosin Reservoir in North Korea, fighting outnumbered by a 4:1 margin, turned its "retreat" into a battle in which it defeated the 20th and 26th Chinese Armies trying to annihilate it, much as Xenophon and his "immortal 10,000" did as they fought their way through hostile Persian forces to the Black Sea in 401 BC.

In the case at hand, neither the composition, degree of unit cohesiveness, nor intent of the Iraqi military forces engaged was known at the time of the attack. At no time did any element within the formation offer to surrender. CENTCOM was under no law of war obligation to offer the Iraqi forces an opportunity to surrender before the attack.

DISCUSSION

1. Which provisions of IHL concern the surrender of enemy personnel? Who is considered *hors de combat*? Under which circumstances? (*Cf.* Art. 23 (c) and (d) of Hague Regulations, Arts. 4 and 13 of Convention III and Art. 41 (2) of Protocol I.)

2. a. Why does the US Defense Department Report mention the Conventions and Hague Regulations, but not Protocol I?

   b. Even without application of Protocol I are not the same rules applicable to the US actions in these two cases? (*Cf.* Arts. 4 and 13 of Convention III and Arts. 41 (2), 43 and 44 of Protocol I.) Is Art. 41 (2) of Protocol I even necessary?

3. a. Do you agree with the two-part definition given by the US Department of Defense that "[s]urrender involves an offer by the surrendering party [...] and an ability to accept on the part of his opponent"? What kind of offer must be made? What kind of communication? Who decides when there exists the ability to accept? Which factors are used in reaching such a decision? Are there clear, objective criteria for such a determination?

   b. Is the issue of surrender really a matter of reasonableness? How is reasonableness to be defined? From whose perspective? And under which circumstances? Does it require the balancing of unnecessary suffering - and superfluous injury - and military necessity? Are the criteria used to assess these factors clear? Could military necessity ever outweigh an unconditional surrender? (*Cf.* Art. 41 (2) (b) of Protocol I.)

4. Is the tactic of crushing and burying enemy combatants considered unnecessary suffering? (*See* **Case No. 64**, US, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons. p. 978.) In comparison to the suffering provoked by a lawful artillery fire on the same position? In relation to which factors can the necessity and the extent of the suffering be evaluated? (*Cf.* Art. 35 (2) of Protocol I.)

5. a. If a military method logistically makes it almost impossible to surrender is that in effect not equivalent to denying quarter in violation of IHL? Could that describe the situation in the first case discussed in the above Report?

   b. Must an attacker constantly give enemy soldiers an opportunity to surrender?

   c. Must any surrender actually expressed and of which the enemy has become aware of be accepted?

   d. Must an attack on a military objective, *e.g.*, military barracks, made with collective weapons, *e.g.*, by aerial or artillery bombardment, stop as soon as some enemy soldiers surrender? (*See* **Case No. 75**, British Military Court at Hamburg, The Peleus Trial. [*Cf.* section 6] p. 1022.) As soon as some enemy soldiers are wounded? As soon as all concerned enemy soldiers surrender? Is there a difference relevant for IHL between artillery fire and bulldozing enemy positions?

   e. If some wounded and sick Iraqi soldiers were in the trench bulldozed, was the bulldozing not an unlawful attack on wounded and sick? (*Cf.* Arts. 12 and 50 of Convention I.)

   f. Should US forces have searched in the bulldozed Iraqi positions for casualties as soon as fighting ended at the site of the position? (*Cf.* Art. 15 of Convention I.)

6. Must combatants make a formal gesture to indicate surrender, *e.g.*, raising their hands or dropping their weapons, before being considered *hors de combat*? Must combatants always do so? Even the sick and wounded and shipwrecked? What if they are already defenceless? Is a formal surrender always realistically possible? (*Cf.* Art. 41 (2) of Protocol I.)

7. a. Do you agree with the US assessment of the historical facts regarding attacking retreating enemy forces? Does it establish that it continues to be permissible to do so today? If so, does that make it permissible to attack the Iraqi forces departing Kuwait?

   b. In the second incident discussed in the Report, did the situation change once the soldiers concerned became trapped? Were the Iraqis then *hors de combat*? If so, did the air attacks constitute a grave breach of IHL? A war crime? (*Cf.* Art. 130 of Convention III and Art. 85 of Protocol I.)

8. Does the large number of POWs taken demonstrate that the US complied with IHL provisions concerning *hors de combat*? Yet, could there not still perhaps have been more?

Case No. 152, UN Compensation Commission, Recommendations

THE CASE

[**Source:** UN Doc. S/AC.26/1994/1 (May 26, 1994); footnotes omitted. Available on http://www.unog.ch/uncc]

RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING INDIVIDUAL CLAIMS FOR SERIOUS PERSONAL INJURY OR DEATH (CATEGORY "B" CLAIMS)

[...]

II. LEGAL ISSUES

[...]

A. Jurisdiction

The claims before this Panel are claims for fixed amounts by individuals who have suffered serious personal injury or whose spouse, child or parent died, as a direct result of Iraq's unlawful invasion and occupation of Kuwait.

[...]

2. *Ratione personae* (eligible claimants)

[...]

b) Claims submitted by/for members of the Kuwaiti Armed Forces or the Allied Coalition Armed Forces

Decision 11 of the Governing Council states that

> " ...members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Collation military operations against Iraq, except if the following three conditions are met:
>
> (a) the compensation is awarded in accordance with the general criteria already adopted; and
>
> (b) they were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and
>
> (c) the loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949)".

The organization of the Allied Coalition Armed Forces began a few days after the occupation of Kuwait by Iraq, and continued with the placement of armed forces and air and naval military units from 28 countries, including Kuwait, in the Persian Gulf region.

Among the claims submitted for serious personal injury or death suffered by members of the Kuwaiti Armed Forces, several were put forward for events that occurred during the day of the invasion (August 2, 1990) or during the days

immediately following. The Panel concludes that the exclusion from compensation stated in Decision 11 is not applicable to these claimants because the Allied Coalition Armed Forces did not exist at that time. In the Panel's view, these claims are compensable since the serious personal injury or death was the direct consequence of Iraq's invasion and occupation of Kuwait.

Claims were also submitted with respect to serious personal injury or death suffered by Kuwait military personnel, including members of the Kuwaiti resistance, at the end of the relevant time period. The Panel considers that the exclusion from compensation stated in Decision 11 of the Governing Council is applicable only to members of the Kuwaiti Armed Forces that were integrated as units under the command of the Allied Coalition Armed Forces. For this reason, Decision 11 is not applicable to Kuwaiti members of the resistance or other military personnel who remained within Kuwaiti territory and suffered personal injury or death due to the Iraqi invasion and occupation of Kuwait. Therefore, the Panel recommends the payment of compensation also in these cases. [...]

d) Missing persons

Some death claims were submitted by families for relatives who seemingly disappeared during the invasion and occupation of Kuwait by Iraq. These families made inquiries or tracing requests to the International Committee of the Red Cross, but were unable to locate their relatives. The Panel recommends that compensation be awarded where from the documentation submitted it could be presumed that the "missing" person is deceased.

In instances where it could not conclude that the "missing" person is deceased, the Panel holds that compensation cannot be recommended at this stage and that a new claim can be submitted if the family ever receives confirmation of the death. [...]

5. Injury or death related to authorities other than Iraqi

The Panel had before it a number of claims submitted by persons who were allegedly arrested in Kuwait by Kuwaitis during the days immediately preceding March 2, 1991 and were then interned in Saudi Arabia in camps for Iraqi prisoners of war. Some of these claimants were allegedly tortured by those who were in control of the camps. All such claimants had Jordanian passports.

A number of other claims were from Jordanian nationals who had been living in Kuwait before Iraq's invasion and whose personal statements indicated that the injuries or death suffered were the result of actions by Kuwaiti nationals or authorities, in particular mistreatment during detention. The issue was raised in article 16 reports in the following terms:

> "A substantial number of claimants in category 'B' have put forward claims in which they assert that they were kept in detention or mistreated in Kuwait after March 2, 1991".

The Panel considered comments made on this issue by several Governments, including the Government of Iraq.

All these claims raise the issue as to whether the losses and damages can be considered as a "direct" result of Iraq's invasion and occupation of Kuwait, or in other words, are attributable to Iraq.

The Panel determines that in such cases there is no "direct" link to the invasion and occupation of Kuwait because these acts were accomplished by authorities or persons and in places out of the control of the Iraqi authorities.

Moreover, in the view of the Panel, these acts are not covered by para. 18 of Decision 1 which states that claimants may be compensated for serious personal injuries suffered as a result "of military operations or threat of military action by either side during the period August 2, 1990 to March 2, 1991," since the acts that caused the injuries cannot be considered "military operations."

Therefore, while the Panel recognizes that the claimants in this group presented well-substantiated claims, and that under general principles of law these claimants would be entitled to claim for compensation for the injuries or death suffered, the Panel cannot recommend the payment of compensation from the Compensation Fund for them.

DISCUSSION

1. According to IHL who must provide compensation and when? Who is entitled to receive compensation? (*Cf.* Art. 3 of Hague Convention IV, Arts. 51/52/131/148 respectively of the four Geneva Conventions and Art. 91 of Protocol I.)

2. a. According to the UN Compensation Commission, who must provide compensation and when? Who is entitled to receive compensation? Is Decision 11 consistent with IHL?

   b. Should compensation be paid to families for the death of a relative but not for a missing relative? Have not families in both situations suffered a loss? What if no proof of death ever surfaces concerning a missing relative? Should a family in such a situation, thus, never receive compensation? (*Cf.* Arts. 32 and 33 of Protocol I.)

3. a. According to IHL is compensation due only for those IHL violations committed by the aggressor State? Are not all States party to the conflict (and to the Conventions) bound to respect IHL and liable to pay compensation for violations of it?

   b. Do you agree with the Commission that no "direct" link exists between the injuries of Jordanians and the invasion and occupation of Kuwait? Would, *e.g.,* the camps for Iraqi prisoners, where the Jordanians were interned and suffered injuries, have existed if Iraq had not invaded Kuwait?

   c. Is para. 18 of Decision 1, cited by the Commission, consistent with IHL? What constitutes a "military operation"? Do IHL provisions only cover "military operations"?

   d. The Commission recognized the Jordanians claims as well-substantiated, thus, does IHL not entitle them to compensation? If so, from whom?

4. Does compensation appropriately redress the wrongful taking of life? How does one assess an appropriate and just amount?

XXIV. THE THIRD GULF WAR

Case No. 153, US/UK, Conduct of the 2003 War in Iraq

THE CASE

[**Source:** Human Rights Watch, "Off Target: The Conduct of the War and Civilian Casualties in Iraq", (2003) (footnotes omitted) online http://www.hrw.org]

II. CONDUCT OF THE AIR WAR

Many of the civilian casualties from the air war occurred during U.S. attacks targeting senior Iraqi leaders. [...]

Coalition forces took significant steps to protect civilians during the air war, including increased use of precision-guided munitions when attacking targets situated in populated areas and generally careful target selection. The United States and United Kingdom recognized that employment of precision-guided munitions alone was not enough to provide civilians with adequate protection. They employed other methods to help minimize civilian casualties, such as bombing at night when civilians were less likely to be on the streets, using penetrator munitions and delayed fuzes to ensure that most blast and fragmentation damage was kept within the impact area, and using attack angles that took into account the locations of civilian facilities such as schools and hospitals.

Synopsis of the Air War

The war in Iraq started at 3:15 a.m. on March 20, 2003, with an attempt to "decapitate" the Iraqi leadership by killing Saddam Hussein. This unsuccessful air strike was not part of long-term planning but was instead a "target of opportunity" based on late-breaking intelligence, which ultimately proved incorrect.

The major air war effort began at approximately 6:00 p.m. on the same day with an aerial bombardment of Baghdad and the Iraqi integrated air defense system. During the early morning hours of March 21, Coalition air forces attacked targets in Basra, Mosul, al-Hilla, and elsewhere in Iraq. On the night of March 21, precision-guided munitions began destroying government facilities in the Iraqi capital. The air war shifted to attacks on Republican Guard divisions south of Baghdad after the sandstorms of March 25 stalled the ground offensive, but the bombardment of Baghdad continued. U.S. forces hit telecommunications facilities on the night of March 27.

Daylight bombing in Baghdad began on March 31, and elements of the Republican Guard around the city bore the brunt of the aerial assault aimed at paving the way for U.S. ground forces. The bombing of government facilities largely ceased by the morning of April 3 when the airport was taken, but attacks

on Republican Guard units continued. On April 5, close air support missions flew over Baghdad to support ground combat. The same day, the United States bombed the reported safe house of Ali Hassan al-Majid (known as "Chemical Ali") in Basra. On April 7, air attacks targeted Saddam Hussein and other Iraqi leaders in Baghdad. On April 9, Baghdad fell.

Collateral Damage Estimates

The U.S. military uses the term "collateral damage" when referring to harm to civilians and civilian structures from an attack on a military target. Collateral damage estimates [CDE] are part of the U.S. military's official targeting process and are usually prepared for targets well in advance. Since the CDE influences target selection, weapon selection, and even time and angle of attack, it is the military's best means of minimizing civilian casualties and other losses in air strikes.

U.S. air forces carry out a collateral damage estimate using a computer model designed to determine the weapon, fuze, attack angle, and time of day that will ensure maximum effect on a target with minimum civilian casualties. Defense Secretary Donald Rumsfeld reportedly had to authorize personally all targets that had a collateral damage estimate of more than thirty civilian casualties.

Asked how carefully the U.S. Air Force reviewed strikes in Iraq for collateral damage, a senior U.S. Central Command official responded, "with excruciating pain." He told Human Rights Watch,

> [T]he primary concern for the conduct of the war was to do it with absolutely minimum civilian casualties. . . . The first concern is having the desired effect on a target. . . . Next is to use the minimum weapon to achieve that effect. In the process, collateral damage may become one of the considerations that would affect what weapon we had to choose. . . . All of the preplanned targets had a CDE done very early in the process, many months before the war was actually fought. . . . For emerging target strikes, we still do a CDE, but do it very quickly. The computer software was able to rapidly model collateral effects.

Strikes with high collateral damage estimates received extra review. According to another senior CENTCOM official,

> CENTCOM came up with a list of twenty-four to twenty-eight high CDE targets that we were concerned about. . . . They had a direct relationship to command and control of Iraqi military forces. These [high CDE targets] were briefed all the way to Bush. He understood the targets, what their use was, and that even under optimum circumstances, there would still be as many as X number of civilian casualties. This was the high CD target list. There were originally over 11,000 aim points when we started the high collateral targeting. Many were thrown out, many were mitigated. We hit twenty of these high collateral damage targets.

Strikes against emerging targets also received review although the process was done much more quickly. U.S. Army Major General Stanley McChrystal, vice director for operations on the Joint Chiefs of Staff, explained the situation in this way:

> There tends to be a careful process where there is plenty of time to review that [the targets]. . . . [T]hen we put together certain processes like time-sensitive targeting. And those are when you talk about the crush of an emerging target that might come up, that doesn't have time to go through a complicated vetting process. . . . [T]here still is a legal review, but it is all at a much accelerated process because there are some fleeting targets that require a very time-sensitive engagement, but they all fit into pre-thought out criteria.

Emerging Targets

[...] Emerging targets develop as a war progresses instead of being planned prior to the initiation of hostilities. They include time-sensitive targets (TSTs) that are fleeting in nature (such as leadership), enemy forces in the field, mobile targets, and other targets of opportunity. [...]

Flawed Targeting Methodology

[...] The United States identified and targeted some Iraqi leaders based on GPS coordinates derived from intercepts of Thuraya satellite phones. Thuraya satellite phones are used throughout Iraq and the Middle East. They have an internal GPS chip that enabled American intelligence to track the phones. The phone coordinates were used as the locations for attacks on Iraqi leadership.

Targeting based on satellite phone-derived geo-coordinates turned a precision weapon into a potentially indiscriminate weapon. According to the manufacturer, Thuraya's GPS system is accurate only within a one-hundred-meter (328-foot) radius. Thus the United States could not determine from where a call was originating to a degree of accuracy greater than one-hundred meters radius; a caller could have been anywhere within a 31,400-square-meter area. This begs the question, how did CENTCOM know where to direct the strike if the target area was so large? In essence, imprecise target coordinates were used to program precision-guided munitions.

Furthermore, it is not clear how CENTCOM connected a specific phone to a specific user; phones were being tracked, not individuals. It is plausible that CENTCOM developed a database of voices that could be computer matched to a phone user.

The Iraqis may have employed deception techniques to thwart the Americans. It was well known that the United States used intercepted Thuraya satellite phone calls in their search for members of al-Qaeda. CENTCOM was so concerned about the possibility of the Iraqis turning the Thuraya intercept capability against U.S. forces that it ordered its troops to discontinue using Thuraya phones in early April 2003. It announced, "Recent intelligence reporting indicates Thuraya satellite phone services may have been compromised. For this reason, Thuraya phone use has been discontinued on the battlefields of Iraq. The phones now represent a security risk to units and personnel on the battlefield." It is highly likely the Iraqi leaders assumed that the United States was attempting to track them through the Thuraya phones and therefore possible that they were spoofing American intelligence.

The United States undoubtedly attempted to use corroborating sources for satellite phone coordinates. Based on the results, however, accurate corroborating information must have been difficult if not impossible to come by and additional methods of tracking the Iraqi leadership just as unreliable as satellite phones.

Satellite imagery and signals intelligence (communications intercepts) apparently yielded little to no useful information in terms of targeting leadership. Detection of common indicators such as increased vehicular activity at particular locations seems not to have been meaningful. Human sources of information were likely the main means of corroborating the satellite phone information in tracking the Iraqi leadership. A human intelligence source was reportedly used to verify the Thuraya data acquired in the attack on Saddam Hussein in al-Mansur, described below. But the source was proven wrong. Human sources were also reportedly used to verify the attack on Ali Hassan al-Majid in Basra, as well as the strike on al-Dura that opened the war. Given the lack of success, it seems human intelligence was completely unreliable.

The U.S. military's targeting methodology includes assessing the effectiveness of an attack after it is completed. Battle damage assessment (BDA) is considered necessary to evaluate the success or failure of an attack so that lessons learned can be applied and improvements made to future missions. BDA is carried out during a conflict as well as at the cessation of hostilities. Effective BDA can reduce the danger to civilians in war by allowing corrective actions to be taken.

Although air strikes on Iraqi leadership repeatedly failed to hit their target and caused many civilian casualties, no decision was made during major combat operations to stop this practice.

Al-Tuwaisi, Basra

U.S. aircraft bombed a building in al-Tuwaisi, a residential area in downtown Basra at approximately 5:20 a.m. on April 5, 2003, in an attempt to kill Lieutenant General 'Ali Hassan al-Majid. Al-Majid, known as "Chemical Ali" because of his role in gassing the Kurds in the 1988 Anfal Campaign, was in charge of southern Iraq during the recent war. Initial British reports indicated that al-Majid was killed in the attack. CENTCOM later reversed this claim and changed al-Majid's status back to "at large." Coalition forces ultimately captured al-Majid on August 21, 2003.

U.S. weapons hit the targeted building in the densely populated section of Basra, but the buildings surrounding the bomb strike - filled with civilian families - were also destroyed. Human Rights Watch investigators found that seventeen civilians were killed in this attack.

The homes of the Hamudi and al-Tayyar families sat on either side of the building bombed by American forces. The homeowners gave Human Rights Watch conflicting reports of possible Iraqi government activity in the targeted building. 'Abd al-Hussain Yunis al-Tayyar said there were members of the Iraqi Intelligence Service, or *Mukhabarat,* staying there, while 'Abid Hassan Hamudi said it was vacant. Both denied any Iraqi leadership presence, as did all others interviewed. Al-Tayyar, Hamudi, and their families never saw al-Majid in the area.

In the early morning hours of Saturday, April 5, al-Tayyar, a 50-year-old laborer, went to his garden to get water. Moments later an American bomb slammed into the targeted house next door, destroying his house as well. He picked himself up and immediately began to search the debris. He spent the rest of the day working to pull the dead bodies of his family from the rubble of his home, finally reaching his dead son at 4:00 p.m.

'Abid Hamudi told Human Rights Watch that there were two bombs in the attack. The first bomb missed its target and slammed into the road a few hundred meters away, while the second hit the targeted home, also reducing his home to rubble. Hamudi was able to save three people, his daughter and her two sons, a five-year-old and six-year-old, all of whom were injured in the blast. The other ten people in his house perished. [...]

The size of the crater suggests that the weapon used in the April 5 attack was a 500-pound laser-guided bomb, the smallest PGM available. A second crater in the street a few hundred meters away, which is consistent with the crater found in the home, supports the assertion that the first bomb missed and was soon followed by another.

The collateral damage estimate done on the target appears to have allowed for a high level of civilian damage. This attack may have been approved due to the perceived military value of al-Majid. Had smaller weapons been used, however, many civilian lives may have been spared. A senior CENTCOM official told Human Rights Watch that the U.S. military needs smaller munitions with lower yields that will reduce collateral damage.

Al-Karrada, Baghdad

On April 8, Sa'dun Hassan Salih lifted his nephew's two-month-old daughter, Dina, from the grass in front of the smoking hole that had been her home. She was alive, both arms and legs broken, but she was orphaned. Her family had been staying in Salih's home in the affluent al-Karrada neighborhood of Baghdad, secure in the belief that such a densely populated area of the city would not be targeted. But they would often return to their home, one mile (1.6 kilometers) away, to get some clothes or other things they needed. "That night they went home to get some belongings," said Salih. "We all felt safer together as a family. If we were going to die, we would die together. But no one would bomb a home. My nephew was the last to leave the house, around 9:00 p.m., in his car. That is the last time I ever saw him."

Minutes later, two bombs, seconds apart, destroyed Zaid Ratha Jabir's home and those inside. Incredibly, Dina survived. She was blown out of the home by the blast and now lives with Salih and his wife, 'Imad Hassun Salih. At first they were filled with grief, but now they are angry. "The Americans said no civilians were targeted," said 'Imad. "I don't understand how this could happen."

According to Salih, there were no obvious military targets in the area. He speculated that a bitter family rival lied to the Americans. He said, "Perhaps someone wanted to kill them because of jealousy and told them [the Americans] Saddam or one of his men were there. But my family had no dealings with the regime. We hate Saddam." A Department of Defense official told Human Rights

Watch that Saddam Hussein's half-brother Watban was the intended target of this air strike, and that he was identified through poor communications security. This was likely a Thuraya intercept. Watban was eventually captured near the Syrian-Iraqi border near the end of the war almost a week later.

[...]

Al-Mansur, Baghdad

[...] On April 7, a U.S. Air Force B-1B Lancer aircraft dropped four 2,000-pound satellite-guided Joint Direct Attack Munitions (JDAMs) on a house in al-Mansur district of Baghdad. The attack killed an estimated eighteen civilians.

U.S. intelligence indicated that Saddam Hussein and perhaps one or both of his sons were meeting in al-Mansur. The information was reportedly based on a communications intercept of a Thuraya satellite phone. Forty-five minutes later the area was rubble. [...]

Pentagon officials admitted that they did not know precisely who was at the targeted location. "What we have for battle damage assessment right now is essentially a hole in the ground, a site of destruction where we wanted it to be, where we believe high-value targets were. We do not have a hard and fast assessment of what individual or individuals were on site," said Major General McChrystal.

[...] This strike shows that targeting based on satellite phones is seriously flawed. Even if the targeted individual is actually determined to be on the phone, the person could be far from the impact point. The GBU-31s dropped on al-Mansur have a published accuracy of thirteen meters (forty-three feet) circular error probable (CEP), while the phone coordinates are accurate only to a one-hundred-meter (328-foot) radius. The weapon was inherently more accurate than the information used to determine its target, which led to substantial civilian casualties with no military advantages. U.S. military leaders defended these attacks even after revelations that the strikes resulted in civilian deaths instead of the deaths of the intended targets. One said that the strikes "demonstrated U.S. resolve and capabilities." [...]

Electrical Power Facilities

The United States targeted electrical power distribution facilities, but not generation facilities, throughout Iraq, according to a senior CENTCOM official. He told Human Rights Watch that instead of using explosive ordnance, the majority of the attacks were carried out with carbon fiber bombs designed to incapacitate temporarily rather than to destroy. Nevertheless, some of the attacks on electrical power distribution facilities in Iraq are likely to have a serious and long-term detrimental impact on the civilian population.

Electrical power was out for thirty days after U.S. strikes on two transformer facilities in al-Nasiriyya. Al-Nasiriyya 400 kV Electrical Power Transformer Station was attacked on March 22 at 6:00 a.m. using three U.S. Navy Tomahawk cruise missiles outfitted with variants of the BLU-114/B graphite bombs. These dispense submunitions with spools of carbon fiber filaments that short-circuit transformers and other high voltage equipment upon contact.

The transformer station is the critical link between al-Nasiriyya Electrical Power Production Plant and the city of al-Nasiriyya. When the transformer station went off-line it removed the southern link to all power in the city, which was then totally reliant on the North Electrical Station 132. Although the carbon fiber is supposed to incapacitate temporarily, three transformers were completely destroyed by a fire from a short circuit caused by the carbon fiber. The station's wires seemed to have been melted by the intense fire. Human Rights Watch was told that the transformers would have to be replaced and the entire facility rewired.

On March 23 at 10:00 a.m., the United States attacked North Electrical Station 132. Hassan Dawud, an engineer at the station when it was attacked, said a U.S. aircraft strafed the facility, destroying three transformers, gas pipes, and the air conditioning, which brought the entire facility down as components that were not damaged by the attack overheated. Damage to the transformers and air conditioning were clearly visible, including large holes in the walls consistent with aircraft cannon fire. Further north in Rafi on Highway 7, Human Rights Watch found a transformer station with significant damage from air strikes, including at least one destroyed transformer.

From its investigations, it is unclear to Human Rights Watch what effective contribution to Iraqi military action these facilities were making and why attacking them offered a definite military advantage to the United States, and in particular how they supported the ground operations in al-Nasiriyya. [...]

No one died as a direct result of the power loss, but the hospital's generators were taxed to their limit and it had to do away with some non-critical services to ensure the wounded were given basic treatment. [The director of al Nasiriyya hospital] also stated that the loss of power created a water crisis in the city.

[...] [T]he water was often contaminated because the power outage prevented water purification. This led to what Dr. 'Abd al-Sayyid termed "water-born diarrheal infections."

Cluster Bomb Strikes

[...] These munitions are area weapons that spread their contents over a large field, or footprint. Because of the dispersal of their submunitions, they can destroy broad, relatively soft targets, like airfields and surface-to-air missile sites. They are also effective against targets that move or do not have precise locations, such as enemy troops or vehicles. [...]

The majority of the Coalition's cluster bombs were CBU-103s, which had been deployed for the first time in Afghanistan. This bomb consists of a three-part green metal casing about five-and-a-half feet (1.7 meters) long with a set of four fins attached to the rear. The casing, which contains 202 bomblets packed in yellow foam, opens at a pre-set altitude or time and releases the bomblets over a large oval area. The CBU-103 adds a Wind Corrected Munitions Dispenser (WCMD) to the rear of the unguided CBU-87, which is designed to improve accuracy by compensating for wind encountered during its fall. It also narrows the footprint to a radius of 600 feet (183 meters).

The CBU-103's bomblets, known as BLU-97s, are soda can-sized yellow cylinders. Each one of these "combined effects munitions" represents a triple

threat. The steel fragmentation core targets enemy troops with 300 jagged pieces of metal. The shaped charge, a concave copper cone that turns into a penetrating molten slug, serves as an anti-armor weapon. A zirconium wafer spreads incendiary fragments that can burn nearby vehicles. This type of bomblet was the payload for 78 percent of the reported U.S. cluster bombs; CBU-87s and CBU-103s both contain 202 BLUs. When used as cluster munitions, the AGM-154 JSOW contains 145 BLUs and the TLAM carries 166 BLUs.

In Iraq, the Coalition used cluster bombs largely for their area effect and anti-armor capabilities. A CENTCOM official explained that common targets included armored vehicles or, when used with time-delay explosives, the path of thin-skinned vehicles. "I know that some were used in more built-up areas, but in most cases they were used against targets where there were those kinds of equipment- guns, tanks," he said.

[...] The U.S. Air Force reduced the danger to civilians from clusters by modifying its targeting and improving technology. Apparently learning a lesson from previous conflicts, the Air Force dropped fewer cluster bombs in or near populated areas. While Human Rights Watch found extensive use of ground-launched cluster munitions in Iraq's cities, it found only isolated cases of air-dropped cluster bombs. As a result, the civilian casualties from cluster bomb strikes were relatively limited. According to a senior CENTCOM official, air commanders received guidance that one of their objectives was to minimize civilian casualties. "In the case of preplanned cluster munition strikes, I am more confident that concern for collateral damage was very high," he said. Less care went into strikes on emerging targets in support of ground troops. The CENTCOM official explained that B-52 bombers would carry a variety of munitions and loiter over the battlefield. If a ground commander called for support and cluster bombs were the only option left, the commander might accept them for his target. "As the battlefield unfolds and the sense of urgency on the ground goes up, my personal opinion is the urgency of the ground commander may be more for protection of his forces. Therefore choosing the optimal weapon is less important than getting a weapon on target," the official said.

When the Air Force did not avoid populated areas, cluster bomb strikes caused civilian casualties. The Baghdad date grove was located immediately across the street, on at least two sides, from Hay Tunis, a densely populated, residential neighborhood. Nihad Salim Muhammad was washing his car when the bombs hit. During the strike, the bomblets injured several people on his street, including four children. Around midnight on April 24, the U.S. Air Force dropped at least one CBU-103 on al-Hadaf girls' primary school in al-Hilla. The strike killed school guard Hussam Hussain, 65, and neighbor Hamid Hamza, 45, and injured thirteen others, according to Hamid Mahdi, a 30-year-old butcher who lived across the street. The manager of the school said there were dozens of paramilitary troops in the neighborhood at the time of the strike. While the Air Force minimized civilian harm by dropping the bombs at night, the incident shows the dangers of dropping clusters in populated areas.

Despite some improvements in technology, one of the Coalition's major failings with cluster bombs was use of outdated cluster bombs. Both the United States and United Kingdom continued to drop older models that are highly inaccurate and unreliable. [...]

III. CONDUCT OF THE GROUND WAR

Ground-Launched Cluster Munitions

Coalition use of ground-launched cluster munitions far outstripped the use of air-dropped models. CENTCOM reported in October that it used a total of 10,782 cluster munitions, which could contain between 1.7 and 2 million submunitions. [...]

[...] Al-Hilla endured the most suffering from the use of ground-launched cluster munitions. Dr. Sa'ad al-Falluji, director and chief surgeon of al-Hilla General Teaching Hospital, said 90 percent of the injuries his hospital treated during the war were from submunitions. In the neighborhood of Nadir, a slum on the south side of the city, every household Human Rights Watch visited suffered personal injury or property damage during a March 31 cluster attack. On the day of the strike, the hospital treated 109 injured civilians from that neighborhood, including thirty children. According to local elders, the attack killed thirty-eight civilians and injured 156. During a visit on May 19, Human Rights Watch found dozens of mud brick homes with pockmarked walls and holes in the roof from shrapnel. Male residents pointed to wounds on their legs and pulled up their shirts to reveal chest and abdominal wounds. In the house of Falaya Fadl Nasir, for example, the strike injured three people, his two children, Mahdi, 18, and Marwa, 10, as well as Imam Hassan 'Abdullah. One grenade pierced the roof of his home, causing a fire inside. Hamid Turki Hamid, 36, a dresser in the hospital, said his son and a friend were in the street when the attack began. After bringing in his son, he returned to gather his neighbor's child. "That's when the bomb exploded, when I was injured," Hamid said.

[...] U.K. forces caused dozens of civilian casualties when they used ground-launched cluster munitions in and around Basra. A trio of neighborhoods in the southern part of the city was particularly hard hit. At noon on March 23, a cluster strike hit Hay al-Muhandissin al-Kubra (the engineers' district) while 'Abbas Kadhim, 13, was throwing out the garbage. He had acute injuries to his bowel and liver, and a fragment that could not be removed lodged near his heart. On May 4, he was still in Basra's al-Jumhuriyya Hospital. Three hours later, submunitions blanketed the neighborhood of al-Mishraq al-Jadid about two-and-a-half kilometers (one-and-a-half miles) northeast. Iyad Jassim Ibrahim, a 26-year-old carpenter, was sleeping in the front room of his home when shrapnel injuries caused him to lose consciousness. He later died in surgery. Ten relatives who were sleeping elsewhere in the house suffered shrapnel injuries. Across the street, the cluster strike injured three children. Ahmad 'Aidan Malih Hoshon, 12, and his sister Fatima, 4, both had serious abdominal injuries; their cousin Muhammad, 13, had injuries to his feet. Hay al-Zaitun, just east of al-Mishraq al-Jadid, suffered casualties from cluster munitions that landed there on the evening of March 25. Jamal Kamil Sabir, a 25-year-old laborer, lost his leg to a

submunition blast while crossing a bridge near his home with his family. He spent eleven days in the hospital. His nephew, Jabal Kamil, 22, took shrapnel in his knee. Jamal's pregnant wife, Zainab Nasir 'Abbas, still had shrapnel in her left leg in May because doctors were afraid to remove it during her pregnancy. A neighbor, Zaitun Zaki Abu Iyad, 40, was killed when cluster grenades landed on her home.

It appears that most if not all of the strikes described above were directed at legitimate military targets. Human Rights Watch saw tanks and artillery positions located in neighborhoods, and witnesses described the presence of Iraqi forces. Nevertheless, the United States and United Kingdom made poor weapons choices when they used cluster munitions in populated areas. Such strikes almost always caused civilian casualties, in the case of al-Hilla numbering more than one hundred, because the weapons blanketed areas occupied by soldier and civilian alike with deadly submunitions that could not distinguish between the two.

U.S. forces screened ground cluster strikes through a computer and human vetting system. The Third Infantry Division's artillery batteries were programmed with a no-strike list of 12,700 sites that could not be fired upon without manual override. The list included civilian buildings such as schools, mosques, hospitals, and historic sites.

Officers of the Second Brigade said they strove to keep strikes at least 500 meters (547 yards) away from such targets although sometimes they cut the buffer zone to 300 meters (328 yards). In general, they also required visual confirmation of a target before firing, but in the case of counter-battery fire, they considered radar acquisition sufficient. The latter detects incoming fire and determines its location, but it cannot determine if civilians occupy an area.

The Third Infantry Division established another layer of review by sending lawyers to the field to review proposed strikes, a relatively recent addition to the vetting process. "Ten years ago, JAGs [judge advocate general attorneys] weren't running around [the battlefield]," said Captain Chet Gregg, Second Brigade's legal advisor. The division assigned sixteen lawyers to divisional headquarters and each brigade. Lead lawyer Colonel Cayce, who served at the tactical headquarters, reviewed 512 missions, and brigade JAGs approved additional attacks, which were often counter-battery strikes. Although less controversial strikes, such as those on forces in the desert, were not reviewed, Cayce said, "I would feel pretty confident a lawyer was involved in strikes in populated areas." Commanders had the final say, but lawyers provided advice about whether a strike was legal under IHL. Cayce said his commander never overruled his advice not to attack and sometimes rejected targets he said were legal.

While the review process involved a careful weighing of military necessity and potential harm to civilians, limited information and the subjectivity of such an analysis meant it was "not a scientific formula." The first challenge was to determine the risk to their forces. "The hard part is how many casualties we will take. It's a gut level, fly by the seat of your pants. There's no standard that says one U.S. life equals X civilian lives," Cayce said. Then lawyers had to evaluate the

threat to civilians. In the case of counter-battery fire, they had to make the judgment without knowing if civilians were present in the target area at the time of the strike; they relied instead on pre-war population figures. Cayce acknowledged the danger of cluster strikes on populated areas and said that he tried to limit them to nighttime. "I was hoping kids were hunkered down, hoping with artillery fire they were not out watching," he said.

[...] The no-strike lists included certain civilian structures but not residential neighborhoods. Forward observers either ignored or failed to see civilians in populated areas. U.S. military lawyers did not challenge the proposed strikes although they raise serious concerns under IHL's proportionality test.

DISCUSSION

1. How do you classify the conflict? Are the rules of Protocol I on the protection of the civilian population against the effects of hostilities applicable? Are the same rules applicable to air and ground launched attacks against land targets in Iraq? (*Cf.* Art. 2 common to the Conventions and Arts. 1 and 49 (3) of Protocol I.)

2. a. What rules of IHL could be violated by the described targeting based on satellite phone-derived geo-coordinates? Is firing weapons based on such targeting perforce indiscriminate? Are the precautionary measures an attacker must take respected? (*Cf.* Arts. 51 and 57 of Protocol I.)

   b. What are the legal ramifications of the suggestion the Iraqis may have been using deception techniques to thwart Americans attempting to use satellite phone coordinates for targeting? May such deception violate IHL if it leads to civilian casualties? Should the U.S. be absolved from their responsibility for casualties if such deception led to civilian casualties? (*Cf.* Arts. 51 (7) and (8) and 58 of Protocol I.)

   c. Were the measures the United States used to corroborate satellite phone coordinates sufficient to meet their obligations under IHL? What constitute "feasible" measures to verify a target? What factors have to be taken into account when evaluating the feasibility of verification measures? If the attacking party attempts to corroborate but its sources are wrong, does that affect your assessment of the legality of the strikes? (*Cf.* Art. 57 Protocol I.)

   d. Given repeated failures to hit their intended targets using satellite phone coordinates and corroboration, does IHL impose an obligation to refrain from this practice? What if they try to improve corroboration? What would be reliable information for such attacks? (*Cf.* Art. 57 Protocol I.)

   e. Do you agree with Human Rights Watch that targeting based on satellite phones is "seriously flawed"? Why or why not?

3. a. Are electrical power facilities legitimate targets? Is there a definite military advantage to incapacitating electrical transformer stations for a period of a few hours? Why would the Coalition target distribution facilities rather than generating facilities? Was the method used to incapacitate electrical power facilities appropriate? (*Cf.* Arts. 52 and 57 of Protocol I.)

b. Is it material to the legality of the strikes whether anyone died as a direct consequence of the attacks? Must the fact that hospitals could not treat some cases because of power shortage be taken into account? The risk of "diarrheal infections" due to the impossibility of water purification stations to function without electricity? (*Cf.* Arts. 51 (5) (b) and 57 (2) (a) (ii) and (iii) of Protocol I.)

4. a. Regarding the attack at Al-Tuwaisi, Basra: If there were members of the Iraqi Intelligence Service in the targeted building, would that make the building a legitimate military objective? (*Cf.* Art. 52 (2) of Protocol I.)

b. Would the proportionality evaluation be affected if there were intelligence officials, but no "high value leadership targets" in the building? Must the proportionality evaluation be based upon the actual or the expected use of the target? What rules govern the possibility that the expected use does not correspond to the actual use of the objective? (*Cf.* Arts. 51 (5) (b) and 57 (2) (a) of Protocol I.)

5. What rules of IHL are material in evaluating the legality of the attack at Al-Karrada, Baghdad?

6. a. Was the planning of the attack on the house in al-Mansur, Baghdad, sufficient to satisfy an attacking party's obligations under the principle of distinction and its obligation to take precautionary measures? (*Cf.* Arts. 51 and 57 of Protocol I.)

b. Was the main question whether the target was a military objective, whether expected civilian casualties were excessive or whether precautions in attack were taken? What precautionary measures were relevant? (*Cf.* Arts. 51, 52 and 57 of Protocol I.)

c. If the attacking party is targeting an individual (who is a combatant), but is unsure which individual is at the targeted location, is the attacking party in a position to properly evaluate the proportionality of the attack? (*Cf.* Arts. 51 (5) (b) and 57 (2) (a) (iii) of Protocol I.)

7. Is it lawful to drop older models of a bomb when a more accurate and reliable model exists? Is there an obligation under IHL to acquire smaller munitions that will reduce collateral damage? More precise weapons? If a party has them, must it use them? Is it sufficient to use the smallest weapon available that can meet the objectives of the attack, or are they precluded from making an attack if the damage would be excessive? (*Cf.* Art. 57 (2) (a) (ii) and (iii) of Protocol I.)

8. a. Are cluster bombs indiscriminate weapons by their nature? Are there instances in which cluster bombs may be used without violating IHL? In which circumstances might it be appropriate to use cluster bombs? (*Cf.* Arts. 51 (4), (5) (b) and 57 (2) (a) (ii) and (iii) of Protocol I.)

b. If, as Human Rights Watch states, "most if not all" of the ground-launched cluster bomb strikes were directed at legitimate military objectives, may those strikes nonetheless have violated IHL? If so, how? As a precautionary measure, is it sufficient to use cluster bombs only at night to comply with IHL?

Even in densely populated areas? (*Cf.* Arts. 51 (4), (5) (b) and 57 (2) (a) (ii) and (iii) of Protocol I.)

c. Does the U.S. procedure for screening ground cluster bomb strikes as described conform to the obligations IHL imposes on an attacker? Why may U.S. military lawyers not have challenged some proposed strikes that Human Rights Watch suggests "raise serious concerns" under the proportionality test? What precautions did the Coalition take to minimise the effects of attacks in general? Are such precautions sufficient?

9. What are the advantages and the risks of involving lawyers in battlefield targeting decisions as described in this case?

10. Would a "standard that says one U.S. life equals X civilian lives" be necessary? Would such a standard concern the evaluation whether an attack must be expected to lead to excessive civilian casualties or the evaluation whether (additional) precautionary measures are feasible? Do the risks for U.S. soldiers at all matter when evaluating the respect of IHL? (*Cf.* Arts. 51 (5) (b) and 57 of Protocol I.)

Document No. 154, US, Populated Area Targeting Record in Iraq

[N.B.: Model cards filled out by US army (Third Infantry Division), annexed to "strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflicts" 2-4 September, 2004, San Remo, Italy, *The Military Lawyer Nuisance or Necessity* by Lt. Colonel Mike Newton Judge Advocate General's Corps, United States Army.]

Commanders are responsible for assessing proportionality before authorizing indirect fire into a populated area or protected place (NFA/RFA). Refer to ROE; seek legal advice; copy SJA, G5 and FSE.

POPULATED AREA TARGETING RECORD

(Military Necessity - Collateral Damage - Proportionality Assessment)

I. MILITARY NECESSITY - What are we shooting at and why?

1. DTG of mission: _____
2. Location - Grid Coordinates: _____
3. Enemy Target (WMD, CHEM, SCUD, ARTY, ARMOR, C2, LOG)
   a. Type and Unit: _____
   b. Importance to Mission: _____
4. Target Intel:
   a. How Observed: UAV, FIST, SOF, other: _____
   b. Unobserved: Q36, Q37, ELINT, other: _____
   c. Last Known DTG of Observation or Detection: _____

5. Other Concerns as applicable:
   a. US Casualities: Number: _____ Location _____
   b. Receiving Enemy Fire: Unit _____ Location _____

II. COLLATERAL DAMAGE - Who or what is there now?

6. City: _____ Original Population: _____
7. Estimated Population Now in Target Area (if known):
   _____
8. Cultural, Economic, or Other Significance and Effects:
   _____

III. MUNITIONS SELECTION - Mitigate civilian casualties and civilian property destruction

9. Available Delivery Systems Within Range: _____
   155 MLRS, ATACMS, AH64, CAS, other: _____
10. Munitions: DPICM, Precision-Guided Munitions (PGM), other:
    _____

IV. COMMANDER'S AUTHORIZATION TO FIRE - Proportionality analysis

11. Legal Advisors' Rank and Name: _____
12. Civil Affairs/G5 Advisor: _____
13. Is the anticipated loss of life and damage to civilian property acceptable in relation to the military advantage expected to be gained?
    Yes/No
14. Commander or Reprensentative's Rank, Name, and Position:
    _____
15. Optional Comments: _____
16. DTG or Decision: _____
17. TARGET NUMBER: _____

Case No. 155, Iraq, Use of Force by US Forces in Occupied Iraq

THE CASE

[**Source:** Human Rights Watch, "Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by U.S. Forces", 2003, footnotes omitted, online: www.hrw.org]

I. SUMMARY

This report documents and analyzes civilian deaths caused by U.S. military forces in Baghdad since U.S. President George W. Bush declared an end to hostilities in Iraq on May 1, 2003. [...]

The U.S. military with responsibility for security in Baghdad is not deliberately targeting civilians. Neither is it doing enough to minimize harm to civilians as required by international law. Iraq is clearly a hostile environment for U.S. troops, with daily attacks by Iraqis or others opposed to the U.S. and coalition occupation. But such an environment does not absolve the military from its obligations to use force in a restrained, proportionate and discriminate manner, and only when strictly necessary. [...]

The individual cases of civilian deaths documented in this report reveal a pattern by U.S. forces of over-aggressive tactics, indiscriminate shooting in residential areas and a quick reliance on lethal force. In some cases, U.S. forces faced a real threat, which gave them the right to respond with force. But that response was sometimes disproportionate to the threat or inadequately targeted, thereby harming civilians or putting them at risk.

In Baghdad, civilian deaths can be categorized in three basic incident groups. First are deaths that occur during U.S. military raids on homes in search of arms or resistance fighters. The U.S. military says it has begun using less aggressive tactics, and is increasingly taking Iraqi police with them on raids. But Baghdad residents still complained of aggressive and reckless behavior, physical abuse, and theft by U.S. troops. When U.S. soldiers encountered armed resistance from families who thought they were acting in self-defense against thieves, they sometimes resorted to overwhelming force, killing family members, neighbors or passers-by.

Second are civilian deaths caused by U.S. soldiers who responded disproportionately and indiscriminately after they have come under attack at checkpoints or on the road. Human Rights Watch documented cases where, after an improvised explosive device detonated near a U.S. convoy, soldiers fired high caliber weapons in multiple directions, injuring and killing civilians who were nearby.

Third are killings at checkpoints when Iraqi civilians failed to stop. U.S. checkpoints constantly shift throughout Baghdad, and are sometimes not well marked, although sign visibility is improving. A dearth of Arabic interpreters and poor understanding of Iraqi hand gestures cause confusion, with results that are sometimes fatal for civilians. [...]

In general, U.S. military police in Baghdad seem better suited for the post-conflict law enforcement tasks required by military occupation. More problematic were

combat units [...], who have been called upon to provide services for which they are not adequately trained or attitudinally prepared. [...] Many of these soldiers fought their way into Iraq, and are now being asked to switch without proper preparation from warriors to police who control crowds, pursue thieves and root out insurgents. [...]

A central problem is the lack of accountability for U.S. soldiers and commanders in Iraq. According to CPA Regulation Number 17, Iraqi courts cannot prosecute coalition soldiers, so it is the responsibility of the participating coalition countries to investigate allegations of excessive force and unlawful killings, and to hold accountable soldiers and commanders found to have violated domestic military codes or international humanitarian law. The lack of timely and thorough investigations into many questionable incidents has created an atmosphere of impunity, in which many soldiers feel they can pull the trigger without coming under review. [...]

At the same time, some steps have been taken to reduce civilian deaths. Checkpoints are more clearly marked and some combat troops have received additional training for police tasks. [...]

The rules of engagement are not made public due to security concerns. But Iraqi civilians have a right to know the guidelines for safe behavior. The coalition should mark all checkpoints clearly, for instance, and inform Iraqis through a public service campaign of how to approach checkpoints and how to behave during raids.

[...]

Checkpoint in al-Mansur [...]

On July 27, U.S. soldiers from Task Force 20, a special operations team searching for Saddam Hussain and other former ruling elite, conducted a raid on the home of Shaikh Abdul Karim al-Gubair in the upscale al-Mansur neighborhood. Soldiers set up checkpoints in the area while the operation took place [...].

According to the witness interviewed by Human Rights Watch, four or five U.S. Humvees blocked a small street near the al-Sa'ah Restaurant at 5:00 p.m. One vehicle was parked in the road and soldiers were diverting traffic. The soldiers left after five minutes, leaving no sign other than the vehicle that cars should not pass, but local shop owners were warning drivers to stay away. A man who worked in an optician's shop across the street, Ahmad Ibrahim al-Shaikh al-Jaburi, told Human Rights Watch what happened next:

> A gray Chevrolet Malibu appeared from the other side of the alley, not from the main street. The Americans started waving for the car to stop, but it did not stop. One of the soldiers who was sitting on top of one of the Humvees turned his machine gun mounted on top of the Humvee and started shooting at the Chevrolet with the machine gun. There was more shooting, probably from one of the [other] soldiers. They hit the car from a distance of fifty meters. The front windshield of the car was full of bullet holes. As a result, the driver of the car lost control and the car stopped slowly after colliding with a Humvee. After the car stopped and the shooting ended, the driver got out of the car raising his hands, and seconds later he collapsed. The soldiers surrounded the car and took out the other

> passenger and they began to drag him in the street. This was done by one soldier who was pulling him by his shoulder, his legs were being dragged. They put him on the pavement next to a house under construction which belonged to Fahd al-Shajra, the former minister of education.

The driver of that car was Muhanad 'Imad Ghazal Ibrahim al-Ruba'i, seventeen years old. He told Human Rights Watch that he was driving with his younger brother Zaid, fourteen, and their cousin Fahd Ahmad, sixteen, to pick up food rations. U.S. soldiers were blocking the road with bricks and told him to turn around, so he took another street to the main road which seemed open. He asked some young Iraqi men if the road was clear and they said it was, as long as Muhanad drove slowly and stopped when ordered. He told Human Rights Watch what happened next:

> We started driving slowly towards the Americans preparing to stop, abiding by what the young men had informed us to do. But the soldiers were hidden on both sides of the street - we could not see them. We could see two Humvees a long way from us. One was parked on the pavement and the other was nearer to us but the road was not blocked. While we were driving slowly, and as we were approaching the Humvee nearer to us, there was an intensive shooting at our car from all sides and directions. When the shooting started I lowered my head so I lost control of the car. The car continued to move very slowly until it collided with a Humvee and stopped.[...]

According to Muhanad al-Ruba'i, he and his cousin Fahd were dragged from the car and forced to sit on the pavement. He was given some bandages, he said, but also beaten every time he tried to ask about his brother Zaid. After approximately thirty minutes, he said, two U.S. soldiers in civilian clothes with beards, machine guns and pistols in their belts arrived in a pick-up truck. Muhanad and Fahd were put in the back together with a uniformed soldier.

At this point, Muhanad said, a Toyota Corona turned onto the alley from the main street. The two soldiers in civilian clothes got out of the truck and, together with the soldier in the back, opened fire on the car. Muhanad told Human Rights Watch:

> They were all shooting at the Toyota; the shooting lasted for three to five minutes. When shooting stopped the two American civilians with other soldiers went to the car and took the two passengers out of the car, they only took out the wounded and they left the driver inside the car because he was dead.

The witness from the optician's shop, Ahmad al-Jaburi, confirmed this account. He told Human Rights Watch:

> I saw a Toyota Corona driving from a side street on the right side of the alley. The side street was open, there were no soldiers there or even a checkpoint. As soon as the car reached the intersection where the side street connects to the alley, there was intensive shooting at the car which led to the death of all the passengers. I think there were either three or four passengers. I saw an old woman with gray hair opening the door of the

> car. She started walking towards the soldiers for a few meters and then she collapsed. She was covered with blood.

Soldiers brought the elderly woman and another injured person from the car to the pickup truck, and put them in the back with Muhanad and Fahd. The driver of the Corona was dead and stayed in the car. Muhanad recalled:

> They brought the two wounded to the pick-up. One was an old woman with gray hair and another was a young man. When they brought the lady she started asking about her sons and she was screaming in pain. There was blood all over her body, her body was full of blood. She begged them for some water but one of the soldiers started hitting her in the stomach and she kept quiet. After that a soldier came and sat with us in the back of the pick-up. [...]

As for [two others from the Corona], however, the family had no information until September 28, two months and one day after the incident. "On that day, Americans came to our house and asked us to come to the airport to receive their corpses," she said.

In addition to these deaths, the witness al-Jaburi said he saw soldiers shoot at a third car, a Toyota Landcruiser that had driven down the alley and parked. One person in the car was wounded in the stomach, he said, and Iraqis took this person to the hospital. From all the shooting, two parked cars also caught fire and were destroyed, one of them belonging to a worker in al-Jaburi's shop. They received $4,500 in compensation from the U.S. Army. Negotiations for compensation were conducted with Lt. Col. Richard Bowyer from the 1st Armored Division, who apologized for the incident.

The U.S. military issued a press statement on July 29 that acknowledged two deaths in one car. "The forces fired on the vehicle when it did not slow down at the checkpoint and started to run the barriers, appearing to be hostile," the statement said. "Coalition forces were not involved in any other incident in the area." On the day of the incident, a military spokesman, Staff Sgt. J.J. Johnson, told the press "there are rules of engagement when somebody approaches a checkpoint .... The soldiers have a right to defend themselves."

The U.S. military maintains the secrecy of its rules of engagement for security reasons. But soldiers and commanders should not hide behind the secrecy of its rules to tolerate the beating of detainees and the denial of medical care to the wounded.

A Bomb and Shooting on Haifa Street

On July 3, around 9:15 a.m., a group of school children was walking home on Baghdad's central Haifa Street. Six children around the age of twelve stopped in front of one of their friend's apartments, building 74, when a large explosion nearby threw them to the ground. According to family members, two of the children died and seven were wounded. [...]

According to the U.S. military, the explosion was from an RPG fired at a convoy of three military vehicles from a car on the street. "An innocent Iraqi citizen sitting on

a street corner was also killed by the blast, according to reports we are hearing," Major Scott Patton told the press.

The military did not comment on its response, which witnesses said involved heavy and indiscriminate shooting that killed the driver of the attacking car and wounded civilians in the area. One witness named Majid Sa'di told the press that he saw the car of the alleged attacker riddled with bullets and he thought the driver was dead.

Human Rights Watch found another witness to the incident, a man coincidentally driving down Haifa Street, who was seriously wounded by a gunshot to the leg. [...] Haidar Hussain Karim al-Fitlawi said he was driving his blue Volkswagen Passat down Haifa Street towards the gas station when the explosion took place. Suddenly, he said, he came under fire from U.S. troops. He told Human Rights Watch:

> They hit my car with more than ten bullets. Five of them hit the fuel tank but luckily it did not catch fire. I got out of the car and I was lying on the ground. I could just feel my leg bent over my shoulder. I lay there bleeding for ten minutes. People stopped a small bus and put the injured in there. I remember a little child in there. They took us all to al-Karama Hospital.

According to al-Fitlawi, no U.S. soldiers were hurt in the attack, although it is doubtful he would have had a good look given the shooting. "The Americans were very scared," he said. "That is why they were shooting at everyone and everything."

[...]

On August 17, U.S. soldiers shot and killed *Reuters* cameraman Mazen Dana, aged forty-three, outside Abu Ghraib prison on the outskirts of Baghdad. Mazen was the twelfth journalist killed since the war began, and the second *Reuters* journalist to die. *Reuters* said Dana and his sound engineer had asked soldiers for permission to film. After the killing, the U.S. military issued an apology and said soldiers thought his camera was an RPG. A military spokesman expressed condolences at the time but said troops would not fire a warning shot if they felt threatened. "I can't give you details on the rules of engagement, but the enemy is not in formations, they are not wearing uniforms," Col. Guy Shields told the press asking about the incident. "During war time, firing a warning shot is not a necessity. There is not time for a warning shot if there is potential for an ambush."

DISCUSSION

1. Is Iraq an occupied territory within the meaning of IHL? (At least until 30 June 2004)? Even if the United States (according to them) acted according to Security Council resolutions? Even if the United States acted in self-defence? Even after the adoption of Security Council resolution 1483 (2003) (*See* **Case No. 159**, Iraq, Occupation and Peacebuilding, A., p. 1645), if that resolution is interpreted as legitimizing the presence of Coalition forces in Iraq? (*Cf.* Art. 2 of Convention IV and para. 5 preambular to Protocol I.)

2. a. When did the IHL of military occupation begin to apply in Iraq? From the moment when the first American soldier put his feet on Iraqi territory? From the moment when the first village was in fact under American control? As soon as major military operations were completed, which, according to the President of the United States, was 1 May 2003? (*Cf.* Art. 2 of Convention IV and Art. 42 of the Hague Regulations.)

   b. In your response to question a., do you distinguish between the obligation to treat protected persons humanely (Art. 27 of Convention IV), the obligation to ensure public order and safety (Art. 43 of the Hague Regulations) and the obligation to ensure hygiene and public health (Art. 56 of Convention IV)? If so, how do you justify such distinctions?

3. Was the behaviour of American troops at the "Al Mansur" checkpoint and after the explosion of a bomb in Haifa Street in conformity with IHL? Do you apply the rules on the conduct of hostilities or those on military occupation to those actions? What measures should have been taken in order to avoid such occurrences? (*Cf.* Arts. 27 and 32 of Convention IV and Arts. 48, 50 (1), 51 (2) and (3), 57 (2) (a) (i) and (b) of Protocol I.)

4. In which circumstances did the American troops have the right to shoot a person in July and August 2003 in Baghdad? Were such shootings governed by IHL or by international human rights law? (*Cf.* Arts. 27 and 32 of Convention IV and Arts. 48, 50 (1), 51 (2) and (3), 57 (2) (a) (i) and (b) of Protocol I.)

5. Did the shooting of the Reuters cameraman of 17 August 2003 violate IHL? (*Cf.* Art. 57 (2) (a) (i) of Protocol I.)

Case No. 156, US, The Taguba Report

THE CASE

United States of America/Iraq, The Taguba Report

[**Source:** Executive summary of Article 15-6 investigation of the 800th Military Police Brigade by Maj. Gen. Antonio M. Taguba, available on http://www.msnbc.msn.com/id/4894001]

ARTICLE 15-6
INVESTIGATION OF THE 800th MILITARY POLICE BRIGADE

BACKGROUND

1. (U) On 19 January 2004, Lieutenant General (LTG) Ricardo S. Sanchez, Commander, Combined Joint Task Force Seven (CJTF-7) requested that the Commander, US Central Command, appoint an Investigating Officer (IO) in the grade of Major General (MG) or above to investigate the conduct of operations within the 800th Military Police (MP) Brigade. LTG Sanchez requested an investigation of detention and internment operations by the

Brigade from 1 November 2003 to present. LTG Sanchez cited recent reports of detainee abuse, escapes from confinement facilities, and accountability lapses, which indicated systemic problems within the brigade and suggested a lack of clear standards, proficiency, and leadership. LTG Sanchez requested a comprehensive and all-encompassing inquiry to make findings and recommendations concerning the fitness and performance of the 800th MP Brigade. [...]

3. (U) On 31 January 2004, the Commander, CFLCC [Coalition Forces Land Component Command], appointed MG Antonio M. Taguba, Deputy Commanding General Support, CFLCC, to conduct this investigation. MG Taguba was directed to conduct an informal investigation under AR [Army Regulation] 15-6 into the 800th MP Brigade's detention and internment operations. Specifically, MG Taguba was tasked to:
   a. (U) Inquire into all the facts and circumstances surrounding recent allegations of detainee abuse, specifically allegations of maltreatment at the Abu Ghraib Prison (Baghdad Central Confinement Facility (BCCF));
   b. (U) Inquire into detainee escapes and accountability lapses as reported by CJTF-7, specifically allegations concerning these events at the Abu Ghraib Prison;
   c. (U) Investigate the training, standards, employment, command policies, internal procedures, and command climate in the 800th MP Brigade, as appropriate;
   d. (U) Make specific findings of fact concerning all aspects of the investigation, and make any recommendations for corrective action, as appropriate. [...]

FINDINGS AND RECOMMENDATIONS

(PART ONE)

(U) **The investigation should inquire into all of the facts and circumstances surrounding recent allegations of detainee abuse, specifically, allegations of maltreatment at the Abu Ghraib Prison (Baghdad Central Confinement Facility).**

1. (U) The US Army Criminal Investigation Command (CID), led by COL [Colonel] Jerry Mocello, and a team of highly trained professional agents have done a superb job of investigating several complex and extremely disturbing incidents of detainee abuse at the Abu Ghraib Prison. They conducted over 50 interviews of witnesses, potential criminal suspects, and detainees. They also uncovered numerous photos and videos portraying in graphic detail detainee abuse by Military Police personnel on numerous occasions from October to December 2003. Several potential suspects rendered full and complete confessions regarding their personal involvement and the involvement of fellow Soldiers in this abuse. Several potential

suspects invoked their rights under Article 31 of the Uniform Code of Military Justice (UCMJ) and the 5th Amendment of the U.S. Constitution. [...]

REGARDING PART ONE OF THE INVESTIGATION, I MAKE THE FOLLOWING SPECIFIC FINDINGS OF FACT:

1. (U) That Forward Operating Base (FOB) Abu Ghraib (BCCF) provides security of both criminal and security detainees at the Baghdad Central Correctional Facility, facilitates the conducting of interrogations for CJTF-7, supports other CPA operations at the prison, and enhances the force protection/quality of life of Soldiers assigned in order to ensure the success of ongoing operations to secure a free Iraq.

2. (U) That the Commander, 205th Military Intelligence Brigade, was designated by CJTF-7 as the Commander of FOB Abu Ghraib (BCCF) effective 19 November 2003. That the 205th MI Brigade conducts operational and strategic interrogations for CJTF-7. That from 19 November 2003 until Transfer of Authority (TOA) on 6 February 2004, COL [...] was the Commander of the 205th MI Brigade and the Commander of FOB Abu Ghraib (BCCF).

3. (U) That the 320th Military Police Battalion of the 800th MP Brigade is responsible for the Guard Force at Camp Ganci, Camp Vigilant, & Cellblock 1 of FOB Abu Ghraib (BCCF). That from February 2003 to until he was suspended from his duties on 17 January 2004, LTC [...] served as the Battalion Commander of the 320th MP Battalion. That from December 2002 until he was suspended from his duties, on 17 January 2004, CPT [...] served as the Company Commander of the 372nd MP Company, which was in charge of guarding detainees at FOB Abu Ghraib. I further find that both the 320th MP Battalion and the 372nd MP Company were located within the confines of FOB Abu Ghraib.

4. (U) That from July of 2003 to the present, BG [Brigadier General] [...] was the Commander of the 800th MP Brigade.

5. (S) That between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force (372nd Military Police Company, 320th Military Police Battalion, 800th MP Brigade), in Tier (section) 1-A of the Abu Ghraib Prison (BCCF). The allegations of abuse were substantiated by detailed witness statements and the discovery of extremely graphic photographic evidence. Due to the extremely sensitive nature of these photographs and videos, the ongoing CID investigation, and the potential for the criminal prosecution of several suspects, the photographic evidence is not included in the body of my investigation. The pictures and videos are available from the Criminal Investigative Command and the CTJF-7 prosecution team. In addition to the aforementioned crimes, there were also abuses committed by members of the 325th MI Battalion, 205th MI

Brigade, and Joint Interrogation and Debriefing Center (JIDC). Specifically, on 24 November 2003, SPC [Specialist] [...], 205th MI Brigade, sought to degrade a detainee by having him strip and returned to cell naked.

6. (S) I find that the intentional abuse of detainees by military police personnel included the following acts:
   a. (S) Punching, slapping, and kicking detainees; jumping on their naked feet;
   b. (S) Videotaping and photographing naked male and female detainees;
   c. (S) Forcibly arranging detainees in various sexually explicit positions for photographing;
   d. (S) Forcing detainees to remove their clothing and keeping them naked for several days at a time;
   e. (S) Forcing naked male detainees to wear women's underwear;
   f. (S) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
   g. (S) Arranging naked male detainees in a pile and then jumping on them;
   h. (S) Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
   i. (S) Writing "I am a Rapest" (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;
   j. (S) Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;
   k. (S) A male MP guard having sex with a female detainee;
   l. (S) Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee;
   m. (S) Taking photographs of dead Iraqi detainees.

7. (U) These findings are amply supported by written confessions provided by several of the suspects, written statements provided by detainees, and witness statements. [...]

8. (U) In addition, several detainees also described the following acts of abuse, which under the circumstances, I find credible based on the clarity of their statements and supporting evidence provided by other witnesses:
   a. (U) Breaking chemical lights and pouring the phosphoric liquid on detainees;
   b. (U) Threatening detainees with a charged 9mm pistol;
   c. (U) Pouring cold water on naked detainees;
   d. (U) Beating detainees with a broom handle and a chair;
   e. (U) Threatening male detainees with rape;

f. (U) Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;

g. (U) Sodomizing a detainee with a chemical light and perhaps a broom stick.

h. (U) Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee. [...]

10. (U) I find that contrary to the provision of AR 190-8 [] Military Intelligence (MI) interrogators and Other US Government Agency's (OGA) interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses. [...] I find that personnel assigned to the 372nd MP Company, 800th MP Brigade were directed to change facility procedures to "set the conditions" for MI interrogations. I find no direct evidence that MP personnel actually participated in those MI interrogations.

11. (U) I reach this finding based on the actual proven abuse that I find was inflicted on detainees and by the following witness statements:

a. (U) **SPC** [...], **372nd MP Company**, stated in her sworn statement regarding the incident where a detainee was placed on a box with wires attached to his fingers, toes, and penis, "that her job was to keep detainees awake." She stated that MI was talking to CPL [Corporal] [...]. She stated: **"MI wanted to get them to talk. It is** [...] **and** [...]**'s job to do things for MI and OGA to get these people to talk."**

b. (U) **SGT [Sergeant]** [...]**, 372nd MP Company**, stated in his sworn statement as follows: **"I witnessed prisoners in the MI hold section, wing 1A being made to do various things that I would question morally. In Wing 1A we were told that they had different rules and different SOP [Standing Operating Procedures] for treatment. I never saw a set of rules or SOP for that section just word of mouth. The Soldier in charge of 1A was Corporal** [...]. **He stated that the Agents and MI Soldiers would ask him to do things, but nothing was ever in writing he would complain (sic)."** When asked why the rules in 1A/1B were different than the rest of the wings, SGT [...] stated: **"The rest of the wings are regular prisoners and 1A/B are Military Intelligence (MI) holds."** When asked why he did not inform his chain of command about this abuse, SGT [...] stated: **"Because I assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something. Also the wing belongs to MI and it appeared MI personnel approved of the abuse."** SGT [...] also stated that he had heard MI insinuate to the guards to abuse the inmates. When asked what MI said he stated: **"Loosen this guy up for us."Make sure he has a bad night." "Make sure he gets the treatment."** He claimed these comments were made to CPL [...] and SSG [Staff Sergeant] [...]. Finally, SGT [...] stated that (sic): **"the MI staffs to my understanding have been giving** [...] **compliments on the way he has been handling the MI holds.**

Example being statements like, "Good job, they're breaking down real fast. They answer every question. They're giving out good information, Finally, and Keep up the good work. Stuff like that."

c. (U) **SPC** [...], **372nd MP Company,** was asked if he were present when any detainees were abused. He stated: **"I saw them nude, but MI would tell us to take away their mattresses, sheets, and clothes."** He could not recall who in MI had instructed him to do this, but commented that, "if they wanted me to do that they needed to give me paperwork." He was later informed that "we could not do anything to embarrass the prisoners."

d. (U) **Mr.** [...], a US civilian contract translator was questioned about several detainees accused of rape. He observed (sic): **"They (detainees) were all naked, a bunch of people from MI, the MP were there that night and the inmates were ordered by SGT** [...] **and SGT** [...] **ordered the guys while questioning them to admit what they did. They made them do strange exercises by sliding on their stomach, jump up and down, throw water on them and made them some wet, called them all kinds of names such as "gays" do they like to make love to guys, then they handcuffed their hands together and their legs with shackles and started to stack them on top of each other by insuring that the bottom guys penis will touch the guy on tops butt."**

e. (U) **SPC** [...], **109th Area Support Medical Battalion**, a medic testified that: **"Cell 1A was used to house high priority detainees and cell 1B was used to house the high risk or trouble making detainees. During my tour at the prison I observed that when the male detainees were first brought to the facility, some of them were made to wear female underwear, which I think was to somehow break them down."**

12. (U) **I find that prior to its deployment to Iraq for Operation Iraqi Freedom, the 320th MP Battalion and the 372nd MP Company had received no training in detention/internee operations.** I also find that very little instruction or training was provided to MP personnel on the applicable rules of the Geneva Convention Relative to the Treatment of Prisoners of War, FM [Field Manual] 27-10, AR 190-8, or FM 3-19.40. Moreover, I find that few, if any, copies of the Geneva Conventions were ever made available to MP personnel or detainees.

13. (U) Another obvious example of the Brigade Leadership not communicating with its Soldiers or ensuring their tactical proficiency concerns the incident of detainee abuse that occurred at Camp Bucca, Iraq, on May 12, 2003. Soldiers from the 223rd MP Company reported to the 800th MP Brigade Command at Camp Bucca, that four Military Police Soldiers from the 320th MP Battalion had abused a number of detainees during inprocessing at Camp Bucca. An extensive CID investigation determined that four soldiers

from the 320th MP Battalion had kicked and beaten these detainees following a transport mission from Talil Air Base.

14. (U) Formal charges under the UCMJ [Uniform Code of Military Justice] were preferred against these Soldiers and an Article-32 Investigation conducted by LTC Gentry. He recommended a general court martial for the four accused, which BG [...] supported. Despite this documented abuse, there is no evidence that BG [...] ever attempted to remind 800th MP Soldiers of the requirements of the Geneva Conventions regarding detainee treatment or took any steps to ensure that such abuse was not repeated. Nor is there any evidence that LTC(P) [...], the commander of the Soldiers involved in the Camp Bucca abuse incident, took any initiative to ensure his Soldiers were properly trained regarding detainee treatment.

RECOMMENDATIONS AS TO PART ONE OF THE INVESTIGATION:

1. (U) Immediately deploy to the Iraq Theater an integrated multi-discipline Mobile Training Team (MTT) comprised of subject matter experts in internment/resettlement operations, international and operational law, information technology, facility management, interrogation and intelligence gathering techniques, chaplains, Arab cultural awareness, and medical practices as it pertains to I/R activities. This team needs to oversee and conduct comprehensive training in all aspects of detainee and confinement operations.

2. (U) That all military police and military intelligence personnel involved in any aspect of detainee operations or interrogation operations in CJTF-7, and subordinate units, be immediately provided with training by an international/ operational law attorney on the specific provisions of The Law of Land Warfare FM 27-10, specifically the Geneva Convention Relative to the Treatment of Prisoners of War, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, and AR 190-8.

3. (U) **That a single commander in CJTF-7 be responsible for overall detainee operations throughout the Iraq Theater of Operations.** I also recommend that the Provost Marshal General of the Army assign a minimum of two (2) subject matter experts, one officer and one NCO [Non-Commissioned Officer], to assist CJTF-7 in coordinating detainee operations.

4. (U) That detention facility commanders and interrogation facility commanders ensure that appropriate copies of the Geneva Convention Relative to the Treatment of Prisoners of War and notice of protections be made available in both English and the detainees' language and be prominently displayed in all detention facilities. Detainees with questions regarding their treatment should be given the full opportunity to read the Convention.

5. (U) That each detention facility commander and interrogation facility commander publish a complete and comprehensive set of Standing Operating Procedures (SOPs) regarding treatment of detainees, and that

all personnel be required to read the SOPs and sign a document indicating that they have read and understand the SOPs.

6. (U) That in accordance with the recommendations of MG Ryder's Assessment Report, and my findings and recommendations in this investigation, all units in the Iraq Theater of Operations conducting internment/confinement/detainment operations in support of Operation Iraqi Freedom be OPCON [Operational Control] for all purposes, to include action under the UCMJ, to CJTF-7.

7. (U) Appoint the C3, CJTF as the staff proponent for detainee operations in the Iraq Joint Operations Area (JOA). (MG Tom Miller, C3, CJTF-7, has been appointed by COMCJTF-7).

8. (U) That an inquiry UP AR 381-10, Procedure 15 be conducted to determine the extent of culpability of Military Intelligence personnel, assigned to the 205th MI Brigade and the Joint Interrogation and Debriefing Center (JIDC) regarding abuse of detainees at Abu Ghraib (BCCF).

9. (U) That it is critical that the proponent for detainee operations is assigned a dedicated Senior Judge Advocate, with specialized training and knowledge of international and operational law, to assist and advise on matters of detainee operations.

FINDINGS AND RECOMMENDATIONS

(PART TWO)

(U) **The Investigation inquire into detainee escapes and accountability lapses as reported by CJTF-7, specifically allegations concerning these events at the Abu Ghraib Prison:**

REGARDING PART TWO OF THE INVESTIGATION, I MAKE THE FOLLOWING SPECIFIC FINDINGS OF FACT: [...]

6. (U) Detainee operations include accountability, care, and well being of Enemy Prisoners of War, Retained Person, Civilian Detainees, and Other Detainees, as well as Iraqi criminal prisoners. [...]

8. (U) There is a general lack of knowledge, implementation, and emphasis of basic legal, regulatory, doctrinal, and command requirements within the 800th MP Brigade and its subordinate units.

9. (U) The handling of detainees and criminal prisoners after in-processing was inconsistent from detention facility to detention facility, compound to compound, encampment to encampment, and even shift to shift throughout the 800th MP Brigade AOR [Area of Responsibility]. [...]

23. (U) The Abu Ghraib and Camp Bucca detention facilities are significantly over their intended maximum capacity while the guard force is under-manned and under resourced. This imbalance has contributed to the poor

living conditions, escapes, and accountability lapses at the various facilities. The overcrowding of the facilities also limits the ability to identify and segregate leaders in the detainee population who may be organizing escapes and riots within the facility.

24. (U) The screening, processing, and release of detainees who should not be in custody takes too long and contributes to the overcrowding and unrest in the detention facilities. [...]

28. (U) Neither the camp rules nor the provisions of the Geneva Conventions are posted in English or in the language of the detainees at any of the detention facilities in the 800th MP Brigade's AOR, even after several investigations had annotated the lack of this critical requirement. [...]

33. (S/NF) The various detention facilities operated by the 800th MP Brigade have routinely held persons brought to them by Other Government Agencies (OGAs) without accounting for them, knowing their identities, or even the reason for their detention. The Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib called these detainees "ghost detainees." On at least one occasion, the 320th MP Battalion at Abu Ghraib held a handful of "ghost detainees" (6-8) for OGAs that they moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law. [...]

RECOMMENDATIONS REGARDING PART TWO OF THE INVESTIGATION:

[...] (U) Develop, staff, and implement comprehensive and detailed SOPs utilizing the lessons learned from this investigation as well as any previous findings, recommendations, and reports. (U) SOPs must be written, disseminated, trained on, and understood at the lowest level. (U) Iraqi criminal prisoners must be held in separate facilities from any other category of detainee. [...] (U) Detention Rules of Engagement (DROE), Interrogation Rules of Engagement (IROE), and the principles of the Geneva Conventions need to be briefed at every shift change and guard mount. [...] (U) The Geneva Conventions and the facility rules must be prominently displayed in English and the language of the detainees at each compound and encampment at every detention facility [...].

FINDINGS AND RECOMMENDATIONS

(PART THREE)

(U) **Investigate the training, standards, employment, command policies, internal procedures, and command climate in the 800th MP Brigade, as appropriate:**

(Names deleted)

REGARDING PART THREE OF THE INVESTIGATION, I MAKE THE FOLLOWING SPECIFIC FINDINGS OF FACT:

1. (U) I find that BG [...] took command of the 800th MP Brigade on 30 June 2003 from BG [...]. BG [...] has remained in command since that date. The 800th MP Brigade is comprised of eight MP battalions in the Iraqi TOR: 115th MP Battalion, 310th MP Battalion, 320th MP Battalion, 324th MP Battalion, 400th MP Battalion, 530th MP Battalion, 724th MP Battalion, and 744th MP Battalion.

2. (U) Prior to BG [...] taking command, members of the 800th MP Brigade believed they would be allowed to go home when all the detainees were released from the Camp Bucca Theater Internment Facility following the cessation of major ground combat on 1 May 2003. At one point, approximately 7,000 to 8,000 detainees were held at Camp Bucca. Through Article-5 Tribunals and a screening process, several thousand detainees were released. Many in the command believed they would go home when the detainees were released. In late May-early June 2003 the 800th MP Brigade was given a new mission to manage the Iraqi penal system and several detention centers. This new mission meant Soldiers would not redeploy to CONUS [Continental United States] when anticipated. Morale suffered, and over the next few months there did not appear to have been any attempt by the Command to mitigate this morale problem. [...]

4. (U) I find that the 800th MP Brigade was not adequately trained for a mission that included operating a prison or penal institution at Abu Ghraib Prison Complex. As the Ryder Assessment found, I also concur that units of the 800th MP Brigade did not receive corrections-specific training during their mobilization period. [...] I found no evidence that the Command, although aware of this deficiency, ever requested specific corrections training from the Commandant of the Military Police School, the US Army Confinement Facility at Mannheim, Germany, the Provost Marshal General of the Army, or the US Army Disciplinary Barracks at Fort Leavenworth, Kansas. [...]

13. (U) With respect to the 320th MP Battalion, I find that the Battalion Commander, LTC (P) [...], was an extremely ineffective commander and leader. [...] The 320th MP Battalion was stigmatized as a unit due to previous detainee abuse which occurred in May 2003 at the Bucca Theater Internment Facility (TIF), while under the command of LTC (P) [...]. Despite his proven deficiencies as both a commander and leader, BG [...] allowed LTC (P) [...] to remain in command of her most troubled battalion guarding, by far, the largest number of detainees in the 800th MP Brigade. LTC (P) [...] was suspended from his duties by LTG Sanchez, CJTF-7 Commander on 17 January 2004.

14. (U) During the course of this investigation I conducted a lengthy interview with BG [...] that lasted over four hours, and is included verbatim in the investigation Annexes. BG [...] was extremely emotional during much of her testimony. What I found particularly disturbing in her testimony was her complete unwillingness to either understand or accept that many of the

problems inherent in the 800th MP Brigade were caused or exacerbated by poor leadership and the refusal of her command to both establish and enforce basic standards and principles among its soldiers.

15. (U) BG [...] alleged that she received no help from the Civil Affairs Command, specifically, no assistance from either BG [...] or COL [...]. She blames much of the abuse that occurred in Abu Ghraib (BCCF) on MI personnel and stated that MI personnel had given the MPs "ideas" that led to detainee abuse. [...]

19. (U) I find that individual Soldiers within the 800th MP Brigade and the 320th Battalion stationed throughout Iraq had very little contact during their tour of duty with either LTC (P) [...] or BG [...]. BG [...] claimed, during her testimony, that she paid regular visits to the various detention facilities where her Soldiers were stationed. However, the detailed calendar provided by her Aide-de-Camp, 1LT [First Lieutenant] [...], does not support her contention. Moreover, numerous witnesses stated that they rarely saw BG [...] or LTC (P) [...].

20. (U) In addition I find that psychological factors, such as the difference in culture, the Soldiers' quality of life, the real presence of mortal danger over an extended time period, and the failure of commanders to recognize these pressures contributed to the perversive atmosphere that existed at Abu Ghraib (BCCF) Detention Facility and throughout the 800th MP Brigade.

21. [...] Brigade and unit SOPs for dealing with detainees if they existed at all, were not read or understood by MP Soldiers assigned the difficult mission of detainee operations. Following the abuse of several detainees at Camp Bucca in May 2003, I could find no evidence that BG [...] ever directed corrective training for her soldiers or ensured that MP Soldiers throughout Iraq clearly understood the requirements of the Geneva Conventions relating to the treatment of detainees.

22. On 17 January 2004 BG [...] was formally admonished in writing by LTG Sanchez regarding the serious deficiencies in her Brigade. LTG Sanchez found that the performance of the 800th MP Brigade had not met the standards set by the Army or by CJTF-7. He found that incidents in the preceding six months had occurred that reflected a lack of clear standards, proficiency and leadership within the Brigade. LTG Sanchez also cited the recent detainee abuse at Abu Ghraib (BCCF) as the most recent example of a poor leadership climate that "permeates the Brigade." I totally concur with LTG Sanchez' opinion regarding the performance of BG [...] and the 800th MP Brigade.

RECOMMENDATIONS AS TO PART THREE OF THE INVESTIGATION:

1. (U) That BG [...], Commander, 800th MP Brigade be Relieved from Command and given a General Officer Memorandum of Reprimand for the following acts which have been previously referred to in the aforementioned findings:

- Failing to ensure that MP Soldiers at theater-level detention facilities throughout Iraq had appropriate SOPs for dealing with detainees and that Commanders and Soldiers had read, understood, and would adhere to these SOPs.
- Failing to ensure that MP Soldiers in the 800th MP Brigade knew, understood, and adhered to the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.
- Making material misrepresentations to the Investigation Team as to the frequency of her visits to her subordinate commands.
- Failing to obey an order from the CFLCC Commander, LTG [...], regarding the withholding of disciplinary authority for Officer and Senior Noncommissioned Officer misconduct.
- Failing to take appropriate action regarding the ineffectiveness of a subordinate Commander, LTC (P) [...].
- Failing to take appropriate action regarding the ineffectiveness of numerous members of her Brigade Staff [...].
- Failing to ensure that numerous and reported accountability lapses at detention facilities throughout Iraq were corrected.

2. (U) That COL [...], Commander, 205th MI Brigade, be given a General Officer Memorandum of Reprimand and Investigated UP Procedure 15, AR 381-10, US Army Intelligence Activities for the following acts which have been previously referred to in the aforementioned findings: [...]
   - Failing to ensure that Soldiers under his direct command knew, understood, and followed the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.
   - Failing to properly supervise his soldiers working and "visiting" Tier 1 of the Hard-Site at Abu Ghraib (BCCF).

3. (U) That LTC (P) [...], Commander, 320th MP Battalion, be Relieved from Command, be given a General Officer Memorandum of Reprimand, and be removed from the Colonel/O-6 Promotion List for the following acts which have been previously referred to in the aforementioned findings: [...]
   - Failing to ensure that Soldiers under his direct command were properly trained in Internment and Resettlement Operations.
   - Failing to ensure that Soldiers under his direct command knew and understood the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.
   - Failing to properly supervise his soldiers working and "visiting" Tier 1 of the Hard-Site at Abu Ghraib (BCCF).
   - Failing to properly establish and enforce basic soldier standards, proficiency, and accountability. [...]

13. (U) I find that there is sufficient credible information to warrant an Inquiry UP Procedure 15, AR 381-10, US Army Intelligence Activities, be conducted to determine the extent of culpability of MI personnel, assigned to the 205th MI

Brigade and the Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib (BCCF). [...]

OTHER FINDINGS/OBSERVATIONS

1. (U) Due to the nature and scope of this investigation, I acquired the assistance of Col (Dr.) Henry Nelson, a USAF Psychiatrist, to analyze the investigation materials from a psychological perspective. He determined that there was evidence that the horrific abuses suffered by the detainees at Abu Ghraib (BCCF) were wanton acts of select soldiers in an unsupervised and dangerous setting. There was a complex interplay of many psychological factors and command insufficiencies. [...]

CONCLUSION

1. (U) Several US Army Soldiers have committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq. Furthermore, key senior leaders in both the 800th MP Brigade and the 205th MI Brigade failed to comply with established regulations, policies, and command directives in preventing detainee abuses at Abu Ghraib (BCCF) and at Camp Bucca during the period August 2003 to February 2004.
2. (U) Approval and implementation of the recommendations of this AR 15-6 Investigation and those highlighted in previous assessments are essential to establish the conditions with the resources and personnel required to prevent future occurrences of detainee abuse.

DISCUSSION

1. a. How would you qualify the conflict in Iraq at the time of the alleged abuses? Is the International Humanitarian Law (IHL) of international armed conflicts applicable to all detainees mentioned in the Taguba report?
   b. Does the report make a difference as to the treatment of the prisoners of war and that of the other detainees? Does it make a legal distinction? What is the status of those not considered as prisoners of war? Are they necessarily protected civilians? Civilian internees? What if they are detained for reasons not linked to the conflict? (*Cf.* Arts. 4 and 5 of Convention III and Arts. 4, 76, 78 and 79 of Convention IV.)
   c. Does the question of whether the detainees were prisoners of war, civilians accused of offences or civilian internees, matter when evaluating whether the reported treatment violated IHL?
2. Qualify each of the "abuse" cases mentioned in the Taguba report in terms of IHL (para. 6-8 of Part One). Which cases described in the report amount to torture? To ill-treatment? Is the distinction between torture and ill-treatment relevant for IHL? (*Cf.* Arts. 17 and 130 of Convention III and Arts. 31, 32 and 147 of Convention IV.) Does this report qualify some violations as war crimes? In what circumstances does the report mention IHL or the Geneva Conventions?

3. a. According to the Tabuga report, were the reported abuses cases of individual misbehaviour? The result of a lack of training and discipline tolerated by authorities and commanders? Standard interrogation procedure?
   b. Could the treatment of individuals during interrogation as described be justified under Art. 5 of Convention IV?
   c. When "interrogators actively requested that MP guards set physical and mental conditions for favourable interrogation of witnesses" (para. 10, Part One), is it an incitement to commit abuses? Is the incitement to commit a crime a violation of IHL or of other bodies of law? How does the report deal with the the interrogators (from Military Intelligence or other agencies) behaviour?
   d. Which are the requirements and modalities of the ICRC for visiting detainees? Do they have a legal basis in IHL? Were they respected by the Coalition? Is the practice of "ghost detainees" (para. 33, Findings and Recommandations, Part Two) a violation of IHL? (*Cf.* Art. 126 of Convention III and Art. 143 of Convention IV.)
4. What do you think about the recommendations made by MG Taguba in his report, following the specific findings he made? Do you think that measures such as the training of guards, displaying the Geneva Conventions in detention facilities, establishing sets of procedures, etc. are adequate and sufficient? What about the sanctions recommended in the report? Do you find them proportionate to the crimes committed? Who should be sanctioned for these abuses? Only the perpetrators? Also the commanders if they knew but did not act on this knowledge? Other higher hierarchy? People who incited the commission of these abuses?

Case No. 157, US, The Schlesinger Report

THE CASE

A. Final Report of the Independent Panel To Review DoD Detention Operations, August 2004

[**Source:** Independent Panel to Review DoD Detention Operations, Chairman The Honorable James R. Schlesinger, August 24, 2004, to U.S. Secretary of Defense Donald Rumsfeld, available on: http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf]

INTRODUCTION-CHARTER AND METHODOLOGY

The Secretary of Defense chartered the Independent Panel on May 12, 2004, to review Department of Defense (DoD) Detention Operations [...]. In his memorandum, the Secretary tasked the Independent Panel to review Department of Defense investigations on detention operations whether completed or ongoing, as well as other materials and information the Panel deemed relevant to

its review. The Secretary asked for the Panel's independent advice in highlighting the issues considered most important for his attention. He asked for the Panel's views on the causes and contributing factors to problems in detainee operations and what corrective measures would be required. [...]

The panel did not conduct a case-by-case review of individual abuse cases. This task has been accomplished by those professionals conducting criminal and commander-directed investigations. Many of these investigations are still on-going. The Panel did review the various completed and on-going reports covering the causes for the abuse. Each of these inquiries or inspections defined abuse, categorized the abuses, and analyzed the abuses in conformity with the appointing authorities' guidance, but the methodologies do not parallel each other in all respects. The Panel concludes, based on our review of other reports to date and our own efforts that causes for abuse have been adequately examined.

The Panel met on July 22nd and again on August 16th to discuss progress of the report. Panel members also reviewed sections and versions of the report through July and mid-August.

An effective, timely response to our requests for other documents and support was invariably forthcoming, due largely to the efforts of the DoD Detainee Task Force. We conducted reviews of multiple classified and unclassified documents generated by DoD and other sources.

Our staff has met and communicated with representatives of the International Committee of the Red Cross and with the Human Rights Executive Directors' Coordinating Group.

It should be noted that information provided to the Panel was that available as of mid-August 2004. If additional information becomes available, the Panel's judgments might be revised.

THE CHANGING THREAT [...]

In waging the Global War on Terror, the military confronts a far wider range of threats. In Iraq and Afghanistan, U.S. forces are fighting diverse enemies with varying ideologies, goals and capabilities. American soldiers and their coalition partners have defeated the armoured divisions of the Republican Guard, but are still under attack by forces using automatic rifles, rocket-propelled grenades, roadside bombs and surface-to-air missiles. We are not simply fighting the remnants of dying regimes or opponents of the local governments and coalition forces assisting those governments, but multiple enemies including indigenous and international terrorists. This complex operational environment requires soldiers capable of conducting traditional stability operations associated with peacekeeping tasks one moment and fighting force-on-force engagements normally associated with war-fighting the next moment.

Warfare under the conditions described inevitably generates detainees - enemy combatants, opportunists, trouble-makers, saboteurs, common criminals, former regime officials and some innocents as well. These people must be carefully but

humanely processed to sort out those who remain dangerous or possess militarily-valuable intelligence. [...]

General Abizaid himself best articulated the current nature of combat in testimony before the U.S. Senate Armed Services Committee on May 19, 2004:

> Our enemies are in a unique position, and they are a unique brand of ideological extremists whose vision of the world is best summed up by how the Taliban ran Afghanistan. If they can outlast us in Afghanistan and undermine the legitimate government there, they'll once again fill up the seats at the soccer stadium and force people to watch executions. If, in Iraq, the culture of intimidation practiced by our enemies is allowed to win, the mass graves will fill again. Our enemies kill without remorse, they challenge our will through the careful manipulation of propaganda and information, they seek safe havens in order to develop weapons of mass destruction that they will use against us when they are ready. Their targets are not Kabul and Baghdad, but places like Madrid and London and New York. While we can't be defeated militarily, we're not going to win this thing militarily alone.... As we fight this most unconventional war of this new century, we must be patient and courageous.

In Iraq the U.S. commanders were slow to recognize and adapt to the insurgency that erupted in the summer and fall of 2003. Military police and interrogators who had previous experience in the Balkans, Guantanamo and Afghanistan found themselves, along with increasing numbers of less-experienced troops, in the midst of detention operations in Iraq the likes of which the Department of Defense had not foreseen. As Combined Joint Task Force-7 (CJTF-7) began detaining thousands of Iraqis suspected of involvement in or having knowledge of the insurgency, the problem quickly surpassed the capacity of the staff to deal with and the wherewithal to contain it. [...]

Some individuals seized the opportunity provided by this environment to give vent to latent sadistic urges. Moreover, many well-intentioned professionals, attempting to resolve the inherent moral conflict between using harsh techniques to gain information to save lives and treating detainees humanely, found themselves in uncharted ethical ground, with frequently changing guidance from above. Some stepped over the line of humane treatment accidentally; some did so knowingly. Some of the abusers believed other governmental agencies were conducting interrogations using harsher techniques than allowed by the Army Field Manuel 34-52, a perception leading to the belief that such methods were condoned. In nearly 10 percent of the cases of alleged abuse, the chain of command ignored reports of those allegations. More than once a commander was complicit. [...]

Today, the power to wage war can rest in the hands of a few dozen highly motivated people with cell phones and access to the Internet. Going beyond simply terrorizing individual civilians, certain insurgent and terrorist organizations represent a higher level of threat, characterized by an ability and willingness to violate the political sovereignty and territorial integrity of sovereign nations.

Essential to defeating terrorist and insurgent threats in the ability to locate cells, kill or detain key leaders, and interdict operational and financial networks.

However, the smallness and wide dispersal of these enemy assets make it problematic to focus on signal and imagery intelligence as we did in the Cold War, Desert Storm, and the first phase of Operation Iraqi Freedom. The ability of terrorists and insurgents to blend into the civilian population further decreases their vulnerability to signal and imagery intelligence. Thus, information gained from human sources, whether by spying or interrogation, is essential in narrowing the field upon which other intelligence gathering resources may be applied. In sum, human intelligence is absolutely necessary, not just to fill these gaps in information derived from other sources, but also to provide clues and leads for the other sources to exploit. [...]

THE POLICY PROMULGATION PROCESS [...]

In early 2002, a debate was ongoing in Washington on the application of treaties and laws to al Qaeda and Taliban. The Department of Justice, Office of Legal Counsel (OLC) advised DoD General Counsel and the Counsel to the President that, among other things:

- Neither the Federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners,
- The President had the authority to suspend the United States treaty obligations applying to Afghanistan for the duration of the conflict should he determine Afghanistan to be a failed state,
- The President could find that the Taliban did not qualify for Enemy Prisoner of War (EPW) status under Geneva Convention III.

The Attorney General and the Counsel to the President, in part relying on the opinions of OLC, advised the President to determine the Geneva Conventions did not apply to the conflict with al Qaeda and the Taliban. The Panel understands DoD General Counsel's position was consistent with the Attorney General's and the Counsel to the President's position. Earlier, the Department of State had argued that the Geneva Conventions in their traditional application provided a sufficiently robust legal construct under which the Global War on Terror could effectively be waged. [...]

Regarding the applicability of the Convention Against Torture and Other Cruel Inhumane or Degrading Treatment, the OLC opined on August 1, 2002 that interrogation methods that comply with the relevant domestic law do not violate the Convention. It held that only the most extreme acts, that were specifically intended to inflict severe pain and torture, would be in violation; lesser acts might be "cruel, inhumane, or degrading" but would not violate the Convention Against Torture or domestic statutes. The OLC memorandum went on to say, as Commander in Chief exercising his wartime powers, the President could even authorize torture, if he so decided. [...]

The Secretary of Defense directed the DoD General Counsel to establish a working group to study interrogation techniques. [...]

The study led to the Secretary's promulgation on April 16, 2003 of the list of approved techniques. His memorandum emphasized appropriate safeguards should be in place and, further "*Use of these techniques is limited to*

interrogations of unlawful combatants held at Guantanamo Bay, Cuba." He also stipulated that four of the techniques should be used only in case of military necessity and that he should be so notified in advance. If additional techniques were deemed essential, they should be requested in writing, with "recommended safeguards and rationale for applying with an identified detainee." [...]

In August 2003, MG Geoffrey Miller arrived to conduct an assessment of DoD counterterrorism interrogation and detention operations in Iraq. He was to discuss current theatre ability to exploit internees rapidly for actionable intelligence. He brought to Iraq the Secretary of Defense's April 16, 2003 policy guidelines for Guantanamo - which he reportedly gave to CJTF-7 as potential model - recommending a command-wide policy be established. He noted, however, the Geneva Conventions did apply to Iraq. In addition to these various printed sources, there was also a store of common lore and practice within the interrogator community circulating through Guantanamo, Afghanistan and elsewhere.

At the operational level, in the absence of more specific guidance from CENTCOM, interrogators in Iraq relied on FM34-52 and on unauthorized techniques that had migrated from Afghanistan. On September 14, 2003, Commander CJTF-7 signed the theater's first policy on interrogation which contained elements of the approved Guantanamo policy and elements of the SOF policy. Policies approved for use on al Qaeda and Taliban detainees who were not afforded the protection of EPW status under the Geneva Conventions now applied to detainees who did fall under the Geneva Convention protections. [...]

INTERROGATION OPERATIONS

Any discussion of interrogation techniques must begin with the simple reality that their purpose is to gain intelligence that will help protect the United States, its forces and interests abroad. The severity of the post-September 11, 2001 terrorist threat and the escalating insurgency in Iraq make information gleaned from interrogations especially important. When lives are at stake, all legal and moral means of eliciting information must be considered. Nonetheless, interrogations are inherently unpleasant, and many people find them objectionable by their very nature. [...]

INTERROGATION OPERATIONS ISSUES [...]

Interrogation Techniques

Interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from CJTF-7. Moreover, interrogators at Abu Ghraib were relying on a 1987 version of FM 34-52, which

authorized interrogators to control all aspects of the interrogation to include light, heating, food, clothing and shelter given to detainees.

A range of opinion among interrogators, staff judge advocates and commanders existed regarding what techniques were permissible. Some incidents of abuse were clearly cases of individual criminal misconduct. Other incidents resulted from misinterpretations of law or policy or confusion about what interrogation techniques were permitted by law or local SOPs. The incidents stemming from misinterpretation or confusion occurred for several reasons: the proliferation of guidance and information from other theatres of operation; the interrogators' experiences in other theatres; and the failure to distinguish between permitted interrogation techniques in other theatre environments and Iraq. Some soldiers or contractors who committed abuse may honestly have believed the techniques were condoned.

Use of Contractors and Interrogators

As a consequence of the shortage of interrogators and interpreters, contractors were used to augment the workforce. Contractors were a particular problem at Abu Ghraib. The Army Inspector General found that 35 percent of the contractors employed did not receive formal training in military interrogation techniques, policy, or doctrine. The Naval Inspector General, however, found some of the older contractors had backgrounds as former military interrogators and were generally considered more effective than some of the junior enlisted military personnel. Oversight of contractor personnel and activities was not sufficient to ensure intelligence operations fell within the law and the authorized chain of command. Continued use of contractors will be required, but contracts must clearly specify the technical requirements and personnel qualifications, experience, and training needed. They should also be developed and administered in such as way as to provide the necessary oversight and management. [...]

THE ROLE OF MILITARY POLICE AND MILITARY INTELLIGENCE IN DETENTION OPERATIONS [...]

ABU GHRAIB, IRAQ [...]

Request for Assistance

Commander CJTF-7 recognized serious deficiencies at the prison and requested assistance. In response to this request, MG Miller and a team from Guantanamo were sent to Iraq to provide advice on facilities and operations specific to screening, interrogations, HUMINT collection and interagency integration in the short-and long-term. [...]

LAWS OF WAR/GENEVA CONVENTIONS [...]

The United States became engaged in two distinct conflicts, Operation Enduring Freedom (OEF) in Afghanistan and Operation Iraqi Freedom (OIF) in Iraq. As a result of a Presidential determination, the Geneva Conventions did not apply to al

Quaeda [sic] and Taliban combatants. Nevertheless, these traditional standards were put into effect for OIF and remain in effect at this writing. Some would argue this is a departure from the traditional view of the law of war as espoused by the ICRC and others in the international community.

Operation Enduring Freedom [...]

On February 7, 2002 the President issued a memorandum stating, in part,

> ... the war against terrorism ushers in a new paradigm .... Our nation recognizes that this new paradigm - ushered in not by us, but by terrorists - requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

Upon this premise, the President determined the Geneva Conventions did not apply to the U.S. conflict with al Qaeda, and that Taliban detainees did not qualify for prisoner of war status. Removed from the protections of the Geneva Conventions, al Qaeda and Taliban detainees have been classified variously as "unlawful combatants," "enemy combatants", and "unprivileged belligerents". [...]

The Panel notes the President qualified his determination, directing that United States policy would be "consistent with the principles of Geneva." Among other things, the Geneva Conventions adhere to a standard calling for a delineation of rights for all persons, and humane treatment for all persons. They suggest that no person is "outlaw", that is, outside the laws of some legal entity.

The Panel finds the details of the current policy vague and lacking. Justice Sandra Day O'Connor, writing for the majority in *Hamdi v Rumsfeld,* June 28, 2004 points out "the Government has never provided any court with the full criteria that it uses in classifying individuals as (enemy combatants)." Justice O'Connor cites several authorities to support the proposition that detention "is a clearly established principle of the law of war," but also states there is no precept of law, domestic or international, which would permit the indefinite detention of any combatant.

As a matter of logic, there should be a category of persons who do not comply with the specified conditions and thus fall outside the category of persons entitled to EPW status. Although there is not a particular label for this category in law of war conventions, the concept of "unlawful combatant" or "unprivileged belligerent" is a part of the law of war.

Operation Iraqi Freedom

Operation Iraqi Freedom is wholly different from Operation Enduring Freedom. It is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war. From the very beginning of the campaign, none of the senior leadership or command considered any possibility other than that the Geneva Conventions applied.

The message in the field, or the assumptions made in the field, at times lost sight of this underpinning. Personnel familiar with the law of war determinations for OEF in Afghanistan tended to factor those determinations into their decision-

making for military actions in Iraq. Law of war policy and decisions germane to OEF migrated, often quite innocently, into decision matrices for OIF. We noted earlier the migration of interrogation techniques from Afghanistan to Iraq. Those interrogation techniques were authorized for OEF. More important, their authorization in Afghanistan and Guantanamo was possible only because the President had determined that individuals subjected to these interrogation techniques fell outside the strict protections of the Geneva Conventions.

One of the more telling examples of this migration centers around CJTF-7's determination that some of the detainees held in Iraq were to be categorized as unlawful combatants. "Unlawful combatants" was a category set out in the President's February 7, 2002 memorandum. Despite lacking specific authorization to operate beyond the confines of the Geneva Conventions, CJTF-7 nonetheless determined it was within their command discretion to classify, as unlawful combatants, individuals captured during OIF. CJTF-7 concluded it had individuals in custody who met the criteria for unlawful combatants set out by the President and extended it in Iraq to those who were not protected as combatants under the Geneva Conventions, based on the OLC opinions. While CJTF-7's reasoning is understandable in respect to unlawful combatants, nonetheless, they understood there was no authorization to suspend application of the Geneva Conventions, in letter and spirit, to all military actions of Operation Iraqi Freedom. In addition, CJTF-7 had no means of discriminating detainees among the various categories of those protected under the Geneva Conventions and those unlawful combatants who were not. [...]

THE ROLE OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

Since December 2001, the International Committee of the Red Cross (ICRC) has visited US detention operations in Guantanamo, Iraq and Afghanistan numerous times. Various ICRC inspection teams have delivered working papers and reports of findings to US military leaders at different levels. While ICRC has acknowledged U.S. attempts to improve the conditions of detainees, major differences over detainee status as well as application of specific provisions of Geneva Conventions III and IV remain. If we were to follow the ICRC's interpretations, interrogation operations would not be allowed. This would deprive the U.S. of an indispensable source of intelligence in the war on terrorism. [...]

One important difference in approach between the U.S. and the ICRC is the interpretation of the legal status of terrorists. According to a Panel interview with CJTF-7 legal counsel, the ICRC sent a report to the State Department and the Coalition Provisional Authority in February 2003 citing lack of compliance with Protocol 1. But the U.S. has specifically rejected Protocol 1 stating that certain elements in the protocol, that provide legal protection for terrorists, make it plainly unacceptable. Still the U.S. has worked to preserve the positive elements of Protocol 1. In 1985, the Secretary of Defense noted that "certain provisions of Protocol 1 reflect customary international law, and others appear to be positive new developments. We therefore intend to work with our allies and others to develop a common understanding or declaration of principles incorporating

these positive aspects, with the intention they shall, in time, win recognition as customary international law." In 1986 the ICRC acknowledged that it and the U.S. government had "agreed to disagree" on the applicability of Protocol 1. Nevertheless, the ICRC continues to presume the United States should adhere to this standard under the guise of customary international law.

This would grant legal protections to terrorists equivalent to the protection accorded to prisoners of war as required by the Geneva Conventions of 1949 despite the fact terrorists do not wear uniforms and are otherwise indistinguishable from non-combatants. To do so would undermine the prohibition on terrorists blending in with the civilian population, a situation which makes it impossible to attack terrorists without placing non-combatants at risk. For this and other reasons, the U.S. has specifically rejected this additional protocol.

The ICRC also considers the U.S. policy of categorizing some detainees as "unlawful combatants" to be a violation of their interpretation of international humanitarian law. It contends that Geneva Conventions III and IV, which the U.S. has ratified, allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities. In the ICRC's view, the category of "Unlawful combatant" deprives the detainees of certain human rights. It argues that lack of information regarding the reasons for detention and the conditions for release are major sources of stress for detainees.

However, the 1949 Geneva Conventions specify conditions to qualify for protected status. By logic, then, if detainees do not meet the specific requirements of privileged status, there clearly must be a category for those lacking in such privileges. The ICRC does not acknowledge such a category of "unprivileged belligerents", and argues that it is not consistent with its interpretation of the Geneva Conventions. [...]

On balance, the Panel concludes there is value in the relationship the Department of Defense historically has had with the ICRC. The ICRC should serve as an early warning indicator of possible abuse. Commanders should be alert to ICRC observations in their reports and take corrective actions as appropriate. The Panel also believes the ICRC, no less than the Defense Department, needs to adapt itself to the new realities of conflict, which are far different from the Western European environment from which the ICRC's interpretation of Geneva Conventions was drawn. The Department of Defense has established an office of detainee affairs and should continue to reshape its operational relationship with the ICRC.

RECOMMENDATIONS [...]

9. The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21st Century. In doing so, the United States should emphasize the standard of reciprocity, in spite of the low probability that such will be extended to United States Forces by some adversaries, and the preservation of United States societal values and international image that flows from an adherence to recognized humanitarian standards. [...]

[APPENDIX C:]

THE WHITE HOUSE
WASHINGTON
February 7, 2002

MEMORANDUM FOR: THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of Al Qaeda and Taliban Detainees
[...]

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

   a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

   b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

   c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

   d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva. [...]

[*Signed:* G.W. Bush.]

[APPENDIX H:]
ETHICAL ISSUES
Introduction

For the United States and other nations with similar value systems, detention and interrogation are themselves ethically challenging activities. Effective interrogators must deceive, seduce, incite, and coerce in ways not normally acceptable for members of the general public. As a result, the U.S. places restrictions on who may be detained and the methods interrogators may employ. Exigencies in the Global War on Terror have stressed the normal American boundaries associated with detention and interrogation. In the ensuing moral uncertainty, arguments of military necessity make the ethical foundation of our soldiers especially important.

Ethical Foundations of Detention and Interrogation

Within our values system, consent is a central moral criterion on evaluating our behavior towards others. Consent is the manifestation of the freedom and dignity of the person and, as such, plays a critical role in moral reasoning. Consent *restrains*, as well as *enables*, humans in their treatment of others. Criminals, by not respecting the rights of others, may be said to have consented - in principle - to arrest and possible imprisonment. In this construct - and due to the threat they represent - insurgents and terrorists "consent" to the possibility of being captured, detainees, interrogated, or possibly killed. [...]

Permissions and Limits on Interrogation Techniques

For the U.S., most cases for permitting harsh treatment of detainees on moral grounds begin with variants of the "ticking time bomb" scenario. The ingredients of such scenarios usually include an impending loss of life, a suspect who knows how to prevent it - and in most versions is responsible for it - and a third party who has no humane alternative to obtain the information in order to save lives. Such cases raise a perplexing moral problem: It is permissible to employ inhumane treatment when it is believed to be the only way to prevent loss of lives? In periods of emergency, and especially in combat, there will always be a temptation to override legal and moral norms for morally good ends. Many in Operations Enduring Freedom and Iraqi Freedom were not well prepared by their experience, education, and training to resolve such ethical problems.

A morally consistent approach to the problem would be to recognize there are occasions when violating norms is understandable but not necessarily correct - that is, we can recognize that a good person might, in good faith, violate standards. In principle, someone who, facing such a dilemma, committed abuse should be required to offer his actions up for review and judgment by a competent authority. An excellent example is the case of a 4th Infantry Division battalion commander who permitted his men to beat a detainee whom he had good reason to believe had information abut future attacks against his unit. When the beating failed to produce the desired results, the commander fired his weapon near the detainee's head. The technique was successful and the lives of U.S. servicemen were likely saved. However, his actions clearly violated the Geneva Conventions and he reported his actions knowing he would be prosecuted by the Army. He was punished in moderation and allowed to retire.

In such circumstances interrogators must apply a "minimum harm" rule by not inflicting more pressure than is necessary to get the desired information. Further, any treatment that causes permanent harm would not be permitted, as this surely constitutes torture. Moreover, any pain inflicted to teach a lesson or after the interrogator has determined he cannot extract information is morally wrong.

National security is an obligation of the state, and therefore the work of interrogators carries a moral justification. But the methods employed should reflect this nation's commitment to our own values. Of course the tension between military necessity and our values will remain. Because of this, military professionals must accept the reality that during crises they may find themselves in circumstances where lives will be at stake and the morally appropriate methods to preserve those lives may not be obvious. This should not preclude action, but these professionals must be prepared to accept the consequences. [...]

B. Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defense Detention Operations

[**Source:** Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defence Detention Operations; 8.09.2004, available on http://www.icrc.org]

The Schlesinger Panel Report is a significant document and a welcome example of self-examination in the face of trying circumstances. It draws valuable lessons by naming violations, attributing responsibility, and offering recommendations designed to avoid repetition.

At the same time, the Panel Report contains a number of inaccurate assertions, conclusions and recommendations on the legal positions take by, and the role of, the ICRC, and about the laws of armed conflict.

The ICRC's reactions to them follow. [...]

II. ON THE LEGAL POSITIONS OF THE ICRC

A. Page 85: "If we were to follow the ICRC's interpretations, interrogation operations would not be allowed."

The ICRC has never stated, suggested or intimated that interrogation of any detainee is prohibited, regardless of the detainee's status or lack of status under the Geneva Conventions. The ICRC has always recognized the right of States to take measures to address their security concerns. It has never called into question the right of the US to gather intelligence and conduct interrogations in furtherance of its security interests. Neither the Geneva Conventions, nor customary humanitarian law, prohibit intelligence gathering or interrogation. They do, however, require that detainees be treated humanely and their dignity as human beings protected. More specifically, the Geneva Conventions, customary humanitarian law and the Convention against Torture prohibit the use of torture and other forms of cruel, inhuman or degrading treatment. This absolute prohibition is also reflected in other international legal instruments and in most national laws.

B. Page 86: "This [U.S. adherence to legal standards of detention contained in Additional Protocol I to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts] would grant legal protections to terrorists equivalent to the protections accorded to prisoners of war as required by the Geneva Conventions of 1949 despite the fact terrorists do not wear uniforms and are otherwise indistinguishable from combatants."

The provisions of Additional Protocol I to which the ICRC refers are the "fundamental guarantees" of Article 75. The U.S. has explicitly accepted these provisions as binding customary international law (see: "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", Michael J. Matheson, 2 Am.U.J.Int'l L.&Pol." Y419-31 (1987).

D. Page 86-7: "[The ICRC] contends that Geneva Conventions III and IV allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities."

The ICRC does not make such an assertion. Its reading of this issue is simply based on the Conventions themselves.

a) Civilians who pose a severe security risk may, indeed, be detained without criminal charge in international armed conflict. Their internment must be reviewed twice a year, but can be extended as long as hostilities continue and they continue to pose a serious security risk. They must be released as soon as possible after the end of the hostilities unless they are being prosecuted or serving a sentence.

b) All enemy combatants (whether they qualify for prisoner of war status or treatment under Geneva Convention III, or are covered by Geneva Convention IV or by the customary provisions of Article 75 Protocol I)

may be detained beyond the conflict if they are being prosecuted or are serving a sentence.

E. Page 87: "[I]f detainees do not meet the specific requirements of privileged status (under the Geneva Conventions), there clearly must be a category for those lacking such privileges. The ICRC does not acknowledge such a category of "unprivileged belligerents", and argues that it is not consistent with its interpretation of the Geneva Conventions."

Although the Panel acknowledges the existence of Geneva Convention IV Relative to the Protection of Civilians, it assumes that if one does not qualify for prisoner of war status under Geneva Convention III, one is necessarily outside the entire scheme of the Conventions. This reflects a failure to acknowledge that such persons are entitled to the protections of Geneva Convention IV if they fulfil the nationality criteria set forth by Article 4 of this Convention. The ICRC rejects the concept of a status outside the framework of armed conflict for persons who, in fact, are entitled to the protections of either Geneva Convention III or IV, or by the customary provisions of Article 75 Protocol I. This position is in line with the clear text of both Conventions and with the US position on the customary nature of Article 75 Protocol I.

III. ON THE LAWS OF ARMED CONFLICT

A. Page 81: "The Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III. Furthermore, the Panel accepts the conclusion the Geneva Convention IV and the provisions of domestic criminal law are not sufficiently robust and adequate to provide for the appropriate detention of captured terrorist."

1. Geneva Convention III and the relevant U.S. Army Regulations call for status determinations by a "competent tribunal" precisely to determine whether a person, having committed a belligerent act and having fallen into the hands of the enemy in the frame of an international armed conflict, meets the criteria for prisoner of war status. Thus, one cannot conclude that a detainee is not entitled to the protections of the Third Convention without first following the procedures set out in the Convention for making such a determination. See also II.E above.

2. The ICRC is concerned about the suggestion that Geneva Convention IV may be ignored because it is "not sufficiently robust". Geneva Convention IV explicitly acknowledges the existence of circumstances under which persons who fall within its terms may be deprived of their liberty. Such persons may be interned for imperative security reasons and for as long as these imperative reasons exist. They may be charged with criminal conduct, tried, convicted, and sentenced (to terms beyond the end of the conflict and even to death under certain conditions). They should be prosecuted for war crimes, that is, serious violations of the laws and customs of war. They can also be prosecuted for unlawful participation in hostilities (and therefore be

called "unlawful combatants", although this terminology is not used in IHL), but such prosecution does not entail their exclusion from the protection of Geneva Convention IV. Geneva Convention IV does not contain any prohibition of interrogation. Furthermore, the Panel's suggestion that because Geneva Convention IV would not be "sufficiently robust" it could be waived by decision of individual State parties is a dangerous premise. To accept this argument would mean creating an exception that risks undermining all the humanitarian protections of the law.

B. Page 82: "As a matter of logic, there should be a category of persons who do not comply with the specified conditions and thus fall outside the category of persons entitled to EPW (enemy prisoner of war) status. Although there is not a particular label for this category in law of war conventions, the concept of 'unlawful combatant' or 'unprivileged belligerent' is part of the law of war".

This assertion promotes the argument that persons who fail to qualify for prisoner of war status under Geneva Convention III are categorically outside of the protections of the Geneva Conventions. However, Geneva Convention IV, Article 4 provides protected status to persons "who find themselves... in the hands of a party to the conflict", unless they fail to meet certain nationality criteria or are covered by the other Geneva Conventions. Detainees not protected by those other Conventions, and who do meet the nationality criteria for coverage under Geneva Convention IV, do, indeed, "have a label in the law of war conventions". That label is "civilian", or "protected person" under Geneva Convention IV - even if they are definitely suspected of activity hostile to the security of the detaining State or of being "unlawful combatants". Persons who do not meet the nationality criteria are covered by Article 75 of Additional Protocol I to the Geneva Conventions. This article forms part of customary international law.

IV. ON THE RECOMMENDATIONS

A. The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21st Century. In doing so, the United States should emphasize the standard of reciprocity... The Panel believes the International Committee of the Red Cross, no less than the Defense Department, needs to adapt itself to the new realities of conflict which are fare different from the Western European environment from which the ICRC's interpretation of Geneva Conventions was drawn. (Recommendations 9 and 10).

The purpose and principles of humanitarian law are of universal origin. The perspective of the ICRC, which has been operating for 140 years and does so today in all corners of the globe, is firmly based on this tradition. The Geneva Conventions codify these principles and are among the most widely ratified international treaties in the world. That said, there is no doubt that the conflicts of today differ markedly from those that led to the Geneva Conventions of 1949, and the ICRC continues to initiate or participate in debates about how the Geneva Conventions can best be applied in contemporary situations of armed conflict.

Nevertheless, a decision to deviate unilaterally from these universally established standards should not be taken lightly. To date, there has been little evidence presented that faithful application of existing law is an impediment in the pursuit of those who violate the same law.

Moreover, the standard of reciprocity cannot apply to fundamental safeguards such as prohibition of torture without accepting the risk of destroying not only the principle of law, but also the very values on which it is built.

DISCUSSION

1. For which reasons do you think such a report was commissioned by the US Department of Defence? (*Cf.* Art. 1 common to the Conventions.)
2. Do you agree on the fact that "[...] in waging the Global War on Terror, the military confronts a far wider range of threats" than in other conflicts? Was the conflict against Iraq part of the "global war on terror"? Which kind of "new threats" could you think of? Which of those "new threats" raise issues not contemplated/regulated by existing rules of IHL?
3. Do you consider it possible to unilaterally "suspend [...] treaty obligations [...] for the duration of the conflict" if the said conflict takes place in a failed State? Under IHL? Under public international law? At least concerning Convention III? (*Cf.* Arts. 1 and 2 common to the Conventions and Art. 4 of Convention III.)
4. How far can States parties to the Convention against Torture (*See* http://www.icrc.org/ihl) and the Geneva Conventions go in interpreting the definitions of torture and other cruel, inhumane or degrading treatments? How could you justify that "as Commander in Chief exercising [...] wartime powers", a Head of State could "authorize torture if he so decided?"
5. Do the States parties to the treaties of IHL have the power to create new legal categories such as "unlawful combatants"?
6. Do you agree with the theory that Conventions III and IV allow for only two categories of detainees: prisoners of war and detained protected civilians (brought to trial, sentenced or held as civilian internees)? Why do you think that the ICRC is so insistent in excluding other categories? What rules of IHL would apply to such other categories of persons? (*Cf.* Art. 4 of Convention IV and Art. 75 of Protocol I.)
7. Can a State reject certain provisions of a treaty and at the same time "work to preserve the positive elements" of the said treaty? On which basis could the latter elements be considered as binding the concerned State?
8. Does the fact that "some incidents or abuse were clearly cases of individual criminal conduct" and that other incidents were the results of "misinterpretation of law or policy or confusion about what interrogation techniques were permitted" have an influence on the legal responsibility of the parties to the conflict? On the individual criminal responsibility of the perpetrators?

9. The report mentions a wide use of private individuals contracted to conduct interrogation operations in detention facilities. Is this resort to non-military personnel legal? What kind of problems could result from such practice? (*Cf.* Arts. 12, 39 and 127 of Convention III and Arts. 29, 99 and 144 of Convention IV.)

10. On which legal basis did the ICRC visit US detention operations in Guantánamo, Iraq and Afghanistan? Is this right to visit absolute? Can it be suspended? What are the purposes of such visits? (*Cf.* Art. 126 of Convention III and Arts. 5 and 143 of Convention IV.)

11. How far could and should the ICRC "adapt itself to the new realities of conflicts"? Is such an adaptation possible? Lawful? Necessary?

Case No. 158, Iraq, Medical Ethics in Detention

THE CASE

A. Abu Ghraib: its Legacy for Military Medicine

[**Source:** MILES, Steven H. *Abu Ghraib: its legacy for military medicine*, The Lancet, Volume 364, Nr 9435, 21 August 2004; footnotes omitted.]

The complicity of US military medical personnel during abuses of detainees in Iraq, Afghanistan, and Guantanamo Bay is of great importance to human rights, medical ethics, and military medicine. Government documents show that the US military medical system failed to protect detainees' human rights, sometimes collaborated with interrogators or abusive guards, and failed to properly report injuries or deaths caused by beatings. An inquiry into the behaviour of medical personnel in places such as Abu Ghraib could lead to valuable reforms within military medicine.

The policies

As the Bush administration planned to retaliate against al-Qaeda's terrorist attacks on the USA, it was reluctant to accept that the Geneva Convention Relative to the Treatment of Prisoners of War would apply to al-Qaeda detainees. In January, 2002, a memorandum from the US Department of Justice to the Department of Defense concluded that since al-Qaeda was not a national signatory to international conventions and treaties, these obligations did not apply. It also concluded that the Convention did not apply to Taliban detainees because al-Qaeda's influence over Afghanistan's government meant that it could not be a party to treaties. In February, 2002, the US president signed an executive order stating that although the Geneva Conventions did not apply to al-Qaeda or Taliban detainees, "our nation ... will continue to be a strong supporter of Geneva and its principles ... the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with

military necessity in a manner consistent with the principles of Geneva." This phrasing subordinates US compliance to the Geneva Convention to undefined "military necessity."

An August, 2002 Justice Department memorandum to the President and a March, 2003 Defense Department Working Group distinguished cruel, inhumane, or degrading treatment, which could be permitted in US military detention centres, from torture, which was ordinarily banned except when the President set aside the US commitment to the Convention in exercising his discretionary war-making powers. These memoranda semantically analysed the words "harm" or "profound disruption of the personality" in legal definitions of torture without grounding the terms on references to research showing the prevalence, severity, or duration of harm from abusing detainees. Also, the memoranda do not distinguish between coercive interrogation involving soldiers from those employing medical personnel or expertise. For example, both documents excuse the use of drugs during interrogation. Neither document mentions medical ethics codes or the history of medical or psychiatric complicity with torture or inhumane treatment.

In late 2002, the Secretary of Defense approved "Counter Resistance Techniques" including nudity, isolation, and exploiting fear of dogs for interrogating al-Qaeda suspects at Guantanamo. In April, he revised those techniques and advised those devising interrogation plans to give consideration to the view of other countries that some of the authorised techniques such as threats, insults, or intimidation violate the Geneva Convention. [...]

The Interrogation Rules of Engagement posted at Abu Ghraib stated: "[Interrogation] Approaches must always be humane ... Detainees will NEVER be touched in a malicious or unwanted manner ... the Geneva Conventions apply." These rules were imported from the US operation in Afghanistan and echoed the 2003 memo by the Secretary of Defense. They stated: "Wounded or medically burdened detainees must be medically cleared prior to interrogation" and approved "Dietary manipulation (monitored by med)" for interrogation. Defense Department memoranda define the latter as substituting hot meals to cold field rations rather than food deprivation but there are credible reports of food deprivation.

Although US military personnel receive at least 36 minutes of basic training on human rights, Abu Ghraib military personnel did not receive additional human rights training and did not train civilian interrogators working there. Military medical personnel in charge of detainees in Iraq and Afghanistan denied being trained in Army human rights policies. Local commanding officers were unfamiliar with the Geneva Convention or Army Regulations regarding abuses. [...]

The offences

Confirmed or reliably reported abuses of detainees in Iraq and Afghanistan include beatings, burns, shocks, bodily suspensions, asphyxia, threats against detainees and their relatives, sexual humiliation, isolation, prolonged hooding and shackling, and exposure to heat, cold, and loud noise. These include

deprivation of sleep, food, clothing, and material for personal hygiene, and denigration of Islam and forced violation of its rites. Detainees were forced to work in areas that were not demined and seriously injured. Abuses of women detainees are less well documented but include credible allegations of sexual humiliation and rape.

US Army investigators concluded that Abu Ghraib's medical system for detainees was inadequately staffed and equipped. The International Committee of the Red Cross (ICRC) found that the medical system failed to maintain internment cards with medical information necessary to protect the detainees' health as required by the Geneva Convention; this reportedly was due to a policy of not officially processing (ie, recording their presence in the prison) new detainees. Few units in Iraq and Afghanistan complied with the Geneva obligation to provide monthly health inspections. The medical system also failed to assure that prisoners could request proper medical care as required by the Geneva Convention. For example, an Abu Ghraib detainee's sworn document says that a purulent hand injury caused by torture went untreated. The individual was also told by an Iraqi physician working for the US that bleeding of his ear (from a separate beating) could not be treated in a clinic; he was treated instead in a prison hallway.

The medical system failed to establish procedures, as called for by Article 30 of the Geneva Convention, to ensure proper treatment of prisoners with disabilities. An Abu Ghraib prisoner's deposition reports the crutch that he used because of a broken leg was taken from him and his leg was beaten as he was ordered to renounce Islam. The same detainee told a guard that the prison doctor had told him to immobilise a badly injured shoulder; the guard's response was to suspend him from the shoulder. The medical system collaborated with designing and implementing psychologically and physically coercive interrogations. Army officials stated that a physician and a psychiatrist helped design, approve, and monitor interrogations at Abu Ghraib. This echoes the Secretary of Defense's 2003 memo ordering interrogators to ensure that detainees are "medically and operationally evaluated as suitable" for interrogation plans. In one example of a compromised medically monitored interrogation, a detainee collapsed and was apparently unconscious after a beating, medical staff revived the detainee and left, and the abuse continued. There are isolated reports that medical personnel directly abused detainees. Two detainees' depositions describe an incident where a doctor allowed a medically untrained guard to suture a prisoner's laceration from being beaten.

The medical system failed to accurately report illnesses and injuries. Abu Ghraib authorities did not notify families of deaths, sicknesses, or transfers to medical facilities as required by the Convention. A medic inserted a intravenous catheter into the corpse of a detainee who died under torture in order to create evidence that he was alive at the hospital. In another case, an Iraqi man, taken into custody by US soldiers was found months later by his family in an Iraqi hospital. He was comatose, had three skull fractures, a severe thumb fracture, and burns on the bottoms of his feet. An accompanying US medical report stated that heat stroke had triggered a heart attack that put him in a coma; it did not mention the injuries.

Death certificates of detainees in Afghanistan and Iraq were falsified or their release or completion was delayed for months. Medical investigators either failed to investigate unexpected deaths of detainees in Iraq and Afghanistan or performed cursory evaluations and physicians routinely attributed detainee deaths on death certificates to heart attacks, heat stroke, or natural causes without noting the unnatural aetiology of the death. In one example, soldiers tied a beaten detainee to the top of his cell door and gagged him. The death certificate indicated that he died of "natural causes during his sleep." After news media coverage, the Pentagon revised the certificate to say that the death was a "homicide" caused by "blunt force injuries and asphyxia." [...]

The legacy

Pentagon officials offer many reasons for these abuses including poor training, understaffing, overcrowding of detainees and military personnel, anti-Islamic prejudice, racism, pressure to procure intelligence, a few criminally-inclined guards, the stress of war, and uncertain lengths of deployment. Fundamentally however, the stage for these offences was set by policies that were lax or permissive with regard to human rights abuses, and a military command that was inattentive to human rights.

Legal arguments as to whether detainees were prisoners of war, soldiers, enemy combatants, terrorists, citizens of a failed state, insurgents, or criminals miss an essential point. The US has signed or enacted numerous instruments including the UN Universal Declaration of Human Rights, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Standard Minimum Rules for the Treatment of Prisoners, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and US military internment and inter-rogation policies, collectively containing mandatory and voluntary standards barring US armed forces from practicing torture or degrading treatments of all persons. [...]

The Geneva Convention states: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction ... The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... Outrages upon personal dignity, in particular, humiliating and degrading treatment ... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." [...]

Pentagon leaders testified that military officials did not investigate or act on reports by Amnesty International and the ICRC of abuses at Abu Ghraib and other coalition detention facilities throughout 2002 and 2003. The command at Abu Ghraib and in Iraq was inattentive to human rights organisations' and soldiers' oral and written reports of abuses. [...]

The role of military medicine in these abuses merits special attention because of the moral obligations of medical professionals with regard to torture and because of horror at health professionals who are silently or actively complicit with torture. Active medical complicity with torture has occurred throughout the world. Physicians collaborated with torture during Saddam Hussein's regime. Physicians' and nurses' professional organisations have created codes against participation in torture [*See infra* B. The Tokyo Declaration]. [...] Numerous non-medical groups have asserted that healers must be advocates for persons at risk of torture. [...]

At the operational level, medical personnel evaluated detainees for interrogation, and monitored coercive interrogation, allowed interrogators to use medical records to develop interrogation approaches, falsified medical records and death certificates, and failed to provide basic health care.

Which medical professionals were responsible for this misconduct? The US Armed Forces deploy physicians, physicians' assistants, nurses, medics (with several months of training), and various command and administrative staff. International statements assert that every health-care worker has an ethical duty to oppose torture. For example, the UN Principles of Medical Ethics Relevant to the Protection of Prisoners Against Torture refers to "health personnel," "particularly physicians" but it also names physicians' assistants, paramedics, physical therapists and nurse practitioners. Likewise, the Geneva Convention refers to the duties of physicians, surgeons, dentists, nurses, and medical orderlies. Furthermore, the US Armed Forces medical services are under physician commanders and each medic, as with civilian physicians' assistants, is personally accountable to a physician. Thus, physicians are responsible for the policies of the medical system; military medical personnel are should abide by the ethics of medicine regarding torture.

Abu Ghraib will leave a substantial legacy. Medical personnel prescribed anti-depressants to and addressed alcohol abuse and sexual misconduct in US soldiers in the psychologically destructive prison milieu. The reputation of military medicine, the US Armed Forces, and the USA was damaged. The eroded status of international law has increased the risk to individuals who become detainees of war since Abu Ghraib because it has decreased the credibility of international appeals on their behalf. [...]

B. The Tokyo Declaration

[**Source:** The Tokyo Declaration; Adopted by the 29th Wold Medical Assembly Tokyo, Japan, October 1975; available on http://www.wma.net/e/policy/c18.htm]

World Medical Association Declaration of Tokyo. Guidelines for Medical Doctors Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment.

Adopted by the 29th World Medical Assembly Tokyo, Japan, October 1975.

PREAMBLE

It is the privilege of the medical doctor to practise medicine in the service of humanity, to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease the suffering of his or her patients. The utmost respect for human life is to be maintained even under threat, and no use made of any medical knowledge contrary to the laws of humanity.

For the purpose of this Declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason.

DECLARATION

1. The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedures is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife.

2. The doctor shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment.

3. The doctor shall not be present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment is used or threatened.

4. A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible. The doctor's fundamental role is to alleviate the distress of his or her fellow men, and no motive whether personal, collective or political shall prevail against this higher purpose.

5. Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.

6. The World Medical Association will support, and should encourage the international community, the national medical associations and fellow doctors to support the doctor and his or her family in the face of threats or reprisals resulting from a refusal to condone the use of torture or other forms of cruel, inhuman or degrading treatment.

DISCUSSION

1. Which acts and omissions by medical personnel mentioned in Document A violated IHL? In your opinion, do the principles of medical ethics applicable in peacetime differ from the ones applicable in situations of armed conflict? (*Cf.* Arts. 13, 14, 17, 30, 31, 120 and 122 (2), (3), (5) and (6) of Convention III; Arts 16, 27, 29, 31, 32, 91, 92, 129, 137 and 138 of Convention IV and Arts. 11 and 16 of Protocol I.)
2. Are the members of military medical services subject to the same obligations as civilian healers? May military orders or procedures differ from established principles of medical ethics?
3. Document A of this case establishes that, in this particular context, a "collaboration" has been established between the medical staff and those in charge of interrogating prisoners and detainees. Is such collaboration possible? Never? Sometimes? If yes, under what conditions and in which circumstances? (*Cf.* Arts. 13, 14, 17 and 30 of Convention III; Arts. 16, 27, 29, 31, 32, 91, 92, 129, 137 and 138 of Convention IV and Arts. 11 and 16 of Protocol I.)

Case No. 159, Iraq, Occupation and Peacebuilding

THE CASE

A. UN Security Council Resolution 1483 (2003)

[**Source:** Resolution 1483 (2003) of the United Nations Security Council, 23 May 2003, online: http://www.un.org/documents/scres.htm]

The Security Council

[...]

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, *recalls* resolution 1325 (2000) of 31 October 2000, [...]

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority, [...]

4. *Calls* upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls* upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907; [...]

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through: [...]
   (e) promoting economic reconstruction and the conditions for sustainable development, [...]
   (i) encouraging international efforts to promote legal and judicial reform; [...]

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority; [...]

B. Orders of the Coalition Provisional Authority

[**Source:** Preliminary provisions of official documents of the *Coalition Provisional Authority* (CPA), Coalition Provisional Authority, "CPA Official Documents", online: http://www.cpa-iraq.org/regulations/index.html]

Regulations - are instruments that define the institutions and authorities of the Coalition Provisional Authority (CPA).

Orders - are binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.

Memoranda - expand on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation.

Public Notices - communicate the intentions of the Administrator to the public and may require adherence to security measures that have no penal consequence or reinforces aspects of existing law that the CPA intends to enforce.

[...]

1) CPA Order number 7: Penal Code (CPA/ORD/9 June2003/07)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war,

Reconfirming the provisions of General Franks' Freedom Message to the Iraqi People of April 16, 2003,

Recognizing that the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards,

Acting on behalf, and for the benefit, of the Iraqi people,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

1bis) CPA Order number 31: Modifications of Penal Code and Criminal Proceedings Law (CPA/ORD/10 Sep 2003/31)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recognizing that instances of kidnapping, rape, and forcible vehicle larceny represent a serious threat to the security and stability of the Iraqi population,

Understanding that attacks of looting or sabotage against critical electrical power and oil infrastructure facilities undermine efforts to improve the conditions of the Iraqi people,

Noting that the denial of pre-trial bail in certain cases and lengthy jail sentences represent deterrents to such conduct,

I hereby promulgate the following modifications of the Penal Code and Criminal Proceedings Law: [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

1ter) CPA Memorandum 3: Criminal Procedures (CPA/MEM/18 Jun 2003/03)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recognizing the CPA's obligation to restore law and order, provide for the safety of the people of Iraq, and ensure fundamental standards for persons detained,

Acting, in particular, consistent, with the Fourth Geneva Convention of 1949 Relative to the Treatment of Civilians in Time of War (hereinafter "The Fourth Geneva Convention"),

Noting the deficiencies of the Iraqi Criminal Procedure Code with regard to fundamental standards of human rights,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

2) CPA Order number 10: Management of Detention and Prison Facilities (CPA/ORD/8 Jun 2003/10)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recognizing the urgent necessity to ensure safe and humane prisons in order to re-establish law and order and provide for the safety of the people of Iraq,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

3) CPA Order number 13 (revised): The Central Criminal Court of Iraq (CPA/ORD/11 Jul 2003/13)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Committed to promoting the development of a judicial system in Iraq that warrants the trust, respect and confidence of the Iraqi people,

Noting the continuing need for military support to maintain public order,

Furthering the CPA's duty to restore and maintain order and its right to ensure its security and fundamental standards of due process;

Recognizing the role that Iraqi jurists and legal systems must assume in addressing those serious crimes that most directly threaten public order and safety,

Acting on behalf, and for the benefit, of the Iraqi people,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

4) CPA Order number 15: Establishment of the Judicial Review Committee (CPA/ORD/- Jul 2003/-)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Noting the obligation on the CPA to restore and maintain order and the right of the CPA to take measures for its security, to ensure fundamental standards of due process and to promote the rule of law,

Noting that the Iraqi justice system has been subjected to political interferences and corruption over years of Iraqi Ba'ath Party rule,

Noting that it is inherent to the stability of any society that the judicial system is independent and impartial but is seen to be so,

Recognizing the role that the Judicial Review Committee will have in ensuring as far as possible the highest standards of judicial service in,

Acting in accordance with the Administrator's Order Number 1 of May, 16 2003 on the De-Baathification of Iraqi Society (CPA/ORD 16 May 2003/01),

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

5) CPA Order No. 39: Foreign Investment (Amended by Order 46) (CPA/ORD/19 September 2003/39)

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA) and the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Having worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq,

Acknowledging the Governing Council's desire to bring about significant change to the Iraqi economic system,

Determined to improve the conditions of life, technical skills, and opportunities for all Iraqis and to fight unemployment with its associated deleterious effect on public security,

Noting that facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis,

Recognizing the problems arising from Iraq's legal framework regulating commercial activity and the way in which it was implemented by the former regime,

Recognizing the CPA's obligation to provide for the effective administration of Iraq, to ensure the well being of the Iraqi people and to enable the social functions and normal transactions of every day life,

Acting in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect,

Having coordinated with the international financial institutions, as referenced in paragraph 8(e) of the U.N. Security Council Resolution 1483, In close consultation with and acting in coordination with the Governing Council, I hereby promulgate the following: [...]

Section 3: Relation to Existing Iraqi Law

1) This Order replaces all existing foreign investment law. [...]

Section 4: Treatment of Foreign Investors

1) A foreign investor shall be entitled to made foreign investments in Iraq on terms no less favourable than those applicable to an Iraqi investor, unless otherwise provided herein.

2) The amount of foreign participation in newly formed or existing business entities in Iraq shall not be limited. [...]

Section 5: Areas of Foreign Investment

1) Foreign investment may take place with respect to all economic sectors in Iraq, except that foreign and direct ownership of the natural resources sector involving primary extraction and initial processing remains prohibited. In addition, this Order does not apply to banks and insurance companies. [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

5bis) CPA Order No. 54: Trade Liberalization Policy 2004 (CPA/ORD/24 February 2004/54)

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), and the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003),

Noting the responsibility of the Department of Border Enforcement, in CPA Order Number 26, to monitor and control the movement of persons and goods into and out of Iraq,

Further implementing the Reconstruction Levy imposed by CPA Order Number 38 (CPA/ORD/19 September 2003/38),

Having worked closely with the Governing Council, international organizations and relevant Ministries in developing policies that will foster international trade and a free market economy in Iraq,

I hereby promulgate the following: [...]

Section 1: Suspension of Customs Charges

All customs tariffs, duties, import taxes [...], and similar surcharges for goods entering or leaving Iraq are suspended until the sovereign transitional Iraqi administration imposes such charges following the CPA's transfer of full governance authority to that administration. [...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

5ter) CPA Order No. 64: Amendment to the Company Law No. 21 of 1997 (CPA/ORD/29 February 2004/64)

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA) and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003),

Having worked closely with the Governing Council to ensure that economic change as necessary to benefit the people of Iraq occurs in a manner acceptable to the people of Iraq,

[...] *Recognizing* that some of the rules concerning company formation and investment under the prior regime no longer serve a relevant social or economic purpose, and that such rules hinder economic growth,

Noting that Iraqi entrepreneurs and businesses will benefit from more streamlined requirements for forming companies and investing in them,

Recognizing the CPA's obligation to provide for the effective administration of Iraq, to ensure the well-being of the Iraqi people and to enable the social and economic functions and normal transactions of every day life,

Acting in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a nontransparent centrally planned economy to a free market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect, [...]

I hereby promulgate the following: [...]

14) Article 12, paragraph First of the Law is amended to read as follows: "A juridical or natural person foreign or domestic has the right to acquire membership in the companies stipulated in this law as founder, shareholder, or partner, unless such person is banned from such membership under the law, or due to a decision issued by a competent court or authorized governmental body."

[...]

(*signed*) L. Paul Bremer,
Administrator,
Coalition Provisional Authority

C. Daphne Eviatar, "Free Market Iraq? Not so fast", *New York Times* (10 January 2004)

[**Source:** EVIATAR Daphne, "Free Market Iraq? Not So Fast", in *New York Times*, 10 January 2004.]

There is no doubt about American intentions for the Iraqi economy. As Defense Secretary Donald H. Rumsfeld has said, "Market systems will be favored, not Stalinist command systems."

And so the American-led coalition has fired off a series of new laws meant to transform the economy. Tariffs were suspended, a new banking code was adopted, a 15 percent cap was placed on all future taxes, and the once heavily guarded doors to foreign investment in Iraq were thrown open.

In a stroke, L. Paul Bremer III, who heads the Coalition Provisional Authority, wiped out longstanding Iraqi laws that restricted foreigners' ability to own property and invest in Iraqi businesses. The rule, known as Order 39, allows foreign investors to own Iraqi companies fully with no requirements for reinvesting profits back into the country, something that had previously been restricted by the Iraqi constitution to citizens of Arab countries.

In addition, the authority announced plans last fall to sell about 150 of the nearly 200 state-owned enterprises in Iraq, ranging from sulfur mining and pharmaceutical companies to the Iraqi national airline.

But the wholesale changes are unexpectedly opening up a murky area of international law, prompting thorny new questions about what occupiers should and should not be permitted to do. While potential investors have applauded the new rules for helping rebuild the Iraqi economy, legal scholars are concerned that the United States may be violating longstanding international laws governing military occupation.

History provides limited guidance. The United States signed both the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 and has incorporated their mandates regarding occupation into the Army field manual "The Law of Land Warfare." But foreign armies, whether the Vietnamese in Cambodia, the Turks in Northern Cyprus or the United States in Panama and Haiti, have rarely declared themselves to be occupying forces. After World War II, for example, the Allies claimed the Hague regulations did not apply because they had sovereign power in Germany and Japan, which had surrendered. And although most of the world calls Israel's control of the West Bank and Gaza since 1967 an occupation, the Israeli government has not accepted that status, although it has said it will abide by occupation law.

Reconstruction and privatization in Kosovo, for example, have been bitterly debated. The United Nations authority over Kosovo, set up by the peace treaty after a war that was unsanctioned by the United Nations, hesitated to privatize what was in essence seized state property, but it decided the economic future of Kosovo was too important to wait for a final peace settlement that would fix Kosovo's legal status.

The government in Belgrade and the much-reduced Serbian community in Kosovo have argued that such sales are specifically forbidden in the United

Nations resolution setting up the authority itself. This dispute, though similar, sidesteps questions of occupation law because Kosovo, unlike Iraq, involves United Nations and NATO forces.

In Iraq the latest pronouncements by the Security Council only add to the muddle. Resolution 1483, issued in May, explicitly instructs the occupying powers to follow the Hague Regulations and the Geneva Convention, but in a strange twist it also suggests that the coalition should play an active role in administration and reconstruction, which many scholars say violates those treaties.

The conflict centers on Article 43 of the Hague Regulations, which says an occupying power must "re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

In other words, the occupying power is like a temporary guardian. It is supposed to restore order and protect the population but still apply the laws in place when it arrived, unless those laws threaten security or conflict with other international laws.

"Under the traditional law the local law should be kept unchanged as much as possible," said Eyal Benvenisti, professor of international law at Tel Aviv University and author of "The International Law of Occupation" (Princeton, 1993). Repairing roads, factories and telephone systems, then, is a legitimate way to get the economy running again. But transforming a tightly restricted, centrally planned economy into a free-market one may not be.

In a memo written last March and leaked in May to *The New Statesman*, the British magazine, Lord Goldsmith, Prime Minister Tony Blair's top legal adviser, warned that "the imposition of major structural economic reforms" might violate international law, unless the Security Council specifically authorized it.

Officials of the coalition authority insist the Security Council did that with Resolution 1483. They maintain that wiping out Saddam Hussein's entire economic system falls within Resolution 1483's instructions "to promote the welfare of the Iraqi people through the effective administration of the territory" and assist the "economic reconstruction and the conditions for sustainable development."

So the authority is pressing ahead with most of the plans for economic reform in Iraq and promises to have new laws in Iraq governing, among other things, business ownership, foreign investment, banking, the stock exchange, trade and taxes by June, when power is to be transferred to the Iraqis.

"We believe the C.P.A. can undertake significant economic measures in Iraq particularly where those measures support coalition objectives and the security of coalition forces," said Scott Castle, general counsel to the coalition. "There's a close nexus between the economic health of Iraq and the security of Iraq."

Some experts in international law call that a stretch. "The Security Council cannot require you to comply with occupation law on one hand and on the other give you authority to run the country in defiance of that law," said David Scheffer, a professor of international law at Georgetown University and a former United

States ambassador at large for war crimes issues. He added that "1483 is internally inconsistent."

Order 39 "raises the biggest single question about coalition policy as it relates to the laws of war," said Adam Roberts, a professor of international relations at Oxford University and an editor of "Documents on the Laws of War" (Oxford, 2000). "That order embodies a major change not just in human rights or the political situation, but in the economic one. It would appear to go further in a free market direction and in allowing external economic activity in Iraq than what one would expect under the provisions of the 1907 Hague law about occupations."

International business lawyers at a conference of investors in London in October similarly warned that the coalition authority's orders might not be legal.

Part of the problem is that the old occupation law does not seem to fit the realities of modern warfare. As Mr. Benvenisti explains in his book and in a forthcoming article in the Israel Defense Forces law review, when the Hague regulations were initially drafted, war was understood to be a legitimate contest between professional armies, not a messy attempt to remove a tyrannical leader.

"The Hague law reflects the interests of sovereigns to maintain their basis of power, their property and their institutions," Mr. Benvenisti said. Instead of wholesale transformation of a nation, then, occupation was supposed to be a short, transient state of affairs, with minimal intervention of the occupying authority in the lives of civilians.

But in Iraq the United States' explicit goal is to completely remake Iraqi institutions and society. "Their objectives far exceed the constraints of the law," Mr. Scheffer said, noting that occupation laws were restrictive precisely in order to prevent overzealousness on the part of an occupying power. "We're squeezing transformation into a very tight square box called occupation law, and the two really are not a good match."

In a forthcoming article in the *American Journal of International Law*, he sets forth a dozen possible violations by the occupying powers of international law, including failure to plan for and prevent the looting of hospitals, museums, schools, power plants, nuclear facilities, government buildings and other infrastructure; failure to maintain public order and safety during the early months of the occupation; and excessive civilian casualties.

In the article Mr. Scheffer explains how individuals could use United States laws to sue individual coalition officials in American courts. "This is a rather uncharted field in U.S. jurisprudence," he said in an interview. "But I would not underestimate how far litigation might go."

Ruth Wedgwood, a professor of international law at Johns Hopkins University and a member of the Defense Policy Board, which advises the Pentagon, is not so concerned. In her view the Iraqi laws do not deserve much deference because they were issued by an authoritarian government. "If it's not a democratically crafted law, it lacks the same legitimacy," she said.

Coalition officials have recently backtracked on privatization, in part because of the legal concerns. "We recognize that any process for privatizing state-owned

enterprises in Iraq ultimately must be developed, adopted, supported and implemented by the Iraqi people," Mr. Castle said.

Still, some specialists worry that the radical economic changes that are moving forward will lack legitimacy in the eyes of Iraqi citizens. Iraqis may see such wholesale economic transformation as "threatening and potentially exploitative," said Samer Shehata, professor of Arab politics at Georgetown University. "I think the sensible answer is to leave extremely important decisions like the possibility of complete foreign ownership of firms to a later date, when a legitimate Iraqi government is elected by the Iraqi people in free and fair elections."

DISCUSSION

1. In general, what powers, responsibilities and obligations do occupying forces have in relation to maintenance of law and order? May an occupying power introduce changes to legislation and to the political and economic system necessary to consolidate peace? Does it matter whether the local legislation had been democratically adopted? (*Cf.* Art. 43 of the Hague Regulations [*See* **Document No. 1**, The Hague Regulations, p. 517.] and Arts. 47 and 64 of Convention IV.)

2. In this case, do the changes created by the Coalition Provisional Authority (CPA) respect the letter and spirit of the provisions of Convention IV relating to penal legislation in an occupied territory? Are they perhaps even required by IHL? (*Cf.* Arts. 64, 67, 68 and 71-76 of Convention IV.)

3. a. Does IHL permit the Coalition to not apply local Iraqi law that contravenes the principles and rules of international law? Which rules? Which principles? (*Cf.* Art. 43 of the Hague Regulations and Art. 64 of Convention IV.)

   b. Does international human rights law apply in an occupied territory? Does IHL prevail in all respects? Do the treaty obligations of the occupying power or those of the occupied power apply? Does IHL permit occupying forces to abolish institutions and rules contrary to human rights? (*Cf.* Art. 43 of the Hague Regulations and Art. 64 of Convention IV.)

4. a. What would justify the introduction of fundamental changes, such as the reform of the economic system, administrative structures, or the electoral system, by the coalition forces?

   b. Would a Security Council resolution be sufficient to authorize such changes? If so, would this not invoke a *ius ad bellum* argument to respond to an issue arising in *ius in bello* (that is, the law of military occupation)?

5. What are the implications of the recognition of the United States and the United Kingdom as occupying powers in resolution 1483 for the IHL that is applicable?

6. Who or what gives the CPA the right to legislate? The CPA itself? IHL? Security Council resolution 1483?

7. What changes may an occupying power make to the economic system? May the United States introduce a free-market economy in Iraq under IHL? Can the United States argue that IHL obliges it to make such changes?

Case No. 160, Iraq, The Trial of Saddam Hussein

THE CASE

A. Iraq: Law of Occupation

[**Source:** House of Commons Library, Research Paper 03/51, "Iraq: Law of Occupation", 3 June 2003, online: http://www.parliament.uk/commons/lib/research/rp2003/rp03-051.pdf]

This paper discusses some legal issues surrounding the occupation of Iraq during and after Operation *Iraqi Freedom* in spring 2003. It gives an account of UN Security Council Resolution 1483, of 22 May 2003. [...]

Summary of main points

- The USA and the UK have the status of occupying powers in Iraq.
- This started as soon as they took control of portions of Iraqi territory. The status of occupying power is a matter of *de facto* control. It does not matter whether their military campaign was lawful.
- The main laws on occupation are in The Hague Regulations of 1907 and the fourth Geneva Convention of 1949. Other laws are relevant as well.
- Occupying powers have a duty to maintain public order and safety. They have the right to protect themselves. They do not take over sovereignty.
- Occupying powers may make limited changes to institutions, laws and other arrangements, but these must serve the general purposes of maintaining order, safety and security. [...]
- The UN Security Council passed Resolution 1483 on 22 May 2003. This recognises the role of the USA and the UK and calls on them to administer Iraq effectively in order to benefit the Iraqi people. It allows the creation of an interim administration, to be run by Iraqis, until a new government is formed.
- Security Council Resolution 1483 sets up a post of UN Secretary-General's Special Representative for Iraq. Sergio Vieira de Mello, UN High Commissioner for Human Rights, has been appointed. He will coordinate UN activities and liaise with the occupying powers.

[...]

IV. Justice

The Saddam Hussein regime was accused of many very serious crimes. These included systematic and widespread torture, arbitrary justice, extrajudicial killing and "disappearances." Crimes against humanity, and possibly genocide, were committed during campaigns against the Kurds, in particular the Anfal campaign of the late 1980s, and against the Marsh Arabs, in particular in the early 1990s. War crimes were committed during the Iran-Iraq War, and during the invasion, occupation and resistance to the liberation of Kuwait. The brutality of the regime was regarded as a key factor in its survival, and reportedly this plays strongly still in the minds of Iraqis today. There are suggestions that the business of reconstruction may itself be hampered by fear among Iraqis, who have yet to see conclusive proof that the previous regime is wholly unable to return. Justice is likely to be an important issue in practical as well as moral and emotional terms.

Security Council Resolution 1483 [*See* **Case No. 159**, p. 1645.] does not make detailed provision for the administration of justice. [...]

In the Preamble the Security Council affirms "the need for accountability for crimes and atrocities committed by the previous Iraqi regime." In Paragraph 3 it appeals to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice. It does not define the membership of "the previous Iraqi regime."

A. Options

a. Geneva provisions

Geneva Convention IV covers the legal system in Articles 64 to 77. These provisions are not aimed primarily at the trial of serious international offences, but they would apply if members of the previous regime were tried in Iraq by the occupying powers.

The existing penal laws should remain in force, unless they constitute a threat to the security of the occupying power or an obstacle to the application of the Convention itself. In these two cases, the laws of the occupied territory may be repealed or suspended by the occupying power. The occupying power may also introduce new laws if these are essential to enable it to fulfil its obligations under the Convention, to maintain order, and to maintain its own security.

It might appear that the maintenance of existing laws would create the absurdity of coalition forces in Iraq having to uphold the oppressive laws and penalties of the Saddam Hussein regime. However, the provision that they may be varied if they present an obstacle to the application of the Convention would seem to circumvent this difficulty. Beyond this, the occupying powers are bound by their other legal obligations, for instance, for the UK, those arising from the *Rome Statute of the International Criminal Court* 1998, and the strict application of existing law could conflict with these. Equally, as mentioned above, there is a precedent in the case of Nazi Germany for existing laws to be set aside on the grounds of their manifest inhumanity.

Under Article 66 the occupying power may establish "non-political military courts" to try offences against the laws it has promulgated. Under Article 68 it may impose the death penalty for these offences, but only in cases of espionage, serious sabotage against its military installations or intentional acts causing death, and only if these were capital offences in the territory concerned before the occupation.

Civilians may not be prosecuted for acts committed before the occupation, except in the case of breaches of the laws and customs of war.

Under Article 67, the courts shall apply only those provisions of law, applicable prior to an offence, "which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence."

The fair trial provisions for those prosecuted by the occupying power are set out in Articles 71 to 74. They include the right to be charged in a language understood by the accused, and the rights to present evidence, to call witnesses and to choose legal representation. There is also a right of appeal.

b. International Criminal Court

The Prosecutor of the International Criminal Court (ICC) may investigate a situation either on his own initiative, or at the request of a state party to the Rome Statute of the ICC, or at the request of the Security Council in a resolution adopted under Chapter VII of the UN Charter. If he investigates on his own initiative or at the request of a state party, an indictee must either be a national of a state party or have committed the alleged offences in the territory of a state party. Iraq is not a party to the Rome Statute. If the Prosecutor investigates at the request of the Security Council, these restrictions on nationality and territory do not apply.

Iraqis accused of war crimes, crimes against humanity or genocide could be brought before the ICC at the request of the Security Council. Without a Security Council resolution they could be prosecuted only for crimes committed on the territory of a state party to the Rome Statute. They could not be prosecuted at the ICC for crimes committed before the entry into force of the Rome Statute on 1 July 2002.

c. *ad hoc* tribunal

The Security Council could establish an *ad hoc* tribunal to deal with crimes committed by members of the Iraqi regime, armed forces and others, in the same way that it did for the former Yugoslavia and Rwanda. This would be done by means of a resolution setting out the jurisdiction of the tribunal. The Council could define jurisdiction broadly as it saw fit, citing the relevance to international peace and security, for which it has responsibility. The tribunals for former Yugoslavia and Rwanda have retrospective jurisdiction.

Two other methods have been used in the past. The Nuremberg Tribunal was established by agreement of the Allies, embodied in a treaty, and the Tokyo Tribunal was established under US military powers. Today, the latter would be subject to the Geneva provisions mentioned above.

d. national courts

The Iraqi courts could bring to justice those accused of breaking Iraqi law, while third states could seek to prosecute crimes over which they have jurisdiction. Some states claim universal jurisdiction over serious international crimes, such as torture and war crimes.

An alternative model might be found in Sierra Leone. There a Special Court has been established to try those accused of the most serious crimes in the civil war. The Special Court was set up at Sierra Leone's request by means of an agreement between the UN and Sierra Leone. It has a hybrid nature, with jurisdiction over both international crimes and crimes existing under Sierra Leonean law. It is staffed by both local and international judges and prosecutors, appointed partly by the UN and partly by the Sierra Leone Government, after mutual consultation.

B. Comments

The Foreign Secretary, Jack Straw, made comments on trials for members of the Saddam Hussein regime in response to a question by Douglas Hogg:

> "I cannot give the right hon. and learned Gentleman a precise, definite answer because these matters are still subject to discussion with the United States Government, and they will not be resolved until a functioning interim authority has been established. We want the Iraqi people, in the main, to take responsibility for ensuring justice in respect of former members of the regime. They had no effective justice system during the 24 years of Saddam Hussein's rule, but historically Iraq had a reasonably well functioning and fair judicial system. I held a discussion last week with British Ministers about how our Government could aid and assist in the creation of a new judicial system in Iraq, and I am happy to write to the right hon. and learned Gentleman about that."

There is a question as to whether an international tribunal should be established to try the leaders of the regime. We have not ruled that out, but I am sceptical because of the vast costs of the international tribunals set up to deal with Yugoslavia and, even worse, Rwanda. The right hon. and learned Gentleman did not mention the International Criminal Court, but let me say that it does not have a direct role because its jurisdiction is only for events that took place after July last year (HC Deb 28 April 2003, cc32-3).

Pierre-Richard Prosper, the US Ambassador for War Crimes, was interviewed by the *Daily Telegraph* in April 2003. The report gave the following account of his arguments:

> "those accused of war crimes against US troops in recent weeks or during the Gulf war should be tried by military tribunals or civilian courts in America, while offences against Kuwaitis and Iranians should be dealt with by their respective countries."

As for Saddam's crimes, he believes that the Iraqis themselves should take the lead, and that their former president and his henchmen should be tried in Iraq itself. "We really need to allow the Iraqis the opportunity to do this. They are the victims. It

is their country that was oppressed and abused. We want them to have a leadership role, and we're there to be supportive." (*Daily Telegraph*, 21 April 2003).

The *Economist* argued that the model for trying in the USA those accused of crimes against US forces "should not be contentious," but it went on, America's current plan for the top leaders of Saddam's regime is far more controversial, and almost certainly a mistake. This is to reject the idea of an international tribunal, and instead to hold trials before Iraqi-only courts. The administration's stated goals are laudable. It rightly argues that the worst crimes of Saddam's regime were against the Iraqi people, and so concludes that they themselves should be the ones to judge their tormentors. Iraqi-controlled trials will also help establish the rule of law in Iraq, claims the administration, providing the cornerstone of a new, sorely-needed legal system.

These are indeed desirable goals, but they are unlikely to be achieved through locally controlled trials of Saddam, if he is caught alive, or his minions. Iraq's judges and lawyers have all been compromised by their own involvement in decades of repression. Returning Iraqi exiles, themselves victims of the regime, would also lack credible impartiality, even in the eyes of most Iraqis. The usual pattern after the fall of dictatorships is the escape of top leaders, revenge killings and kangaroo courts. Such could yet be the turn of events in Iraq. Trials held under American auspices will also be too easy for sceptics, inside as well as outside Iraq, to dismiss as "victors' justice." (*Economist*, 3 May 2003). The *Economist* went on to advocate either an international tribunal, as in the cases of former Yugoslavia and Rwanda, or a mixed court, as in Sierra Leone. [...]

B. Iraq: Memorandum on Concerns Relating to Law and Order

[**Source:** Amnesty International, "Iraq: Memorandum on concerns relating to law and order", (23 July 2003) MDE14/157/2003, online: http://web.amnesty.org/library/index/engmde141572003]

II. AMNESTY INTERNATIONAL'S CONCERNS

1. Applicable international law

Amnesty International welcomes the fact that the US and UK governments, in exercising their authority as the occupying powers through the CPA, have made use of international human rights standards to inform the formation of new legislation and the suspension of certain provisions of Iraqi law which were inconsistent with such standards. For example, we welcome the use of provisions of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners as a basis for CPA Memorandum Number 2 on Management of Detention and Prison Facilities. We also welcome the CPA's suspension of the death penalty, a step which is consistent with the internationally recognized desirability of its abolition.

However, we are concerned at the statement in a letter, dated 27 June 2003, to Amnesty International from Ambassador Paul Bremer, the CPA Administrator, that "the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949. This Convention takes precedence, as a matter of law, over other human rights conventions."

Amnesty International stresses that, consistent with international humanitarian law, Coalition states are also under an obligation to respect the provisions of the human rights treaties to which they are a party, as well as those to which Iraq is a party, especially given that these treaties have been formally incorporated into Iraqi domestic law. Iraq is a party to the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Elimination of All Forms of Discrimination against Women.

The Human Rights Committee, set up under the ICCPR, and other bodies monitoring the implementation by states of their human rights obligations under the treaties they have ratified, have consistently ruled that such obligations extend to any territory in which a state exercises jurisdiction or control, including territories occupied as a result of military action. International human rights law complements provisions of international humanitarian law, for example by providing content and standards of interpretation, such as on the use of force to respond to disorders outside combat situations or with regard to safeguards for criminal suspects.

Amnesty International also points out that the European Convention for the Protection of Human Rights and Fundamental Freedoms is applicable to the conduct of forces belonging to Coalition states, such as the UK, that are parties to this treaty. Commenting on the extra-territorial application of the Convention in its Decision as to Admissibility in Bankovic (Application no. 52207/99), the European Court of Human Rights stated (para 71):

> "the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".

Recommendation

Amnesty International urges the CPA to recognize the applicability of international human rights law and standards, as complementary to international humanitarian law, and to abide by all the relevant obligations. [...]

C. Tribunal Established Without Consultation

[**Source:** Amnesty International, "Tribunal established without consultation", Press Release, 10 December 2003, MDE14/181/2003, online: http://web.amnesty.org/library/index/engmde141812003]

Iraq: Tribunal established without consultation

Amnesty International has expressed concern to the Coalition Provisional Authority (CPA) and the Iraqi Governing Council about the decision to establish an Iraqi special tribunal that was taken without prior consultation with the Iraqi civil society or the international community.

"We have been urging that the proposals to establish the tribunal be subject to widespread consultation within Iraqi civil society, especially the legal profession and human rights groups, as well as the international community," said Amnesty International today. "Unfortunately, the draft statute of the tribunal was not made public before its adoption."

Under international humanitarian law, the authority of the CPA as an Occupying Power to establish a tribunal of the scope envisaged for the Iraqi special tribunal is doubtful at best. Amnesty International is concerned about reports that the tribunal will use Iraqi criminal code - some aspects of which are inconsistent with international human rights standards - to regulate trial procedures and define crimes and punishments.

"We are particularly concerned that the Iraqi Penal Code provides for the death penalty for crimes under the jurisdiction of the tribunal," said Amnesty International.

Amnesty International is seeking a copy of the statute that was adopted in order to analyze it in detail.

D. Iraqi Special Tribunal: Questions & Answers

[**Source:** Human Rights First, "Iraqi Special Tribunal: Questions and Answers", http://www.humanrightsfirst.org/international_justice/w_context/w_cont_10.htm]

On the basis of what authority was the tribunal established and what is its supervisory body?

The Statute of the Iraqi Special Tribunal was enacted directly by the Iraqi Governing Council on December 10, 2003. The then-U.S. Administrator for Iraq, Paul Bremer, temporarily ceded legislative authority to the Council for that purpose.

The Interim Government of Iraq has assumed all of the supervisory powers given under the Statute to the Governing Council.

Who will the tribunal try?

The Statute provides the tribunal with jurisdiction over Iraqi nationals or residents of Iraq.

It also includes the principle of command responsibility, according to which not only those who directly commit a crime, but those in the chain of command who order it to be carried out can be held responsible. It further specifies that no one shall have immunity from criminal responsibility, for instance because of any official position including head of state.

At this time, it is unclear how many individuals will be tried by the tribunal or how many trials will take place.

Currently, 12 former high-ranking members of the former Ba'ath regime have appeared before an Iraqi judge and are apparently awaiting indictment. [...]

What crimes can the tribunal prosecute?

The tribunal has jurisdiction over crimes against humanity, war crimes and genocide.

The tribunal also is able to prosecute three crimes under Iraqi law:

- Attempting to manipulate the judiciary
- Wasting national resources or squandering public assets and funds
- Abusing position and pursuing policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country

For the tribunal to have jurisdiction, these crimes must have been committed between July 17, 1968 - the date on which the Ba'ath party came to power in Iraq by a political coup in which Saddam Hussein played a leading role - and May 1, 2003 - the date President Bush declared that major combat operations in Iraq had ended.

It is not necessary for the crimes to have been committed on the territory of Iraq. The tribunal also has jurisdiction to prosecute crimes committed elsewhere by Iraqi nationals or residents of Iraq, such as during Iraq's war against Iran (1980-1988) and its invasion and occupation of Kuwait (1990-1991). [...]

Who are the judges?

[...] According to the Statute, the authority to appoint judges and investigative judges resided with the Governing Council, and now rests with the Interim Government, which is required to consult on all appointments with a new Judicial Council.

In general, the Statute provides that judges and investigative judges shall be Iraqi nationals. It allows, however, for non-Iraqi judges with experience in dealing with crimes against humanity, genocide, war crimes and crimes under Iraqi law to be appointed if necessary.

The Statute further provides that a judge or investigative judge may not have been a member of the Ba'ath party. [...]

DISCUSSION

1. According to IHL, may the CPA and/or the Governing Council of Iraq create a tribunal? May the Iraqi Special Tribunal be considered as having been established by the occupying power? If so, for which crimes and according to which law may the occupying power create such a court? (*Cf.* Convention IV, Arts. 64, 66 and 71.)
2. What options exist in IHL to try Saddam Hussein? Discuss the advantages and disadvantages of every option.

Case No. 161, Iraq, The End of Occupation

THE CASE

[**Source:** United Nations Security Council Resolution 1546 (2004), 8 June 2004 and Annex, Letter of Secretary of State Colin Powell to the UN Security Council, available on: www.un.org/documents/scres.htm]

UN Security Council Resolution 1546 (2004)

The Security Council,

Welcoming the beginning of a new phase in Iraq's transition to a democratically elected government, and *looking forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004, [...]

Reaffirming the independence, sovereignty, unity, and territorial integrity of Iraq, [...]

Welcoming the efforts of the Special Adviser to the Secretary-General to assist the people of Iraq in achieving the formation of the Interim Government of Iraq, as set out in the letter of the Secretary-General of 7 June 2004 (S/2004/461),

Taking note of the dissolution of the Governing Council of Iraq, and *welcoming* the progress made in implementing the arrangements for Iraq's political transition referred to in resolution 1511 (2003) of 16 October 2003, [...]

Recalling the establishment of the United Nations Assistance Mission for Iraq (UNAMI) on 14 August 2003, and *affirming* that the United Nations should play a leading role in assisting the Iraqi people and government in the formation of institutions for representative government, [...]

Recognizing the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the multinational force,

Recognizing also the importance of the consent of the sovereign Government of Iraq for the presence of the multinational force and of close coordination between the multinational force and that government, [...]

Noting the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations, [...]

Acting under Chapter VII of the Charter of the United Nations,

1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;

3. *Reaffirms* the right of the Iraqi people freely to determine their own political future and to exercise full authority and control over their financial and natural resources;

4. *Endorses* the proposed timetable for Iraq's political transition to democratic government including:
   (a) formation of the sovereign Interim Government of Iraq that will assume governing responsibility and authority by 30 June 2004;
   (b) convening of a national conference reflecting the diversity of Iraqi society; and
   (c) holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, inter alia, have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005; [...]

9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;

10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, [...]

12. *Decides* further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and *declares* that it will terminate this mandate earlier if requested by the Government of Iraq; [...]

24. *Notes* that, upon dissolution of the Coalition Provisional Authority, the funds in the Development Fund for Iraq shall be disbursed solely at the direction of the Government of Iraq, and *decides* that the Development Fund for Iraq shall be utilized in a transparent and equitable manner and through the Iraqi budget including to satisfy outstanding obligations against the Development Fund for Iraq, that the arrangements for the depositing of proceeds from export sales of petroleum, petroleum products, and natural gas established in paragraph 20 of resolution 1483 (2003) shall continue to apply, that the International Advisory and Monitoring Board shall continue its activities in

monitoring the Development Fund for Iraq and shall include as an additional full voting member a duly qualified individual designated by the Government of Iraq and that appropriate arrangements shall be made for the continuation of deposits of the proceeds referred to in paragraph 21 of resolution 1483 (2003);

[...].

Annex

[...]

Letter of Secretary of State Colin Powell to the UN Security Council

The Secretary of State
Washington
5 June 2004

Excellency:

Recognizing the request of the government of Iraq for the continued presence of the Multi-National Force (MNF) in Iraq [...] I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. [...]

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. [...]

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

[...]

Sincerely,

(*Signed*) Colin L. Powell

DISCUSSION

1. a. Did the occupation of Iraq by Coalition forces end on 30 June 2004? On what basis? (*Cf.* Arts. 6 and 47 of Convention IV and Art. 42 of the Hague Regulations (*Cf.* **Document No. 1**, The Hague Regulations, p. 517.).)
   b. May the end of an occupation depend on a determination by the UN Security Council, or only on the facts on the ground? May the UN Security Council absolve an occupying power of its IHL obligations although Convention IV would continue to apply according to the facts on the ground? (*Cf.* Arts. 2, 6 and 47 of Convention IV and Art. 42 of the Hague Regulations.)
2. Is it conceivable that if Iraq is no longer an occupied territory other parts of Convention IV continue to apply? (*Cf.* Part II of Convention IV.)
3. What law applies to the troops of the multinational force in Iraq following the end of the occupation? What are the obligations of the multinational force after 30 June? If they arrest Iraqis? If fighting erupts between those troops and Iraqi insurgents or terrorists? (*Cf.* Arts. 2 and 3 common to the Conventions and Art. 6 (4) of Convention IV.)
4. What is the impact of the consent of the Iraqi Interim Government to the presence of the multinational force on the legal status of that force? What is the impact on its obligations? (*Cf.* Arts. 7 and 47 of Convention IV.)
5. Why is the Iraqi Interim Government not merely a different local authority that would attract the application of Article 47 of Convention IV?
6. Is progressively handing over responsibility for security sufficient to end an occupation?
7. Did Security Council resolution 1546 give Iraq full economic sovereignty?

XXV. ARGENTINA AND FALKLANDS/MALVINAS

Case No. 162, Argentina/UK, The Red Cross Box

THE CASE

[**Source:** Junod, S.-S., *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982)*: International Humanitarian Law and Humanitarian Action, International Committee of the Red Cross, 2nd ed., December 1985, pp. 23-24, and p. 26.]

CHAPTER III:
THE WOUNDED, SICK AND SHIPWRECKED

[...]

3. METHODS OF ACTION

Respect by the parties for the obligations to protect and assist the wounded, sick and shipwrecked depends of course on the instructions received by the officers responsible and other ranks, but above all on the measures taken to organize relief and assistance. The circumstances and the nature of the armed clashes during the conflict in the South Atlantic gave vital importance to medical transports, in particular to ships and helicopters.

Indeed, not only did the hostilities partly take place at sea, but the geographical distance of the British fleet from its home port meant that soldiers wounded in the archipelago had to be treated on hospital ships.

[...]

3.1.3 A neutral zone on the high seas: the Red Cross Box

[Article 30 of Convention II] stipulates that "*such vessels shall in no way hamper the movements of the combatants*".

At Britain's suggestion, and without any special agreement in writing, the parties to the conflict established a neutral zone at sea. This zone, called the Red Cross Box, with a diameter of approximately twenty nautical miles, was located on the high seas to the north of the islands. Without hampering military operations, it enabled hospital ships to hold position [...], and exchange British and Argentine wounded.

Such an arrangement, for which no provision is made in the Second Convention, is perfectly in keeping with the spirit of this Convention and shows that international humanitarian law must not claim to be exhaustive. When the desire to respect the obligations of protection is present, such measures as the establishment of this neutral zone at sea can be improvised as circumstances permit and require, and a certain flexibility remains in the application of the law. Inside the Red Cross Box, and between the hospital ships in general,

radiocommunications were an important factor in efficiency and good functioning: on one hand, the classical use of radiocommunications between the ships and, on the other, the use by the British - for the first time in the history of medical transports - of radio communications by satellite.

For whereas the Argentine hospital ships were able to use coastal radio stations on the Argentine shore, the British had no similar facilities, but instead established radiocommuncations between their hospital ships and with their bases in Britain via the INMARSAT satellite system. [...]

It must be stressed here that the Second Convention forbids hospital ships to use a secret code for their transmissions. The use of secret codes is considered an act harmful to the enemy and can deprive a hospital ship of protection (Article 34). This amounts to forbidding a hospital ship to communicate with the military fleet of the party to which it belongs, because if it communicates in clear, the incoming messages would reveal the position of the vessels of its own fleet.

This ban has humanitarian consequences, however, since it prevents a hospital ship from being notified of the arrival of a contingent of wounded and does not enable it to prepare to receive them. [...]

DISCUSSION

1. a. Can any ship be used as a hospital ship? Is a ship considered a hospital ship from the moment it begins transporting wounded? Are the criteria necessary for protected status the same in an emergency situation? (*Cf.* Arts. 22, 33 and 43 of Convention II and Art. 22 of Protocol I.) Can a hospital ship lose its protected status? (*Cf., e.g.,* Arts. 34 and 35 of Convention II and Art. 23 of Protocol I.)

   b. Under IHL do means exist to ensure that the enemy does not use a hospital ship for purposes that are not purely medical? (*Cf.* Art. 31 (4) of Convention II.)

2. a. May hospital ships move in the centre of a combat zone? (*Cf.* Art. 30 of Convention II.) Does this explain the need for the Red Cross Box? Which conventional provisions provide for the establishment of such a zone?

   b. For the creation of which zones does IHL provide? Which persons are those zones designed to protect? (*Cf.* Art. 3 (3) common to the Conventions, Art. 23 of Convention I, Arts. 14 and 15 of Convention IV and Arts. 59 and 60 of Protocol I.) Was the Red Cross Box established by analogy to those provisions of the law of land warfare? If so, to which?

   c. How does one accurately assess whether such an innovation is in keeping with the spirit of the Convention? Does the Red Cross Box not merely demonstrate the flexibility of IHL but also its inadequacy? Yet, do not the Conventions foresee and actually encourage special agreements between the Parties to the conflict regarding protected zones? (*Cf., e.g.,* Annex I of Conventions I and IV.)

3. Should the prohibition for hospital ships to use secret codes be considered as having become obsolete due to technical developments? Or should it be respected despite technical developments? What new regulation would you suggest regarding this problem? (*Cf.* Art. 34 (2) of Convention II.)

Case No. 163, Inter-American Commission on Human Rights, Tablada

THE CASE

[**Source:** *Inter-American Commission on Human Rights*, Report No. 55/97, Case No. 11.137: Argentina, OEA/Ser/L/V/II.98, Doc. 38, December 6 rev., 1997; footnotes partially omitted. Available on http://www.cidh.org]

CDH/3398

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
Approved by the Commission on November 18, 1997

[...]

IV. ANALYSIS

146. In order to facilitate the analysis of key events and issues raised in this case, this report will examine those events and issues under the following three headings: the attack on and the recovery of the military base; the events that followed the surrender of the attackers and the arrest of their alleged accomplices; and the trial of those same persons for the crime of rebellion in the *Abella* case.

A. THE ATTACK AND RECAPTURE OF THE MILITARY BASE

147. In their complaint, petitioners invoke various rules of International Humanitarian Law, i.e. the law of armed conflict, in support of their allegations that state agents used excessive force and illegal means in their efforts to recapture the Tablada military base. For its part, the Argentine State, while rejecting the applicability of interstate armed conflict rules to the events in question, nonetheless have in their submissions to the Commission characterized the decision to retake the Tablada base by force as a military operation. The State also has cited the use of arms by the attackers to justify their prosecution for the crime of rebellion as defined in Law 23.077. Both the Argentine State and petitioners are in agreement that on the 23 and 24 of January 1989 an armed confrontation took place at the Tablada base between attackers and Argentine armed forces for approximately 30 hours.

148. The Commission believes that before it can properly evaluate the merits of petitioners claims concerning the recapture of the Tablada base by the Argentine military, it must first determine whether the armed confrontation at the base was merely an example of an internal disturbance or tensions or whether it constituted a non-international or internal armed conflict within the

meaning of Article 3 common to the four 1949 Geneva conventions (Common Article 3"). Because the legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions, a proper characterization of the events at the Tablada military base on January 23 and 24, 1989 is necessary to determine the sources of applicable law. This, in turn, requires the Commission to examine the characteristics that differentiate such situations from Common Article 3 armed conflicts in light of the particular circumstances surrounding the incident at the Tablada base.

i. Internal disturbances and tensions

149. The notion of internal disturbances and tensions has been studied and elaborated on most particularly by the International Committee of the Red Cross (ICRC). In its 1973 Commentary on the Draft Additional Protocols to the Geneva Conventions, the ICRC defined, albeit not exhaustively, such situations by way of the following three examples:
   - riots, that is to say, all disturbances *which from the start are not directed by a leader and have no concerted intent*;
   - isolated and sporadic acts of violence, *as distinct from military operations carried out by armed forces or organized armed groups*;
   - other acts of a similar nature which incur, in particular, mass arrests of persons because of their behavior or political opinion (Emphasis supplied.)

150. According to the ICRC, what principally distinguishes situations of serious tension from internal disturbances is the level of violence involved. While tensions can be sequels of an armed conflict or internal disturbance, the latter are
   ... situations in which there is no non-international armed conflict as such, but there exists a confrontation within a country, which is characterized by a certain seriousness or duration and which involves acts of violence. . . In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order.

151. Situations of internal disturbances and tensions are expressly excluded from the scope of international humanitarian law as not being armed conflicts. Instead, they are governed by domestic law and relevant rules of international human rights law.

ii. Non-international armed conflicts under humanitarian law

152. In contrast to these situations of domestic violence, the concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other. In this regard, Common Article 3 simply refers to, but does not actually define an armed conflict of a non-international character. However, Common Article 3 is generally understood to apply to low intensity

and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular state. [Footnote 16 reads: A Commission of Experts convened by the International Committee of the Red Cross made the following pertinent observation: "The existence of an armed conflict is undeniable, in the sense of Article 3, if hostile action against a lawful government assumes a collective character and a minimum of organization." See, ICRC, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict: Report Submitted to the XXIst Conference of the Red Cross, Istanbul at p.99 (1969).] Thus, Common Article 3 does not apply to riots, mere acts of banditry or an unorganized and short-lived rebellion. Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene. It is important to understand that application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory. The Commission notes that the ICRCs authoritative Commentary on the 1949 Geneva Conventions, indicates that, despite the ambiguity in its threshold of application, Common Article 3 should be applied as widely as possible.

153. The most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the lowest level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.

iii. Characterization of the events at the Tablada base

154. Based on a careful appreciation of the facts, the Commission does not believe that the violent acts at the Tablada military base on January 23 and 24, 1989 can be properly characterized as a situation of internal disturbances. What happened there was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons - all forms of domestic violence not qualifying as armed conflicts.

155. What differentiates the events at the Tablada base from these situations are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective - a military base. The officer in charge of the Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsin, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.

156. The Commission concludes therefore that, despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.

iv. The Commission's competence to apply international humanitarian law

157. Before addressing petitioners specific claims, the Commission thinks it useful to clarify the reasons why it has deemed it necessary at times to apply directly rules of international humanitarian law or to inform its interpretations of relevant provisions of the American Convention by reference to these rules. A basic understanding of the interrelationship of these two branches of international law - human rights and humanitarian law - is instructive in this regard.

158. The American Convention, as well as other universal and regional human rights instruments, and the 1949 Geneva Conventions share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity. These human rights treaties apply both in peacetime, and during situations of armed conflict. Although one of their purposes is to prevent warfare, none of these human rights instruments was designed to regulate such situations and, thus, they contain no rules governing the means and methods of warfare.

159. In contrast, international humanitarian law generally does not apply in peacetime, and its fundamental purpose is to place restraints on the conduct of warfare in order to diminish the effects of hostilities. It is understandable therefore that the provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments.

160. It is, moreover, during situations of internal armed conflict that these two branches of international law most converge and reinforce each other. Indeed, the authors of one of the authoritative commentaries on the two 1977 Protocols Additional to the 1949 Geneva Conventions state in this regard:

> Though it is true that every legal instrument specifies its own field of application, it cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international armed conflicts as well as the more specific rules of humanitarian law. [Footnote 21 reads: M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, 619 (1982) [hereinafter "New Rules"].]

161. For example, both Common Article 3 and Article 4 of the American Convention protect the right to life and, thus, prohibit, *inter alia,* summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to state agents are clearly within the Commissions jurisdiction. But the Commissions ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian

can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by state agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.

162. Apart from these considerations, the Commissions competence to apply humanitarian law rules is supported by the text of the American Convention, by its own case law, as well as the jurisprudence of the Inter-American Court of Human Rights. Virtually every OAS member state that is a State Party to The American Convention has also ratified one or more of the 1949 Geneva Conventions and/or other humanitarian law instruments. As States Parties to the Geneva Conventions, they are obliged as a matter of customary international law to observe these treaties in good faith and to bring their domestic law into compliance with these instruments. Moreover, they have assumed a solemn duty to respect and to ensure respect of these Conventions in all circumstances, most particulary, during situations of interstate or internal hostilities.

163. In addition, as States Parties to the American Convention, these same states are also expressly required under Article 25 of the American Convention to provide an internal legal remedy to persons for violations by state agents of their fundamental rights recognized by *the constitution or laws* of the state concerned or by this Convention (emphasis supplied). Thus, when the claimed violation is not redressed on the domestic level and the source of the right is a guarantee set forth in the Geneva Conventions, which the State Party concerned has made operative as domestic law, a complaint asserting such a violation, can be lodged with and decided by the Commission under Article 44 of the American Convention. Thus, the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25.

164. The Commission believes that in those situations where the American Convention and humanitarian law instruments apply concurrently, Article 29 (b) of the American Convention necessarily require it to take due notice of and, where appropriate, give legal effect to applicable humanitarian law rules. Article 29 (b) - the so-called "most-favorable-to-the-individual-clause" - provides that no provision of the American Convention shall be interpreted as "restricting the enforcement or exercise of any right or freedom recognized by virtue of the laws of any State Party of another convention which one of the said states is a party."

165. The purpose of this Article is to prevent States Parties from relying on the American Convention as a ground for limiting more favorable or less

restrictive rights to which an individual is otherwise entitled under either national or international law. Thus, where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.

166. Properly viewed, the close interrelationship between human rights law and humanitarian law also supports the Commission's authority under Article 29 (b) to apply humanitarian law, where it is relevant. In this regard, the authors of the New Rules make the following pertinent point regarding the reciprocal relationship between Protocol II and the Covenant on Civil and Political Rights:

> Protocol II should not be interpreted as remaining behind the basic standard established in the Covenant. On the contrary, when Protocol II in its more detailed provisions establishes a higher standard than the Covenant, this higher standard prevails, on the basis of the fact that the Protocol is "lex specialis" in relation to the Covenant. On the other hand, provisions of the Covenant which have not been reproduced in the Protocol which provide for a higher standard of protection than the protocol should be regarded as applicable irrespective of the relative times at which the two instruments came into force for the respective State. It is a general rule for the application of concurrent instruments of Human Rights - and Part II "Humane Treatment" [of Protocol II] is such an instrument - that they implement and complete each other instead of forming a basis for limitations.

167. Their point is equally valid concerning the mutual relationship between the American Convention and Protocol II and other relevant sources of humanitarian law, such as Common Article 3.

168. In addition, the Commission believes that a proper understanding of the relationship between applicable humanitarian law treaties and Article 27 (1), the derogation clause of the American Convention, is relevant to this discussion. This Article permits a State Party to the American Convention to temporarily derogate, i.e., suspend, certain Convention based guarantees during genuine emergency situations. But, Article 27 (1) requires that any suspension of guarantees not be "inconsistent with that state's other obligations under international law". Thus, while it cannot be interpreted as incorporating by reference into the American Convention all of a state's other international legal obligations, Article 27 (1) does prevent a state from adopting derogation measures that would violate its other obligations under conventional or customary international law. [...]

170. [...] [W]hen reviewing the legality of derogation measures taken by a State Party to the American Convention by virtue of the existence of an armed conflict to which both the American Convention and humanitarian law treaties apply, the Commission should not resolve this question solely by reference to the text of Article 27 of the American Convention. Rather, it must also determine whether the rights affected by these measures are similarly

guaranteed under applicable humanitarian law treaties. If it finds that the rights in question are not subject to suspension under these humanitarian law instruments, the Commission should conclude that these derogation measures are in violation of the State Parties obligations under both the American Convention and the humanitarian law treaties concerned. [...]

v. Petitioners' claims

172. Petitioners do not dispute the fact that some MTP members planned, initiated and participated in the attack on the military base. They contend, however, that the reason or motive for the attack - to stop a rumored military coup against the Alfonsin government - was legally justified by Article 21 of the National Constitution which obliged citizens to take up arms in defense of the Constitution. Consequently, they assert that their prosecutions for the crime of rebellion was violative of the American Convention. In addition, petitioners argue that because their cause was just and lawful, the State, by virtue of its excessive and unlawful use of force in retaking the military base, must bear full legal and moral responsibility for all the loss of life and material damage occasioned by its actions.

173. The Commission believes that petitioners arguments reflect certain fundamental misconceptions concerning the nature of international humanitarian law. It should be understood that neither application of Common Article 3, nor of any other humanitarian law rules relevant to the hostilities at the Tablada base, can be interpreted as recognizing the legitimacy of the reasons or the cause for which the members of the MTP took up arms. Most importantly, application of the law is not conditioned by the causes of the conflict. This basic tenant of humanitarian law is enshrined in the preamble of Additional Protocol I which states in pertinent part:

> *Reaffirming* further that the provisions of the Geneva Conventions of August 12, 1949 . . . must be fully applied in all circumstances . . . without any adverse distinction *based on the nature or origin off [sic] the armed conflict or on the causes espoused by or attributed to the Parties of the Conflict.* (Emphasis supplied)

174. Unlike human rights law which generally restrains only the abusive practices of state agents, Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces. Moreover, the obligation to apply Common Article 3 is absolute for both parties and independent of the obligation of the other. [Footnote 27 reads: A breach of Article 3 by one party, such as an illegal method of combat, could not be invoked by the other party as a ground for its non-compliance with the Article's obligatory provisions. See generally, Vienna Convention on the Law of Treaties, Art. 60.] Therefore, both the MTP attackers and the Argentine armed forces had the same duties under humanitarian law, and neither party could be held responsible for the acts of the other.

[...]

vi. Application of Humanitarian Law

176. Common Article 3's basic purpose is to have certain minimum legal rules apply during hostilities for the protection of persons who do not or no longer take a direct or active part in the hostilities. Persons entitled to Common Article 3's mandatory protection include members of both State and dissident forces who surrender, are captured or are *hors de combat*. Individual civilians are similarly covered by Common Article 3's safeguards when they are captured by or otherwise subjected to the power of an adverse party, even if they had fought for the opposing party.

177. In addition to Common Article 3, customary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish in their targeting between civilians and combatants and other lawful military objectives. [Footnote 29 reads: These principles are set forth in U.N. General Assembly Resolution 2444, "Respect for Human Rights in Armed Conflicts", 23 U.N. GAOR Supp. (No. 18) at 164, which states in pertinent part: [T]he following principles for observance by all governmental and other authorities for action in armed conflicts:
(a) That the right of the parties to a conflict to adopt means of injuring the enemy in [sic] not unlimited;
(b) That it is prohibited to launch attacks against the civilian population as such;
(c) That distinction must be made at all time 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... *See also* U.N. General Assembly Resolution 2675, U.N. GAOR Supp. No. 28 U.N. Doc. A/8028 (1970) which elaborates on and strengthens the principles in Resolution 2444.] In order to spare civilians from the effects of hostilities, other customary law principles require the attacking party to take precautions so as to avoid or minimize loss of civilian life or damage to civilian property incidental or collateral to attacks on military targets.

178. The Commission believes that petitioners misperceive the practical and legal consequences that ensued with respect to the application of these rules to those MTP members who participated in the Tablada attack. Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack to the same extent as combatants. Thus, by virtue of their hostile acts, the Tablada attackers lost the benefits of the above mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians. In contrast, these humanitarian law rules continued to apply in full force with respect to those peaceable civilians present or living in the vicinity of the Tablada base at the time of the hostilities. The Commission notes parenthetically that it has received no petition lodged by any such persons against the state of Argentina alleging that they or their property sustained damage as a result of the hostilities at the base.

179. When they attacked the Tablada base, those persons involved clearly assumed the risk of a military response by the state. The fact that the Argentine military had superior numbers and fire power and brought them to bear against the attackers cannot be regarded in and of itself as a violation of any rule of humanitarian law. This does not mean, however, that either the

Argentine Military or the attackers had unlimited discretion in their choice of means of injuring the other. Rather, both parties were required to conduct their military operations within the restraints and prohibitions imposed by applicable humanitarian law rules.

180. In this connection, petitioners in essence allege that the Argentine military violated two specific prohibitions applicable in armed conflicts, namely:
   a) a refusal by the Argentine military to accept the attackers offer to surrender, tantamount to a denial of quarter; and
   b) the use of weapons of a nature to cause superfluous injury or unnecessary suffering, specifically, incendiary weapons.

181. In evaluating petitioners claims, the Commission is mindful that because of the peculiar and confusing conditions frequently attending combat, the ascertainment of crucial facts frequently cannot be made with clinical certainty. The Commission believes that the appropriate standard for judging the actions of those engaged in hostilities must be based on a reasonable and honest appreciation of the overall situation prevailing at the time the action occurred and not on the basis of speculation or hindsight.

182. With regard to their first allegation, petitioners charge that the Argentine military deliberately ignored the attempt of the attackers to surrender some four hours after the hostilities began on January 23, 1989 which unnecessarily prolonged the fighting an additional twenty-six hours and thereby resulted in needless deaths and suffering on both sides. Apart from the testimony of the MTP survivors, petitioners rely on a video tape, which they submitted to the Commission, to substantiate their claims. The video tape is a compilation of news programs broadcast by channels [...] of Argentina on the day of the attack, as well as subsequent documentaries by the same stations and other footage that the petitioners considered relevant to their case. While the tape is an important aid to its understanding of the events in question, the Commission believes that its probative value is nonetheless questionable. For example, the tape does not provide a sequential and uninterrupted documentation of the 30 hours of combat at the base. Rather, it is an edited depiction of certain events which were compiled by a private producer at the request of the petitioners, for the specific purpose of presentation to the Commission.

183. The Commission carefully viewed the above mentioned video tape, and identified two different scenes which supposedly depict the attempted surrender. The first of them, in which the image is not very clear, shows a very brief scene of a white flag being waved from a window. This first scene, however, is not connected to any of the others on the video, nor is there any indication of the precise moment when it took place. The second scene shows a larger image of one of the buildings inside the military base, which is being hit by a volley of gunfire, presumably from Argentine forces. Upon repeated viewings and careful scrutiny of this second scene, the Commission was not able to see the white flag which supposedly was being waved from within the building by the MTP attackers.

184. The tape is also notable for what it does not show. In fact, it does not identify the precise time or day of the putative surrender attempt. Nor does it show what was happening at the same time in other parts of the base where other attackers were located. If these persons, for whatever reason, continued to fire or commit other hostile acts, the Argentine military might not unreasonably have believed that the white flag was an attempt to deceive or divert them.

185. Thus, because of the incomplete nature of the evidence, the Commission is not in a position to conclude that the Argentine armed forces purposefully rejected a surrender attempt by the attackers at 9:00 am on the 23d of January. The Commission does note, however, that the fact that there were survivors among them tends to belie any intimation that an order of no quarter was actually given.

186. The video tape is even less probative of petitioners' claim that the Argentine military used incendiary weapons against the attackers. The video does show a fiery explosion in a structure presumably occupied by some of the attackers. But the precise nature of the weapon used that caused the explosion in not revealed by the tape. The reason for the explosion could be attributed to a weapon other than an incendiary device. For example, it might have been caused by a munition designed to pierce installations or facilities where the incendiary effect was *not specifically designed* to cause burn injury to persons, or as the result of a direct hit by an artillery shell that exploded munitions located within or near the attackers defensive position. Without the benefit of testimony from munitions experts or forensic evidence establishing a likely causal connection between the explosion and the use of an incendiary weapon, the Commission simply cannot conclude that the Argentine military employed such a device against the attackers.

187. The Commission must note that even if it were proved that the Argentine military had used such weapons, it cannot be said that their use in January 1989 violated an explicit prohibition applicable to the conduct of internal armed conflicts at that time. In this connection, the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons annexed to the 1981 United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Which May be Deemed to be Excessively Injurious and to Have Indiscriminate Effects (Weapons Convention), cited by petitioners, was not ratified by Argentina until 1995. Moreover and most pertinently, Article 1 of the Weapons Convention states that the Incendiary Weapons Protocol applies only to interstate armed conflicts and to a limited class of national liberation wars. As such, this instrument did not directly apply to the internal hostilities at the Tablada. In addition, the Protocol does not make the use of such weapons *per se* unlawful. Although it prohibits their direct use against peaceable civilians, it does not ban their deployment against lawful military targets, which include *civilians who directly participate in combat.*

188. Because of the lack of sufficient evidence establishing that state agents used illegal methods and means of combat, the Commission must conclude

that the killing or wounding of the attackers which occurred *prior to the cessation of combat on January 24, 1989* were legitimately combat related and, thus, did not constitute violations of the American Convention or applicable humanitarian law rules.

189. The Commission wishes to emphasize, however, that the persons who participated in the attack on the military base were legitimate military targets only *for such time as they actively participated in the fighting.* Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence. Instead, they were absolutely entitled to the non-derogable guarantees of humane treatment set forth in both common Article 3 of the Geneva Conventions and Article 5 of the American Convention. The intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments. [Footnote 32 reads: The Commission notes parenthetically in this regard that the War Crimes Tribunal for the former Yugoslavia has found such violations of common Article 3 to entail the individual criminal responsibility of the perpetrator(s) [...]]

[...]

DISCUSSION

1. *paras. 149-156*: What distinguishes a non-international armed conflict from internal disturbances and tensions? Is Art. 3 common to the Conventions applicable to the attack on the Tablada military base? Is Protocol II applicable? (*Cf.* Art. 3 common to the Conventions and Art. 1 of Protocol II.)

2. *paras. 157-171*: Why can the Inter-American Commission apply IHL? Because it is part of international law? Because it is part of Argentinean law? Because it defines more precisely the right to life protected in the American Convention, as far as armed conflicts are concerned? Because it has to apply under Art. 29 of the American Convention any rules offering a better protection than the Inter-American Convention? Because derogations from the rights protected by the American Convention are only admissible, under the American Convention, if they do not violate other obligations of the concerned State? (*Cf.* American Convention on Human Rights, available on http://www.cidh.org)

3. *paras. 173, 174*: If the petitioners' attack was justified under Argentinean law, would that have changed anything from the point of IHL? Is there a distinction between *ius ad bellum* and *ius in bello* in non-international armed conflicts?

4. *paras. 177-179*: Do civilians taking a direct part in hostilities lose protection of Art. 3 common to the Conventions? Of the whole IHL of non-international armed conflicts? Of the rules on the protection of the civilian population against the effects of hostilities? If so, for how long? (*Cf.* Art. 13 (3) of Protocol II.)

5. *paras. 181-185, 189*: Is the denial of quarter prohibited in non-international armed conflicts? Why? Because it is prohibited in international armed conflicts and there

is no relevant difference on this point between non-international and international conflicts? Because it would violate Art. 3 common to the Conventions? Is it justified to deny quarter to one surrendering combatant of a group as long as other members of the group continue to fight?

6. *paras. 186-188*:
   a. Is the use of incendiary weapons prohibited in international armed conflicts? Are there limitations? Do those limitations simply prohibit attacking civilians with incendiary weapons? What do the prohibitions of Protocol III to the 1980 Weapons Convention (*See* **Document No. 6**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention). p. 545, and **Document No. 4**, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Geneva, October 10, 1980. p. 540.) add to the prohibitions applicable to the use of all weapons?
   b. Are the limitations on the use of incendiary weapons also applicable in non-international armed conflicts? Why? Because on this point too there is no relevant difference between non-international and international conflicts? Because a use of incendiary weapons beyond that permitted by IHL of international armed conflicts would violate Art. 3 common to the Conventions? Because no State can claim to have the right to use against its own citizens methods and means of combat which it has agreed not to employ against a foreign enemy in an international armed conflict? If they are not applicable, where lies the difference between the prohibition of the denial of quarter and the limitations to the use of incendiary weapons?

Document No. 164, ICRC, Request to Visit Gravesites in the Falklands/Malvinas

[**Source:** *ICRC Annual Report 1991*, Geneva, ICRC, p. 57.]

ARGENTINA - Following a joint request by the Argentine and British governments in 1990, the ICRC, acting as a neutral intermediary, arranged for a group of 358 family members to visit the graves in the Falklands/Malvinas Islands of Argentine soldiers killed in action during the Falklands/Malvinas conflict. The visit, which took place on 18 March 1991, was carried out in accordance with joint statements issued in Madrid by the two governments and with the rules of international humanitarian law providing that families must be given access to gravesites as soon as circumstances allow.

XXVI. Sri Lanka

Case No. 165, Sri Lanka, Jaffna Hospital Zone

THE CASE

A. Reuters Dispatch of September 26, 1990

[**Source:** De Silva, D., *Reuters Dispatch*, Colombo, September 26, 1990.]

SRI LANKAN ARMY VACATES GARRISON AND OFFERS IT TO RED CROSS

COLOMBO, Sept 26, Reuters - Sri Lankan troops who battled their way into a colonial fort in the heart of rebel territory less than two weeks ago abandoned it on Wednesday and requested that the International Red Cross take it over, a government minister said.

Deputy Defence Minister Ranjan Wijeratne said the move would allow a major hospital to reopen less than one mile [...] from the fort.

But the Liberation Tigers of Tamil Eelam (LTTE), the main guerrilla group fighting for a separate Tamil homeland, said the troops had retreated from the fort after heavy fighting.

"Contrary to the government's claim that they evacuated voluntarily, the fort fell into LTTE hands after heavy fighting that started at two o'clock this morning", Lawrence Thilakar, LTTE spokesman in Paris, told Reuters by telephone.

He said the Tigers now occupied the fort and had recovered heavy weapons and vehicles from it.

The Tigers had pounded troops in the 350-year-old Dutch fort in Jaffna with mortars and rocket-propelled grenades since they launched an offensive in June.

The hospital, with about 1,500 beds, had been shut since June because it was near the fighting.

Wijeratne said he told Philippe Comtesse, head of the International Committee of the Red Cross (ICRC) in Sri Lanka, to take over the fort and resume operations at the hospital. He was awaiting a response.

"Even if the ICRC does not take it, we will not go back to the fort so that we can avoid bombing the area," Wijeratne told a news conference. [...]

Wijeratne said withdrawal from the fort did not mean that the government had abandoned the fight against the rebels in their stronghold of Jaffna. He warned that if the Tigers attempted to move into the vacated base "effective action" would be taken against them.

Military analysts said the fort was not of any strategic importance to the government or the rebels. But since it was located in the heart of the minority Tamil community, it had become a focus of the independence struggle.

Hundreds of government troops fought their way into the garrison two weeks ago and relieved soldiers and policemen who had been trapped there by the rebel siege.

The Tigers launched the June offensive in the north and east after abandoning 14 months of peace talks with the government.

Tamils, who form 13 per cent of the island's 16 million population, say they have been discriminated against by the majority Sinhalese-dominated government since independence from Britain in 1948.

B. ICRC Press Release of November 6, 1990

[**Source:** *ICRC Press Release*, Delegation in Sri Lanka, November 6, 1990.]

In order to allow the early reopening of Jaffna Teaching Hospital, which was badly damaged during the fightings in Jaffna, the International Committee of the Red Cross (ICRC) set up a number of rules to be respected by all parties involved. These provisions are in line with universally recognised practices in situations of conflict. They intend to provide in the future security from the fighting to the patients and the staff of the hospital. These rules have been notified by ICRC to both the Sri Lanka Government and the LTTE, and are to be implemented as of November 6, 1990.

These rules are as follows:

- The premises of Jaffna Hospital are placed under ICRC protection. They will be regarded by the Parties as a *Hospital zone:*
  - the compound will be clearly marked with red crosses for easy identification from the ground and the air
  - no armed personnel will be allowed within the compound;
  - no military vehicle will be stationed at the entrance of the Hospital Compound;
  - no vehicle other than those of the hospital, the Sri Lanka Red Cross and the ICRC will be admitted into the compound;
- Around the Hospital, a safety area is established. The rules governing this safety area (which includes the hospital compound) are:
  - the area will be clearly marked in such a way that it can be easily identified both from the ground and from the air
  - the area will remain void of any military or political installation;
  - no military action will be undertaken either from or against the safety area;
  - no military base, installation or position of any kind will be established or maintained within the area;

- no military personnel will be stationed and no military equipment will be stored at any time within the said area;
- no weapon will be activated within the area, either from the air or from the ground;
- no weapon will be activated from outside the safety area against persons or buildings located within the safety area.

In case of severe or persistent violation of these rules, the ICRC may unilaterally withdraw its protection of the hospital.

The ICRC trusts that the parties concerned will strictly observe the above-mentioned rules as it is on this sole condition that the Jaffna Teaching Hospital will be able to resume, and keep on carrying out thereafter, its much needed humanitarian tasks in favour of the sick and wounded of the Northern Province.

Colombo, November 6, 1990

DISCUSSION

1. Is the conflict in Sri Lanka an international or a non-international armed conflict? Is any kind of protected zone foreseen in the law of non-international armed conflicts? On which legal basis could such a zone be established? (*Cf.* Art. 3 common to the Conventions.)

2. What is the aim of the hospital zone? Of the safety area around it?

3. Which rules foreseen in the ICRC Press Release would anyway apply under IHL even if no hospital zone or safety area were established? (*Cf.* Art. 3 common to the Conventions.)

4. To which kind of zone foreseen in IHL of international armed conflicts does the hospital zone described in the ICRC Press Release correspond? To which the safety area? How can its rules become binding for parties of a non-international armed conflict? (*Cf.* Art. 3 common to the Conventions, Art. 23 of Convention I and Arts. 14 and 15 of Convention IV.)

5. Why does the Sri Lankan government want the ICRC to take over the fort of Jaffna? What arguments exist for the ICRC in favour and against accepting that task? Under what conditions would you accept if you were the ICRC?

6. a. If applying IHL of international armed conflict, may the emblem be used for the hospital compound? Why, according to the rules, is only the hospital zone to be clearly marked with red crosses for easy identification from the ground and the air? May not the safety zone also be so marked? Why? (*Cf.* Art. 44 of Conventions I and II, Art. 6 of Annex I of Convention IV and Art. 18 of Protocol I.).

   b. In non-international armed conflicts when can the emblem be used? By whom? Under what conditions? Could the emblem be used if the zones were not under ICRC control? (Art. 44 of Conventions I and II and Art. 12 of Protocol II.)

7. Why does the ICRC plan to withdraw if the rules are violated? Do the wounded and sick not need the presence of the ICRC most urgently when the rules are violated?

Case No. 166, Canada, Sivakumar v. Canada

THE CASE

[**Source:** *Sivakumar v. Canada (Minister of Employment and Immigration)* (C.A.), [1994] 1 F.C. 433, 1993-11-0; available on http://www.canlii.org/ca/cas/fca/1993/1993fca10048.html; the order of the paragraphs has been modified to facilitate understanding of the case.]

[...] The appellant, Thalayasingam Sivakumar, is a Tamil and a citizen of Sri Lanka. Even though he was found by the Refugee Division to have had a well-founded fear of persecution at the hands of the Sri Lankan government on the basis of his political opinion, the Refugee Division decided to exclude him on the basis of section F(a) of Article 1 of the United Nations Convention Relating to the Status of Refugees [*See* **Case No. 131**, Canada, Ramirez v. Canada, p. 1376.] as someone who had committed crimes against humanity [...]. The issue on this appeal is whether the appellant was properly held responsible for crimes against humanity alleged to have been committed by the Liberation Tigers of Tamil Eelam (LTTE) even though he was not personally involved in the actual commission of the criminal acts. [...]

The standard of proof in section F(a) of Article 1 of the Convention is whether the Crown has demonstrated that there are serious reasons for considering that the claimant has committed crimes against humanity.[...] This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status. [...]

He [the appellant] became involved with the LTTE in 1978, shortly after the LTTE was banned by the Sri Lankan government. While he was at university, the appellant used his office as a student leader to promote the LTTE. [...]

The appellant testified that between 1983 and 1985, he was made aware that the LTTE was naming people working against the LTTE as traitors and killing those people as punishment [...]. The leader of the LTTE, Prabaharan [sic], discussed these killings with the appellant, who testified that, while he never had any direct connection with these killings, he "accepted" what the leader of the LTTE told him. [...]

The appellant remained in India until 1985 when he returned to Sri Lanka. In the intervening years, the appellant had been approached by the LTTE leader. As a result, the appellant rejoined the LTTE as military advisor. He established a

Military Research and Study Centre in Madras where he lectured LTTE recruits on guerrilla warfare. The appellant testified that he instructed recruits on proper relations with the civilian population in order to gain popular support and that the recruits were told to observe the Geneva Convention.

In 1985, the appellant took part in negotiations (organized by the Indian government) between the Sri Lankan government and the five main rebel groups. These talks broke down when 40 Tamil civilians were killed by Sri Lankan forces.

In 1986, the appellant returned to Sri Lanka to visit his family. He resigned his position at the LTTE's military training college as a result of a dispute over military strategy with another member of the LTTE, and turned his attention to developing an anti-tank weapon. In 1987, he went back to India to mass-produce this weapon.

The appellant then returned once more to Sri Lanka with instructions to develop a military and intelligence division for the LTTE to gather information, prepare military maps and recruit new members. At that time, he was appointed to the rank of major within the LTTE.

Hostilities between the Sri Lankan and LTTE forces broke out in early 1987, but these were brought to an end by a peace accord signed in July of 1987. This accord allowed the Tamils to form a Tamil police force in the northern and eastern provinces, and the appellant was instructed to convert the military and intelligence centre into a police academy. However, the accord broke down and the police academy was never established.

The appellant testified that, in 1987, one commander of the LTTE, Aruna, went to a prison under their control and shot about forty unarmed members of other rival Tamil groups with a machine gun, after an assassination attempt by another Tamil group on a high-ranking officer of the LTTE. The appellant testified that, when he learned about the killing, he went to Prabaharan to demand public punishment, which he said he would do. However, little was done to Aruna, except that he lost his rank and was detained for a while. The appellant complained again, but nothing further was done. Aruna was later killed in action. Despite this, the appellant remained in the LTTE.

When a military commander in Jaffna died, the appellant was ordered to take charge of the defence of Jaffna Town. The appellant held the town for 15 days before he and his soldiers were driven into the jungle where they carried on guerrilla attacks. Subsequently, the appellant was ordered to return to India because of a dispute between him and the LTTE's second-in-command. The appellant testified that this dispute arose from his strong conviction that negotiations with Sri Lanka should proceed without pre-condition. Although the appellant participated in peace talks with the Sri Lankan government, the talks were doomed to failure because of the leader of the LTTE's intractable position and confrontational style.

Eventually, the appellant voiced his frustrations with the inability of the LTTE to conduct itself properly in peace talks, and was consequently expelled from the LTTE in December of 1988. The claimant remained underground in India until January of 1989 when he travelled to Canada on a false Malaysian passport via Singapore and the United States.

The evidence clearly shows that the appellant held positions of importance within the LTTE. In particular, the appellant was at various times responsible for the military training of LTTE recruits, for internationally organized peace talks between the LTTE and the Sri Lankan government, for the military command of an LTTE military base, for developing weapons, and, perhaps most importantly, for the intelligence division of the LTTE. It cannot be said that the appellant was a mere member of the LTTE. In fact, he occupied several positions of leadership within the LTTE including acting as the head of the LTTE's intelligence service. Given the nature of the appellant's important role within the LTTE, an inference can be drawn that he knew of crimes committed by the LTTE and shared the organization's purpose in committing those crimes. [...]

It is incontrovertible that the appellant knew about the crimes against humanity committed by the LTTE. The appellant testified before the Refugee Division that he knew that the LTTE was interrogating and killing people deemed to be traitors to the LTTE. [...]

The appellant's testimony must also be placed against the back-drop of the voluminous documentary evidence submitted to the Refugee Division. The various newspaper articles indicate that Tamil militant groups are responsible for wide-spread bloodshed amongst civilians and members of rival groups. In many of these articles, the LTTE are blamed for the violence by spokespeople for the Sri Lankan government. The Amnesty International Reports indicate that various Tamil groups are responsible for violence against civilians, but are not specific about incidents involving the LTTE. [...]

It is clear that if someone personally commits physical acts that amount to a war crime or a crime against humanity, that person is responsible. However, it is also possible to be liable for such crimes "to "commit" them" as an accomplice, even though one has not personally done the acts amounting to the crime [...] the starting point for complicity in an international crime was "personal and knowing participation."

This is essentially a factual question that can be answered only on a case-by-case basis, but certain general principles are accepted. It is evident that mere by-standers or on-lookers are not accomplices. [...]

However, a person who aids in or encourages the commission of a crime, or a person who willingly stands guard while it is being committed, is usually responsible. Again, this will depend on the facts in each case. [...]

Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be accomplices, depending on the facts of the case. Additionally, a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them.[...]

Another type of complicity, particularly relevant to this case is complicity through association. In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. This is not a case merely of being "known by the company one keeps." Nor is it a case of mere membership in an organization making one responsible for all the international crimes that organization commits (). Neither of these by themselves is normally

enough, unless the particular goal of the organization is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed: "someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts" [...]

In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity. [...]

In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization. [...]

Of course, as Mr. Justice MacGuigan has written, "law does not function at the level of heroism" [...]. Thus, people cannot be required, in order to avoid a charge of complicity by reason of association with the principal actors, to encounter grave risk to life or personal security in order to extricate themselves from a situation or organization. But neither can they act as amoral robots.

This view of leadership within an organization constituting a possible basis for complicity in international crimes committed by the organization is supported by Article 6 of the Charter of the International Military Tribunal. [...]

This principle was applied to those in positions of leadership in Nazi Germany during the Nuremberg Trials, as long as they had some knowledge of the crimes being committed by others within the organization. [...]

It should be noted that, in refugee law, if state authorities tolerate acts of persecution by the local population, those acts may be treated as acts of the state [...]. Similarly, if the criminal acts of part of a paramilitary or revolutionary non-state organization are knowingly tolerated by the leaders, those leaders may be equally responsible for those acts. [...]

To sum up, association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a "limited, brutal purpose", is not enough [...]. Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes. [...]

As one Canadian commentator, Joseph Rikhof, ["War Crimes, Crimes Against Humanity and Immigration Law" (1993), 19 Imm.L.R. (2d) 18.], at page 30 has noted:

> [...] This requirement does not mean that a crime against humanity cannot be committed against one person, but in order to elevate a domestic crime such as murder or assault to the realm of international law an additional element will have to be found. This element is that the person who has been victimized is a member of a group which has been targeted systematically and in a widespread manner for one of the crimes mentioned [...]

Another historic requirement of a crime against humanity has been that it be committed against a country's own nationals. This is a feature that helped to distinguish a crime against humanity from a war crime in the past. [...] While I have some doubt about the continuing advisability of this requirement in the light of the changing conditions of international conflict, writers still voice the view that they "are still generally accepted as essential thresholds to consider a crime worthy of attention by international law" [...].

There appears to be some dispute among academics and judges as to whether or not state action or policy is a required element of crimes against humanity in order to transform ordinary crimes into international crimes. The cases decided in Canada to date on the issue of crimes against humanity all involved members of the state, in that each of the individuals was a member of a military organization associated with the government [...]. One author, Bassiouni, [*Crimes against Humanity in International Criminal Law.* Dordrecht: Martinus Nijhoff, 1992.], states that the required international element of crimes against humanity is state action or policy [...]. Similarly, the *Justice Trial* [...], was quite clear in interpreting Control Council Law No. 10 (basically identical in terms to Article 6 of the Charter of the International Military Tribunal) to mean that there must be a governmental element to crimes against humanity [...].

Other commentators and courts take a different approach [...]. Based on these latter authorities, therefore, it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international criminal law. On the contrary, they are now governed by it. [...]

As for the requirement of complicity by way of a shared common purpose, I have already found that the appellant held several positions of importance within the LTTE (including head of the LTTE's intelligence service) from which it can be inferred that he tolerated the killings as a necessary, though perhaps unpleasant, aspect of reaching the LTTE's goal of Tamil liberation. Although the appellant complained about these deaths and spoke out when they occurred, he did not leave the LTTE even though he had several chances to do so. No evidence was presented that the appellant would have suffered any risk to himself had he chosen to withdraw from the LTTE. The panel's finding that there was no serious possibility that the appellant would be persecuted by the LTTE supports the conclusion that the appellant could have withdrawn from the LTTE and failed to do so. I conclude that the evidence discloses that the appellant failed to withdraw from the LTTE, when he could have easily done so, and instead remained in the organization in his various positions of leadership with the knowledge that the LTTE was killing civilians and members of other Tamil groups.

No tribunal could have concluded on this evidence that there were no serious reasons for considering that the appellant was, therefore, a knowing participant and, hence, an accomplice in these killings.

Finally, did these killings constitute crimes against humanity? That is, were the killings part of a systematic attack on a particular group and (subject to my reservations expressed above) were they committed against Sri Lankan nationals? Clearly, no other conclusion is possible other than that the civilians killed by the LTTE were members of groups being systematically attacked by the LTTE in the course of the LTTE's fight for control of the northern portion of Sri Lanka. These groups included both Tamils unsympathetic to the LTTE and the Sinhalese population. It is also obvious that these groups are all nationals of Sri Lanka, if that is still a requirement.

DECISION

I conclude that, given the appellant's own testimony as to his knowledge of the crimes against humanity committed by the LTTE, coupled with the appellant's position of importance within the LTTE and his failure to withdraw from the LTTE when he had ample opportunities to do so, there are serious reasons for considering that the appellant was an accomplice in crimes against humanity committed by the LTTE. The evidence, both the appellant's testimony and the documentary evidence, is such that no properly instructed tribunal could reach a different conclusion. Accordingly, I would dismiss the appeal.

DISCUSSION

1. Is the appellant accused of having committed crimes against humanity, war crimes or both? Does the distinction between these two crimes reside in the nationality of the victims? (*Cf.* Art. 3 (1) common to the Conventions; Art. 50/51/130/147 respectively of the four Conventions; Art. 4 (2) of Protocol II and Arts. 7 and 8 of the ICC Statute, *see* **Case No. 15**, p. 608.)

2. In order to commit a crime against humanity, must the perpetrator be acting on behalf of a State? In order to commit a grave breach of International Humanitarian Law (IHL)? A war crime? (*Cf.* Art. 50/51/130/147, respectively, of the four Conventions; Art. 4 (2) of Protocol II and Arts. 7 and 8 of the ICC Statute.)

3. What "Geneva Conventions" should the appellant have been teaching the LTTE recruits to respect?

4. What obligations did the appellant and Mr. Prabaharan have in regards to Mr. Aruna's acts? Did they fulfil them? (*Cf.* Art. 86 (2) of Protocol I and Art. 28 of the ICC Statute.)

5. When the LTTE executes its members accused of treason, is it violating the rules of IHL applicable to non-international armed conflicts? Does this constitute a crime against humanity? What elements are necessary for this to be the case? (*Cf.* Art. 3 (1) (a) common to the Conventions; Art. 4 (2) of Protocol II and Art. 7 of the ICC Statute.)

6. a. Why is the appellant an accomplice to the crimes committed by the LTTE? Is the fact that he knew they were being committed and nevertheless remained in a position of leadership sufficient for him to be held as an accomplice? Even if the crimes were not committed by his subordinates? (*Cf.* Art. 86 (2) of Protocol I and Art. 25 (3) (d) and 28 of the ICC Statute.)

   b. Should the court have had the same requirements if the appellant were a high-ranking officer in the Sri Lankan armed forces?

   c. Is a member of an armed force, which he knows commits war crimes, and who does not leave - despite having the possibility to do so - an accomplice to its crimes?

   d. In what case may simple membership in an armed force lead to criminal responsibility for all the acts committed by the group? (*Cf.* Art. 25 of the ICC Statute.)

   e. According to IHL and your country's criminal law, is the individual who stands guard while others commit war crimes responsible for those crimes?

7. Should Canada have prosecuted the appellant instead of refusing him refugee status? How may it be justified in not prosecuting him while refusing him refugee status? (*Cf.* Art. 49/50/129/146 respectively of the four Conventions.)

8. a. Does Canada have the right to refuse him refugee status on the basis that he might have committed war crimes or crimes against humanity? Even if he might be persecuted in Sri Lanka?

   b. Since the appellant committed war crimes or crimes against humanity, may he be refouled to Sri Lanka, even if he risks persecution there?

XXVII. SOMALIA

Case No. 167, UN, UN Forces in Somalia

THE CASE

A. Security Council Resolution 794 (1992)

[**Source:** UN Doc. S/RES/794 (December 3, 1992). Available on http://www.un.org/documents/]

The Security Council,

[...]

Determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security,

Gravely alarmed by the deterioration of the humanitarian situation in Somalia and underlining the urgent need for the quick delivery of humanitarian assistance in the whole country, [...]

Responding to the urgent calls from Somalia for the international community to take measures to ensure the delivery of humanitarian assistance in Somalia,

Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities; deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities; and impeding the delivery of food and medical supplies essential for the survival of the civilian population,

Dismayed by the continuation of conditions that impede the delivery of humanitarian supplies to destinations within Somalia, and in particular reports of looting of relief supplies destined for starving people, attacks on aircraft and ships bringing in humanitarian relief supplies, and attacks on the Pakistani UNOSOM contingent in Mogadishu, [...]

Sharing the Secretary-General's assessment that the situation in Somalia is intolerable and that it has become necessary to review the basic premises and principles of the United Nations effort in Somalia, and that UNOSOM's existing course would not in present circumstances be an adequate response to the tragedy in Somalia,

Determined to establish as soon as possible the necessary conditions for the delivery of humanitarian assistance wherever needed in Somalia [...],

[...]

Determined further to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United

Nations, aimed at national reconciliation in Somalia, and encouraging the Secretary-General and his Special Representative to continue and intensify their work at the national and regional levels to promote these objectives, [...]

1. *Reaffirms* its demand that all parties, movements and factions in Somalia immediately cease hostilities, maintain a cease-fire throughout the country, and cooperate with the Special Representative of the Secretary-General as well as with the military forces to be established pursuant to the authorization given in paragraph 10 below in order to promote the process of relief distribution, reconciliation and political settlement in Somalia;

2. *Demands* that all parties, movements and factions in Somalia take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia;

3. *Also demands* that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and ons [sic], all other personnel engaged in the delivery of humanitarian assistance, t [sic] including the military forces to be established pursuant to the authorization given in paragraph 10 below;

4. *Further demands* that all parties, movements and factions in Somalia immediately cease and desist from all breaches of international humanitarian law including from actions such as those described above;

5. *Strongly condemns* all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts;

6. *Decides* that the operations and the further deployment of the 3,500 personnel of the United Nations Operation in Somalia (UNOSOM) authorized by [...] resolution 775 (1992) should proceed at the discretion of the Secretary-General in the light of his assessment of conditions on the ground [...];

7. *Endorses* the recommendation by the Secretary-General [...] that action under Chapter VII of the Charter of the United Nations should be taken in order to establish a secure environment for humanitarian relief operations in Somalia as soon as possible;

8. *Welcomes* the offer by a Member State described in the Secretary-General's letter to the Council of November 29, 1992 (S/24868) concerning the establishment of an operation to create such a secure environment; [...]

10. *Acting* under Chapter VII of the Charter of the United Nations, authorizes the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia; [...]

B. Security Council Resolution 814 (1993)

[**Source:** UN Doc. S/RES/814 (March 26, 1993). Available on http://www.un.org/documents/]

The Security Council,

[...]

Commending the efforts of Member States acting pursuant to resolution 794 (1992) to establish a secure environment for humanitarian relief operations in Somalia,

Acknowledging the need for a prompt, smooth and phased transition from the Unified Task Force (UNITAF) to the expanded United Nations Operation in Somalia (UNOSOM II),

Regretting the continuing incidents of violence in Somalia and the threat they pose to the reconciliation process, [...]

Noting with deep regret and concern the continuing reports of widespread violations of international humanitarian law and the general absence of the rule of law in Somalia, [...]

Acknowledging the fundamental importance of a comprehensive and effective programme for disarming Somali parties, including movements and factions, [...]

Determining that the situation in Somalia continues to threaten peace and security in the region, [...]

Acting under Chapter VII of the Charter of the United Nations, [...]

5. *Decides* to expand the size of the UNOSOM force and its mandate [UNOSOM II]

   [...]

7. *Emphasizes* the crucial importance of disarmament and the urgent need to build on the efforts of UNITAF [...];

9. *Further demands* that all Somali parties, including movements and factions, take all measures to ensure the safety of the personnel of the United Nations and its agencies as well as the staff of the International Committee of the Red Cross (ICRC), intergovernmental organizations and non-governmental organizations engaged in providing humanitarian and other assistance to the people of Somalia in rehabilitating their political institutions and economy and promoting political settlement and national reconciliation; [...]

12. *Requests* the Secretary-General to provide security, as appropriate, to assist in the repatriation of refugees and the assisted resettlement of displaced persons, utilizing UNOSOM II forces, paying particular attention to those areas where major instability continues to threaten peace and security in the region;

13. *Reiterates* its demand that all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law and reaffirms that those responsible for such acts be held individually accountable;

14. *Requests* the Secretary-General, through his Special Representative, to direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia, taking account of the particular circumstances in each locality, on an expedited basis in accordance with the recommendations contained in his report of March 3, 1993, and in this regard to organize a prompt, smooth and phased transition from UNITAF to UNOSOM II; [...]

DISCUSSION

1. a. Are the demands made by the resolutions regarding the protection of humanitarian convoys in line with the pertinent rules of IHL? Does IHL provide a right to humanitarian aid? If so, for whom? Only to civilians? Also in non-international armed conflicts? (*Cf.* Arts. 23, 59 and 142 of Convention IV, Arts. 69, 70 and 81 of Protocol I and Art. 18 of Protocol II.)

   b. Does the recent practice of the UN, as part of its peacekeeping mandate, to send troops to ensure effective provision of humanitarian aid reaffirm the right to humanitarian assistance? (*Cf.* Security Council Resolutions 794, para. 10 and 814, para. 14.)

   c. Are attacks on those providing relief violating IHL? Are they grave breaches of IHL? Even attacks on armed UN forces providing relief? (*Cf.* Arts. 3, 4, 23, 27, 59, 142 and 147 of Convention IV, Arts. 50, 51 (2), 69, 70, 81 and 85 of Protocol I and Arts. 4 (2) (a), 13 (2) and 18 of Protocol II.)

2. a. If the UN forces are authorized to establish and maintain a secure environment in Somalia for providing humanitarian aid through the use of force, does the UN become a Party to the conflict and hence internationalize a non-international armed conflict? Or can the UN forces be considered for the purposes of the applicability of IHL as armed forces of the contributing States (which are Parties to the Conventions), and can any hostilities be considered an armed conflict between those States and the party responsible for the opposing forces? Is Somalia then becoming an occupied territory to which Convention IV applies? Which provisions of Convention IV applicable to occupied territories can appropriately apply to such a UN presence which contradict the basic aims of such UN presence?

   b. Although the Security Council authorizes the UN forces "to take the necessary measures" (Resolution 794, para. 10), are not such measures limited by IHL? If so, IHL of international or non-international conflicts? Is the UN a Party to the Conventions and Protocols? Can the UN conceivably be a Party to an international armed conflict in the sense of Art. 2 common to the Conventions? What do you think about the argument that IHL cannot formally apply to these or any UN operations, because they are not armed conflicts between equal partners but law enforcement actions by the international community authorized by the Security Council representing international legality and their aim is not to make war but to enforce peace?

c. Can you imagine why the UN and its Member States do not want to recognize the *de iure* applicability of IHL to UN operations nor establish precisely which principles and spirit of IHL they recognize to be applicable to UN operations?

d. Are attacks on the Pakistani UNOSOM contingent violating IHL? Are they grave breaches of IHL? Are the members of that contingent civilians or combatants? Are they "taking no active part in hostilities"? Even if they create a secure environment for humanitarian relief to be brought to Somalia?

3. Do the resolutions enforce *ius ad bellum* or *ius in bello* or both? Is such mixing harmful for the respect of IHL?

Case No. 168, Belgium, Belgian Soldiers in Somalia

THE CASE

A. Korad Kalid v. Paracommando Soldier

[**Source:** Available under No. 7 A.R. 1995 at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial translation.]

THE MILITARY COURT,

Permanent Dutch-Language Chamber, in Session in Brussels, has Issued the Judgment Below

IN THE MATTER OF:

THE PUBLIC PROSECUTOR'S DEPARTMENT and 104 Korad Kalid Omar, resident in Kismayo, Somalia, [...]

v.

105 V[...] **J**[...] **F**[...] **J**[...], [...], **3rd Para Battalion in Tielen, standing accused that**

As a soldier on active service in Kismayo, Somalia, he did, on August 21, 1993, deliberately wound or strike Ayan Ahmed Farah; [...]

* * *

Notice of appeal having been given [...] against the judgment after trial handed down by the Court Martial in Brussels, [...]

states that the Court Martial, having considered *inter alia*: [...]

That the accused's conduct should be tested against the rules of engagement which served as a guide for the Belgian troops in Somalia;

That, as a soldier, the accused formed part of a Belgian contingent dispatched to protect a humanitarian operation; that the deployment of military forces presupposes that the humanitarian operation could be threatened by force

and that the international community considered that legitimate force could be used to curb or neutralize unlawful force;

That despite the peaceable intentions of the Belgian and other troops, they had to deal both in Somalia and elsewhere with hostile armed elements;

That in those circumstances the Belgian officers were compelled to take security measures in order to perform their mission and ensure their own safety and that of their men;

That the facts took place at check-point Beach, where the base was protected by a wall; that guard posts were set up in front of the wall and that barbed wire fencing was put up in front of those guard posts;

That on the night of August 20 to 21, 1993, the accused was on guard duty between two and three o'clock in Post 3, with orders to prevent anyone from penetrating into the safety area, i.e., through the barbed wire fencing;

That he suddenly spotted a shadow which he identified as a child; that he carried out his instructions; that it was subsequently found that Liebrand, who was manning Post 4 and had a night-glass, reacted in exactly the same manner, i.e., he fired a warning shot followed by a shot aimed at the legs;

That the accused and Liebrand interpreted and carried out the same orders and followed the same rules of engagement, in the same circumstances and in the same way; that it may thus be stated that the reaction and assessment of both soldiers were correct;

That the intruder was indeed a child; that it is nevertheless an unfortunate and regrettable fact that, in certain cultures and certain circumstances, despite the International Convention on the Rights of the Child, children are wrongfully used in war situations or in the use of force;

That the accused's duties at the time of the facts were difficult and dangerous; that he had to take a decision in a fraction of a second; that his safety and that of his unit could depend on his decision; that it would be unfair to judge his conduct during that night from a comfortable situation far in time and space from where it was exercised; that the fact that his colleague Liebrand reacted in the same way must be given more weight than theoretical speculations;

That it must rather be emphasized that, by aiming at the legs, he limited the necessary damage to such an extent that the court martial noted with satisfaction that Doctor Pierson was able to conclude that "she got away with a scar on her buttock"; [...]

III. WITH REGARD TO THE CASE ITSELF

1. Introduction

Whereas the facts of the charge lie within the context of the duties which the accused was performing on August 21, 1993, as a member of UNOSOM, the UN humanitarian operation in Somalia;

Whereas, in the performance of these duties, the accused saw it as his duty at a given moment, as night guard, to fire an aimed rifle shot at the legs of the child, then aged twelve, of the claimant in the civil action; that in so doing he wounded the victim;

2. With regard to the argument of the defence

[...]

Whereas, according to the provisions of Article 70 of the penal code, no offence has been committed if the act is prescribed by law and ordered by the competent authority;

Whereas in Article 417 of the penal code the law as a general rule presumes the momentary need for self-defence when it is a question of preventing, by night, the climbing or breakage of the fences, walls or accesses to an inhabited house or flat or its dependencies;

3. With regard to the requirements for citing a superior's order as grounds for justification

Whereas, in accordance with domestic and international law, it is necessary to check the legitimacy of every order given;

Whereas, in other words, to be able to claim a superior's order as grounds for justification:

(a) the cited order must be given beforehand, and its implementation must correspond to the purpose of that order,

(b) the cited order must be issued by a legitimate superior acting within the limits of his authority,

(c) the order issued must be legitimate, i.e., in conformity with the law and regulations;

Whereas, in connection with this last point, it may generally be assumed that a soldier of the lowest rank may base his actions on the assumption that the order was legitimate;

Whereas a careful investigation must be made to establish whether the force dictated by the senior officer did not exceed that which was absolutely necessary to bring about the intended action;

Whereas the conduct of which the defendant stands accused will be more closely examined hereafter in the light of the above;

4. With regard to the order given to the accused on August 21, 1993

Whereas, according to the defence, the order given to the accused during his duties as a night guard at the time of the facts was "to defend and prevent anyone from penetrating into" the cantonment of various Belgian military units [...];

5. With regard to the rules of engagement and their legal nature

Whereas this order, cited by the accused in the context of Article 70 of the penal code, must also be viewed in conjunction with the other, more general and earlier permanent instructions given him in the form of the rules of engagement;

Whereas the said rules of engagement are to be understood as meaning the general directives issued by the competent authority in the matter (in this instance, the UN as the international political authority);

Whereas these rules of engagement are intended to give as precise instructions as possible to the armed forces under the direct or indirect command of the aforementioned competent (political or military) authority on the circumstances in which they may use all forms of force in the performance of their duties in an existing or possibly impending armed conflict;

Whereas these rules of engagement initially took the form of a mandate under international administrative law;

Whereas they have this nature with respect to both the Member States called upon by international bodies to take part in certain operations and the commanders that a Member State makes directly available to the international organization concerned;

Whereas the Member States, on the other hand, also "*translate*" the rules of engagement *in the form of an order*, relating to the use of armed force, for the *troops they deploy*;

Whereas, if this (oral or written) order to Belgian military personnel is to translate into an obligation of obedience and thus be admissible in a prosecution for insubordination under the terms of Articles 28 *et seq.* of the military penal code, it must, on the one hand, be issued by a hierarchical or operational superior of the same nationality, within the meaning of said Article 28 of the military penal code; and whereas it may, on the other hand, be disobeyed if its implementation can clearly involve the commission of a crime or offence (*see* Article 11, para. 2, sub-para. 2, of the *Tuchtwet* (Code of Military Discipline [Law of 14 January 1975, available in French on http://www.just.fgov.be]));

Whereas, in the actual drafting of the rules of engagement, account must be and was taken of the other relevant legal provisions issued, and as a rule only the legislator can repeal or suspend a legal provision;

Whereas, regardless of the form in which they are set out, rules of engagement are not to be regarded as orders similar to legislation;

Whereas the Court can further agree with the theoretical views put forward by the Public Prosecutor's Department in its submission regarding the rules of engagement; whereas, more specifically, the Public Prosecutor's Department correctly points out that the actual content of the rules of engagement discussed here is influenced by a number of rather incidental factors, legal standards and factual items, such as:

- the identity of the political authority involved,
- the nature of the ongoing operation,
- international law, including the law of armed conflicts and the relevant treaties,
- the "host nation's" legislation,
- the domestic legal provisions of the Member States placing their armed forces at the disposal of the international organization concerned,
- and, obviously, not least the existing operational requirements and the national or international aims involved;

Whereas, while all these factors must undoubtedly be and were taken into account in the establishment and definition of rules of engagement by the Member State, the criminal judge must, in assessing the grounds for justification as specified, for the purposes of the case before him, in Article 70 of the penal code, primarily test the conduct of the accused soldier who implemented the rules of engagement against the order as actually issued by the hierarchical superior from the Member State concerned to the soldier of his own nationality;

Whereas for the accused soldier the rules of engagement thus took the form of an order, both *de jure* and *de facto*;

6. With regard to the rules of engagement as they were to be implemented by the accused on August 21, 1993 [...]

Whereas even though the prosecution file contains no information on the name and rank of the Belgian superior who laid down the rules of engagement as an order and line of conduct for the accused, there is not the slightest doubt that those rules of engagement were issued to the accused by a Belgian superior; [...]

Whereas, in essence, at the time of the facts attention had to be paid first and foremost to the pertinent factors below:

1) the accused was given defensive orders;
2) in implementing these *defensive* orders, the accused was authorized to use deadly force in response to hostile acts or clear signs of imminent hostilities;
3) in the event of an attack or threat by *unarmed* individuals, the accused was entitled to use reasonable minimal force to repel the attack or threat after a verbal warning, a show of strength and the firing of warning shots;
4) the accused was entitled to regard *armed* individuals as a threat;
5) only minimum force was ever be used.

7. With regard to the manner in which the accused carried out the orders given to him on August 21, 1993 [...]

Whereas the accused acted with the necessary care and in accordance with the law in the given circumstances;

Whereas, on observing the child creep through the concertina and thus arrive in the immediate vicinity of the bunker, he first gave the necessary verbal warnings in both Somali and English;

Whereas he then fired two warning shots into the ground about 50 cm away from the child, who still showed no reaction;

Whereas he finally decided to fire an aimed shot;

Whereas he fired this aimed shot at non-vital organs, viz. the legs;

Whereas the infiltration detected terminated only with this aimed shot;

Whereas the procedure followed by the accused was the only possible one to fulfil his defensive duty;

Whereas the accused had to regard the threat as real and, in order to ward off this threat, used minimum force after giving the required warnings;

Whereas the accused was physically incapable of catching the intruder (in view of the special position of the bunker, which was accessible only from the rear along an aperture in the cantonment wall);

Whereas it was unrealistic to call upon other reserve facilities, e.g., the picket;

Whereas in view of the possible imminent attack, the reaction had to be prompt and this reaction was also commensurate;

Whereas, all being considered, there was no other action suitable in the circumstances which could be taken to prevent further penetration;

Whereas the orders had been given beforehand, and their implementation corresponded to their intention;

Whereas the order was legitimate and was issued by a legitimate superior acting within his authority;

Whereas the force used was unmistakably proportional to the nature and extent of the threat;

Whereas, furthermore, it may be remarked that another guard acted in almost the same manner as the accused;

Whereas in this connection, and to conclude, it may also be remarked that, contrary to what the defence claims, one must reasonably accept that the victim was hit by a shot from the accused and not by the shot from the aforementioned other guard; whereas here attention must be paid primarily to the short distance from which it was fired; [...]

ON THESE GROUNDS,
THE COURT,

[...]

Declares the accused not guilty of the charges brought against him; [...]

B. Osman Somow v. Paracommando Soldier

[**Source:** Available at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial translation.]

PRO JUSTITIA
No. 51 of the Judgment
Nos. 102 and 103 of the session record

THE MILITARY COURT,
permanent Dutch-language chamber, in session in Brussels,
has issued the
judgment below

IN THE MATTER OF:

THE PUBLIC PROSECUTOR'S DEPARTMENT and
102 Osman Somow Mohamed, resident in Jilib-Gombay-Village, Somalia, [...]

v.

103 D[...] **A**[...] **Maria Pierre** [...], **R/69016, Paracommando Battery in Braaschaat,**
standing accused that

As a soldier on active service in Kismayo, Somalia, he did, on April 14, 1993, accidentally cause the death of Hassan Osman Soomon through a lack of foresight or care, but without the intention to assault another person; [...]

* * *

Notice of appeal having been given [...] against the judgment after trial handed down by the Court Martial in Brussels, [...]

states that the Court Martial, having considered *inter alia*: [...]

That Belgium, along with many other countries, dispatches soldiers to protect humanitarian operations; that the dispatch of military troops is justifiable only insofar as humanitarian operations are threatened by force and the international community considers that it has the right to neutralize or curb such force by means of another, legitimate, force;

That events over the past few years have shown that such operations are dangerous not only for the populations whom they are intended to help, but also for those who are given the unenviable task of using the force authorized by the international community;

That the first question to be put is whether the use of a weapon which caused the death of Hassan Osman Soomon was justified and whether, in the use of this weapon, an error was made which would not have been committed by a regular, cautious, highly trained soldier; [...]

That the accused was assigned on July 14, 1993, between 7.00 and 9.00 a.m., to an observation post on the Kismayo beach with orders to guard a shooting sector between barbed wire fences on his left and an imaginary line on his right within which were at least two wrecked ships, with the instruction that no-one was to enter that sector and that no-one should have the opportunity to "install" himself in the wrecks;

That the investigation has established that there was a person to the right of the largest ship; that the accused, after issuing all the specified warnings, aimed at the port side of the hull as a warning and in order not to hit the person on the starboard side of the hull, that the bullet (probably, for nothing is certain) ricocheted and struck the victim who was also in the forbidden area;

That it has not been established from the overall investigation that the accused formally exceeded the rules of engagement, and that no fault, or even carelessness, has been proven to the satisfaction of the law; [...]

III. WITH REGARD TO THE CASE ITSELF

1. Introduction

Whereas the facts of the charge lie within the context of the duties which the accused was performing on July 14, 1993 [...] as a member of UNOSOM, the UN humanitarian operation in Somalia; [...]

Whereas, in the performance of these duties, the accused unintentionally killed the victim;

2. With regard to the argument of the defence

Whereas the defence, moving for acquittal, claims that not the slightest fault can be attributed to the accused; [...]

Whereas, according to the provisions of Article 70 of the penal code [available in French on http://www.just.fgov.be], no offence has been committed if the act is prescribed by law and ordered by the competent authority;

Whereas Article 260 of the penal code provides grounds for justification in favour of an official who has carried out an unlawful order issued to him by a superior in matters falling under the latter's authority; [...]

Whereas the objective ground for justifying the application of the law and the admissibility of the lawful order issued by the competent authority cannot justify any subjective lack of precaution;

Whereas a defendant who has carried out a lawful order in an imprudent manner may not invoke the provisions of Article 70; whereas this also applies to persons belonging to the forces of law and order;

Whereas a person belonging to such forces who incorrectly carries out an order from his superior may not invoke Article 260 of the penal code either; [...]

3. With regard to the order given to the accused on July 14, 1993

Whereas the accused, in his statement drawn up on the date of the facts, claims that his instructions were to drive out any person found in a certain area of the beach at KISMAYO, SOMALIA, using all possible means of intimidation;

Whereas this statement is not contradicted by any other information in the file;

Whereas, *in fine* of the undated report [...], deputy prosecutor FRANSKIN emphasizes the military importance of the order, to wit that the shipwreck lying in the forbidden area could be used by a sniper;

Whereas the order, as described above, to be obeyed by the accused must be viewed also in conjunction with the other, more general instructions issued to him, whether in the form of regulations or in the form of rules of engagement and codes of conduct;

Whereas if a judgment is to be based on the compulsory nature of rules of engagement, it is not enough purely and simply to assume beforehand the binding character of those rules; whereas their precise legal nature must first be determined; whereas, for the accused, the rules of engagement in question also took the form of an order, both *de jure* and *de facto*;

Whereas, in connection with the said rules of engagement, account must indeed be taken of the instructions as actually given to the accused;

Whereas, according to the Public Prosecutor's Department, the rules of engagement [...], were applicable to Operation UNOSOM II starting from May 4, 1993;

Whereas the defence does not dispute this fact;

Whereas, therefore, the order given to the accused at the time of the facts allowed him to make considered use of the weapon as the very last means of subduing an unarmed person who constituted a threat to the discharge of his mission in the controlled area; whereas, in firing any shot, he had to take considerable care to avoid any collateral harm;

Whereas even the law of armed conflicts contains obligations regarding the precautions to be taken in order to spare the population during attacks (Article 57 of Protocol I of May 8, [*sic*] 1977 additional to the Geneva Conventions of August 12, 1949);

4. With regard to the manner in which the accused carried out the orders given to him on July 14, 1993

Whereas the Court, after examining the documents on file and the case presented in court, reaches the conclusion that the accused correctly carried out the order given to him in that, in the given circumstances, he behaved with the care required of a regular, cautious, highly trained soldier and in accordance with the law;

Whereas the Public Prosecutor's Department rightfully does not dispute "that the accused was authorized in the given circumstances to fire a warning shot";

Whereas the "force" inherent in the firing of that warning shot was proportional to the extent of the established threat, and it can be recalled that it was never the accused's intention to harm anyone's bodily integrity;

Whereas it must be remembered that that warning shot was necessary to intimidate a person, never identified, who was entering the forbidden area and also that that person was, from the accused's position, to the right of the wreck;

Whereas the Public Prosecutor's Department and the claimant in the civil action blame the accused for having selected the curved steel bow of the wreck as his aiming point and not, for example, the flat surface of its pilothouse;

Whereas it may also be concluded from the account of the facts that:

- the accused did indeed choose the port side of the curved steel bow of the wreck as his aiming point;
- the victim was fatally wounded as a result of the ricochet of the warning shot fired by the accused, and that it must be noted that the victim entered the area monitored by the accused from behind the wreck;
- before that time the accused had not noticed the victim's presence at all and that, moreover, in view of his position, he had not been able to notice it before, especially as he was observing the state of the area through his binoculars;

Whereas the legal question to be answered is also whether the accused failed to exercise foresight and care when firing his warning shot;

Whereas this question must be answered in the negative since, in view of the curvature of the steel bow of the wreck, the bullet could only have ricocheted towards the area which no-one was allowed to enter;

Whereas it may be assumed that the accused selected this aiming point precisely in order that the person with regard to whom he was required to take intimidation measures should not be injured or killed by a ricocheting bullet;

Whereas it is very clear from the report of the investigation conducted by deputy prosecutor FRANSKIN on the spot that the victim was fatally wounded at only some five metres from the port side of the wreck;

Whereas this relatively short distance supports the accused's claim that he had never seen the victim and could not therefore take account of his presence;

Whereas the accident may be ascribed solely to a set of unfortunate circumstances which could not be foreseen by the accused; [...]

ON THESE GROUNDS,
THE COURT,

[...]

Declares the accused not guilty of the charges brought against him, taking into account the change in the date of the facts and the identity of the victim; [...]

DISCUSSION

1. a. Does the applicability of IHL depend upon whether the accused, as a part of a Belgian contingent of UNOSOM, is considered to be under Belgian authority? Or that of the UN?

   b. Does IHL apply in these circumstances to these UN forces? What do you think about the argument that IHL cannot formally apply to UN operations, because they are not armed conflicts between equal partners but law enforcement actions by the international community authorized by the Security Council representing international legality and their aim is not to make war but to enforce peace?

   c. Can the accused be considered for the purposes of the applicability of IHL as members of the armed forces of Belgium (which is a Party to the Conventions), and can any hostilities be considered an armed conflict between Belgium and Somalia?

2. a. Taking for granted that IHL applies to the accused, although they are on a UN mission, does IHL apply to the situation in Somalia? Is there an armed conflict? Is it an international armed conflict or a non-international armed conflict? Could IHL of international armed conflicts apply even if there were no hostilities between UN forces and regular Somali armed forces? If only events like those described in either of the cases happened, could the situation be qualified as an armed conflict? (*Cf.* Art. 2 of Convention IV.)

b. If IHL of international armed conflict applied, were either of the accused's actions to be judged under the law on conduct of hostilities? (*Cf.* Art. 51 (2) of Protocol I.) Or under the provisions on the treatment of protected civilians? (*Cf.* Art. 27 and 32 of Convention IV.) Were those provisions violated?

c. Did the acts of the defendants violate IHL independently of whether the Belgian operations in Somalia were subject to the laws of international or to those of non-international armed conflicts? (*Cf.* Art. 3 common to the Conventions.)

d. If IHL does not apply, is the accused's shooting of the child, in Case A, prohibited by international law? If IHL applies, does it provide children special protection? Are the rules on this special protection relevant in this case? (*Cf.* Art. 50 of Convention IV, Art. 77 of Protocol I and Art. 4 (3) of Protocol II.)

3. a. If IHL applies, were the shootings in these cases governed by IHL, by International Human Rights Law, or by both? Which of the two branches contain sufficiently detailed rules to permit judging of the accused's behaviour?

b. Does international human rights law apply during an armed conflict? Even to hostile acts committed by combattants? If these acts don't necessarily violate the right to life?

c. Did the accused's actions conform with Art. 57 of Protocol I? Particularly in Case B, did the Court correctly conclude that accused exercised the appropriate level of foresight and care? Assuming that IHL of international armed conflicts is applicable, is Art. 57 at all applicable to uses of force like those of the accused?

d. Were the accused's actions in conformity with UN standards for law enforcement officials, *e.g.,* the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,* adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990?

[Art. 9 of those Principles reads: 9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.]

Are those principles applicable to the accused's actions even in an international armed conflict? Did the threats in either case constitute a situation as described in para. 9 warranting such action by the accused? Is factor number 3 in section III. 6. mentioned in Case A consistent with para. 9 of the *Basic Principles?* Were the orders given to the accused in Case B consistent with para. 9?

4. a. When may a superior order provide a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation? (*Cf.* Art. 33 of the ICC, *See* **Case No. 15**, p. 608)

b. In the first case, could the accused, as a simple soldier, know if the order received was legal?

c. Are Arts. 70 and 260 of the Belgian criminal code compatible with IHL in cases of an order to commit a war crime?

Case No. 169, Canada, R. v. Brocklebank

[N.B.: Clayton Matchee, the Canadian soldier suspected of being the leader of the military group which beat to death a Somalian adolescent, Shidane Arone, in 1993, appeared in court for the first time on 23 July 2002 (Source: Le Devoir, Montréal, 24 July 2002).]

THE CASE

[**Source:** Canada, Court Martial Appeal Reports, Volume 5 Part 3, 1995-1997; footnotes are partially reproduced. Paragraph numbers have been added to facilitate discussion.]

HER MAJESTY THE QUEEN
Appellant,

v.

D.J. Brocklebank
(Private, Canadian Forces), Respondent

INDEXED AS: R.v. BROCKLEBANK
File No.: CMAC 383
Heard: Toronto, Ontario, 29 January, 1996
Judgment: Ottawa, Ontario, 2 April, 1996
Present: Strayer C.J., Décary and Weiler JJ.A.

[Décary J.A:]

[...]

THE FACTS

[...]

[5.] I would add the following to the description of facts set out by my colleague:

- Prior to the departure of the Canadian contingent to Somalia, the Canadian Forces did not instruct the soldiers as to their role and duties as participants in a peacekeeping mission. Nor is there evidence that during their general training soldiers were ever instructed with respect to peacekeeping missions as opposed to war operations.
- On March 16, 1993, Private Brocklebank, [...] who was coming down with dysentery, went to bed early, without knowing that he was to be assigned later on in the evening. From the time he went to bed until he was awakened by Master Corporal Matchee ("Matchee") at approximately 2300 hours, he did not get up, did not leave his tent and did not have any knowledge of the fact that there had been an arrest and that both Matchee and Private Brown ("Brown") had been torturing the prisoner.

- At approximately 2045 hours on the night of March 16, 1993, Sergeant Hillier's patrol captured a Somali youth, Sidane Arone ("Arone"). Flexicuffs were placed on the prisoner's wrists, a baton was placed under his arms at the back, and he was walked through the camp in this way by Captain Sox ("Sox") and by Brown. On the way to the bunker, they stopped briefly at the Command Post so that Sox could tell Major Seward ("Seward") that they had captured someone.
- Brown testified that he had been ordered by Sox to go to the front gate and to get whoever was on gate guard duty, which happened to be Matchee. According to Brown, once Matchee had come to the bunker, Sox had told Matchee, "You are in charge of the prisoner". Sox was the only witness who testified that it was standard operating procedure for the person who was the gate guard to pull back, stay at the bunker location and assume responsibility for the prisoner. Brown, Corporal Glass, Sergeant Hooyer and Sergeant Hillier all testified to the fact that no such standard operating procedure existed.
- Once they reached the bunker, the prisoner was secured by Matchee and by Brown. Sox gave instructions to Matchee that flexicuffs were to be put on the ankles of the prisoner to secure him.
- At approximately 2100 or 2130 hours, Matchee ordered Brown to go and get Matchee's flashlight. When Brown returned with the flashlight, Sox, Warrant Officer Murphy, Seward and other persons were squatted down looking into the bunker. Brown then left the bunker area and some time later, Matchee came to Brown's tent and told Brown that he was going to interrogate or hassle the prisoner. Matchee also told Brown about some kind of an abuse order from Captain Sox, and that Captain Sox wanted the prisoner beaten.
- Brown was scheduled for gate guard duty at 2200 hours, although he first learned that he was going to be on duty that night sometime after 1930 hours. At approximately 2200 hours, Brown was on his way to his sentry post at the gate when Matchee ordered him over to the bunker. At that time, according to Brown, Matchee was in charge of the prisoner while Brown was on guard duty. [Footnote 3: Private Brown was eventually charged and convicted with one count of torture. He was not charged with negligent performance of a military duty.] Brown de-kitted, went into the bunker and began beating the prisoner with Matchee.
- Prior to the arrival of the respondent at the bunker at approximately 2308 hours, Matchee had been beating the prisoner and was showing the prisoner to various people, none of whom had done anything to try to stop Matchee.
- Brown testified that a flashlight was required to see anything in the bunker.
- According to the respondent, when Matchee woke him at approximately 2300 hours, the respondent had no idea why he was being woken. He understood that he was ordered to be on duty at the front gate.

- After leaving his tent at approximately 2307 hours, the respondent was heading to the front gate when Matchee called him to come over to the bunker. The respondent testified that he believed that this was an order and he walked toward the bunker. As he got close to the bunker, Matchee pointed a flashlight at a Somalian in the bunker and said, "Look what we got here". The respondent testified that he had no idea who the prisoner was, nor did he have any idea as to why the person was in the state in which he saw him.

- After Matchee turned off the flashlight, he asked the respondent for his pistol. The respondent asked what Matchee wanted it for and Matchee's response was something to the effect of, "Give me the f'n pistol, just give me your pistol Brocklebank". Brown testified that the respondent still seemed puzzled and told Matchee, "But it's loaded" and Matchee said, "Just give me your pistol Brock, that's an order". The respondent followed the order and gave Matchee his pistol, although he had no awareness at that point what Matchee's intended use of the pistol was. It was not until Matchee told Brown, "I'd like to take a picture of me", that the respondent understood why Matchee wanted the pistol. Matchee then held the pistol to the prisoner's head and told Brown to take pictures of him, which Brown did. After this, Matchee returned the pistol to Brocklebank.

- Brown left the bunker after the picture taking. Brown testified that in the entire time that he was in the area of the bunker, he never saw the respondent de-kit, never saw him enter the bunker and never saw him touch the prisoner. Further, Brown was clear that at no time did he ever see the respondent abuse the prisoner or encourage Matchee in what he was doing. There were no photographs of the respondent with the prisoner.

- The respondent testified that after Brown had left, he remained outside the pit while Matchee was down in the pit with the prisoner. The respondent asked Matchee if anyone else "had seen this" and Matchee told him that Warant Officer Murphy had kicked or hit the prisoner and that Captain Sox had instructed Matchee to "give him a good beating, just don't kill him".

- The respondent testified that he remained outside at the entrance of the bunker, watching the gate from the bunker. He never went down into the pit while Matchee was present. Even though he knew the beating was going on, he assumed it was as a result of an order given to Matchee and he sat there, in shock, not realizing the severity of the beating.

- The respondent testified that at no point had he been ordered to guard the prisoner and that he believed that the prisoner was in the custody of Matchee.

[6.] I shall now move on to the three grounds of appeal. [...]

THE FIRST GROUND OF APPEAL: THE CHARGE OF TORTURE

[7.] I agree with my colleague that the first ground of appeal should be dismissed.

[8.] The accused was charged under section 269.1 of the Criminal Code of Canada ("*the Criminal Code*") and under section 72 of the National Defence Act (*"the Act"*), of the offence of aiding and abetting in the commission of torture. The relevant *Criminal Code* provision reads as follows:

> **269.1** (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. [...]
>
> **72.** (1) Every person is a party to and guilty of an offence who
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of aiding any person to commit it;
> (c) abets any person in committing it; or
> (d) counsels or procures any person to commit it.

[9.] In order to be found guilty of the offence of aiding and abetting in the commission of torture, the panel [the members of the court of first instance] had to be convinced beyond reasonable doubt that Brocklebank a) did or omitted to do something; b) for the purpose of aiding Matchee in the commission of the offence of torture.

[10.] Assuming for the sake of discussion that the accused did or omitted to do something, there was, in my view, not even an iota of evidence that could establish that the respondent had formed the intention required to commit the offence he was charged with. [...]

THE THIRD GROUND OF APPEAL: THE DEFENCE OF OBEDIENCE TO SUPERIOR MILITARY ORDERS

[11.] The defence of obedience to superior military orders was put to the panel by the Judge Advocate in his charge on the offence of torture. Even defence counsel agrees that the defence he was raising was not that of obedience to superior military orders; what he wanted to do, as my colleague puts it, was to raise the defence of honest belief as negating the *mens rea* of the offence of torture. [...]

THE SECOND GROUND OF APPEAL: NEGLIGENT PERFORMANCE OF A MILITARY DUTY

[12.] The prosecution alleges that the Judge Advocate made two fatal errors in his instructions to the panel on the charge of negligent performance of a military duty.

a) The standard of care [...]

[18.] In summary, the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the

reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation. [...] Furthermore, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to the same exacting standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer. [...]

b) A de facto *duty of care*

[24.] Second, the prosecution alleges that the Judge Advocate failed to instruct the panel that the respondent had a *de facto* duty of care as a Canadian Forces soldier to protect civilians with whom he came in contact from foreseeable danger, whether or not he was aware of the duty. Conversely, defence counsel claims that the Judge Advocate erred in instructing the panel that on the charge of negligent performance of a military duty imposed upon the respondent, the panel could consider the "non-statutory duty of care to observe the provisions of chapter 5 of the Unit Guide to the Geneva Conventions with respect to civilians with whom the Canadian Forces come into contact". [...]

[25.] The Judge Advocate was of the view that section 5 of chapter 5 of the Unit Guide to the Geneva Conventions issued by the Chief of Defence Staff (I shall return to the Unit Guide in more details further in these reasons) imposes on a member of the Canadian Forces, at all times including in peacetime, a duty to safeguard civilians in Canadian Forces custody whether or not these civilians are in that member's custody. The Judge Advocate further instructed that the mere knowledge or notice of the relevant provision in the Unit Guide is sufficient to activate the duty and render culpable under section 124 of the Act an omission to safeguard a civilian prisoner. While it is not questioned that the Geneva Conventions for the Protection of War Victims assert the right of civilians to be protected from acts of violence where possible I cannot so quickly subscribe to the Judge Advocate's view that as a matter of military law, the Unit Guide and the Geneva Conventions apply to peacekeeping missions and if they do, that they create a "military duty" in the sense of section 124 of the *National Defence Act*. I will elaborate my reasoning with an outline of the nature and purpose of the charge of negligently performing a military duty, to be followed with an examination of the nature and effect of the Unit Guide and the Geneva Conventions.

i) The charge of negligent performance of a military duty

aa) The context [...]

[35.] The offence of negligently performing a military duty, [...] concerns the discharge of any military duty. The charge relates explicitly to the manner of

discharging a military duty imposed upon a member of the Canadian Forces. [...] The impugned act or omission of the accused must constitute a marked departure from the expected standard of conduct in the performance of a military duty, as distinguished from a general duty of care. [...]

bb) "a military duty" [...]

[48.] The conclusion, in my view, is inescapable: a military duty, for the purposes of section 124, will not arise absent an obligation which is created either by statute, regulation, order from a superior, or rule emanating from the government or Chief of Defence Staff. Although this casts a fairly wide net, I believe that it is nonetheless necessary to ground the offence in a concrete obligation which arises in relation to the discharge of a particular duty, in order to distinguish the charge from general negligence in the performance of military duty *per se*, which upon a plain interpretation of section 124, it was clearly not Parliament's intention to sanction by that section.

ii) Military duty to safeguard prisoners; the Unit Guide and the Geneva Conventions

aa) Where prisoner in custody of accused

[49.] It is a principle of law, recognized by counsel for both parties, that a person who has physical custody of, and authority over a prisoner is under a duty to safeguard that prisoner. That duty exists and is enforceable independently of the Unit Guide and of the Geneva Conventions.

[50.] Counsel for the prosecution relies on a stream of English and Canadian jurisprudence for what he refers to as a common law duty of care. While I agree that the principle exists, I would hesitate to apply *mutatis mutandis* to the military milieu a jurisprudence developed in a non-military context. Although all military duties are subsumed into the broader category of legal duties, general private law duties such as a tort law duty of care owed by prison guards to prisoners are not, in my opinion, contemplated by the term "military duty". As I earlier stated, it is clear that Parliament did not intend to codify a civil law duty of care in the Code of Service Discipline. [...]

[52.] [...] The Judge Advocate correctly instructed the panel that before they could find Private Brocklebank guilty of the charge, they had to establish beyond a reasonable doubt that the prisoner was in his custody, or that he had custodial responsibilities in respect of the prisoner sufficient to invoke the military duty to safeguard the prisoner.

bb) Where prisoner in custody of the Canadian Forces but not in custody of the accused

[53.] The appellant contends, in what appears to have been an afterthought, that even if the prisoner was in the direct custody of the accused, the latter was nonetheless bound by a *de facto* duty to come to the assistance of an

aggrieved prisoner in Canadian Forces custody with whom he came in contact. The Judge Advocate agreed with the prosecution. [...]

[56.] [...] Defence counsel having mentioned:

> ... I believe it is a matter agreed as between us, that there is no suggestion that the Geneva Convention applies to the situation that is before you, but it is admitted that insofar as a guard guarding a prisoner in the army has a responsibility at common law, as we understand the ordinary common law. The responsibility of a guard to the prisoner is so akin to what the Geneva Convention sets out that I have no objection to you having it, but that it will not be an issue as to whether or not, in fact, the rules of the Geneva Convention apply specifically to what occurred in the Somalian operation. [...]

[58.] A military duty, as I earlier found, can arise from statute, regulation, or specific instruction, such as an order from a superior officer or an imperative from the Chief of Defence Staff. Counsel for both prosecution and the defence concede that there is no statutory or regulatory duty extant which imposes an obligation on members of the Canadian Forces to take positive steps to safeguard prisoners who are not in their direct custody. The appellant, however, relies on Canadian Forces Publication (CFP) 318(4), Unit Guide to the Geneva Conventions, issued by the Chief of Defence Staff on June 15, 1973, as the basis of a general military duty of all service members to protect civilian prisoners not in their custody.

[59.] The aims of the manual, as appears from its introduction, is "to acquaint all ranks with the principles of the Geneva Conventions for the Protection of War Victims signed on August 12, 1949" and to comply with the provision contained in each of the four Conventions "requiring participating nations to distribute the text of the Convention as widely as possible and, in particular, to include a study of these texts in programmes of military instruction". The manual "is a guide only". Paragraph 5 of chapter 1 states that the provisions of the Conventions apply "to all nations who have accepted the conventions in declared war and in any other armed conflict which may arise" and paragraph 7 states that "(i)t therefore follows that members of the Canadian Forces should observe all the provisions of the Conventions when engaged in any conflict".

[60.] Chapter 5 of the manual is entitled "Treatment of Civilians" and it deals specifically with Convention IV of the Geneva Conventions, i.e. the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, known as the Civilian Convention. It is noted in the first paragraph that "[t]he Civilian Convention is designed to give protection to categories of civilians particularly exposed to mistreatment in time of war " and that "[i]ts provisions are [...] restricted to the *inhabitants of occupied territory*" [my emphasis]. Paragraph 2 specifies that "the provisions outlined in this chapter should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact". Paragraph 5 provides as follows:

5. Civilians are entitled in all circumstances to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They must be humanely treated at all times and protected against all acts of violence possible and, where appropriate, against insults and public curiosity. [Footnote 31: Whether a civilian, once he becomes a prisoner, remains a civilian for the purposes of the Civilian Convention, is a question which I need not answer in view of the conclusion I have reached as to the applicability and meaning of the Convention. I shall assume, for the sake of discussion, that the civilian convention treats civilians on a same footing whether or not they are prisoners.]

[61.] I do not believe that the relevant provisions of the Unit Guide constitute specific instructions or imperatives giving rise to an ascertainable military duty. The provisions are, by the very words of the manual, "a guide only".

[62.] Even if they were to be considered a specific instruction, they would not apply to the case at bar for the simple reason that the Civilian Convention itself, which the Unit Guide purports to explain, does not apply. The mission of the Canadian Forces in Somalia was a peacekeeping mission. There is no evidence that there was a declared war or an armed conflict in Somalia, let alone that Canadian Forces were engaged in any conflict [footnote 32: The 1949 Geneva Conventions have been approved by the Canadian Parliament in the *Geneva Conventions Act* (R.S.C. 1985, c. G-3, as amended). Protocols I and II to these Conventions, which were adopted in Geneva in 1977, were approved by the Canadian Parliament on June 12, 1990 (38-39 Eliz. II, c. 14) in an amendment to the *Geneva Conventions Act*. Section 9 of *Geneva Conventions Act* provides that "[a] certificate issued by or under the authority of the Secretary of State for External Affaires stating that at a certain time a state of war or of international or non-international armed conflict existed between the States therein or in any State named therein is admissible in evidence in any proceedings for an offence referred to in this Act." No such certificate having been filed in this case, this court is simply not at liberty to assume the existence of a state of war or of an armed conflict in Somalia. Without such evidence, the Convention cannot be said to be applicable and it follows that the Unit Guide to that convention cannot apply either.]. There is no evidence that the prisoner was "exposed to mistreatment in time of war" or that the prisoner was an "inhabitant of occupied territory". That the Civilian Convention does not by its very terms apply to peacekeeping missions is confirmed by the wording of the Additional Protocols adopted in Geneva in 1977. In the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, it is observed that the Civilian Convention "only protects civilians against arbitrary enemy action, and not - except in the specific case of the wounded, hospitals and medical personnel and material - against the effects of hostilities" and that "although humanitarian law had been developed and adapted to the needs of the time in 1949, the Geneva Conventions did not cover all aspects of human suffering in armed conflict". (General Introduction at xxix). The 1977 Protocol I, which relates to the Protection of Victims of International Armed Conflicts and whose article 51 was meant to enlarge the concept of "protection of the civilian population" as found in the Civilian Convention, only affords civilians "general protection against dangers of military operations" means "all the movements and activities carried out by armed forces related to hostilities". The 1977 Protocol II, which relates to the Protection of Victims of Non-International Armed Conflicts, contains a similar provision (article 13).

[63.] Since the Civilian Convention cannot be related to peacekeeping missions such as the one in which the Canadian Forces were involved in Somalia. I fail to see how it could be said that the Unit Guide whose aim is to explain that Convention applies to such missions. I find, furthermore, that there was no evidence before the Judge Advocate that would allow the Court to assume that the peacekeeping mission could be equated to an armed conflict within the purview of the Civilian Convention or the Unit Guide. [...]

[64.] Even if I were to hold that the Unit Guide is a source of specific instructions whose application should be extended to peacekeeping missions, the provision of the Unit Guide that declares that civilians "must be humanely treated at all times and protected against all acts of violence where possible and, where appropriate, against insults and public curiosity" would not, in my view, establish a *de facto* military duty as asserted by the prosecution.

[65.] I see no basis in law for the inference that the Geneva Conventions or the relevant provisions of the Unit Guide impose on service members the obligations [...], to take positive steps to prevent or arrest the mistreatment or abuse of prisoners in Canadian Forces custody by other members of the Forces, particularly other members of superior rank. I do not wish to comment on the duty that a superior officer might have in similar circumstances, but assert that a military duty in the sense of section 124 of the *National Defence Act*, to protect civilian prisoners not under one's custody cannot be inferred from the broad wording of the relevant sections of the Unit Guide or of the Civilian Convention. I agree [...] that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner, consistent with Canada's international obligations, the rule of law and simple humanity. There was evidence in this case to suggest that the respondent could readily have reported the misdeeds of his comrades. However, absent specific wording in the relevant international Conventions and more specifically, the Unit Guide, I simply cannot conclude that a member of the Canadian Forces has a penally enforceable obligation to intervene whenever he witnesses mistreatment of a prisoner who is not in his custody.

[66.] Through the *Geneva Conventions Act* Parliament has honoured its international obligations and codified as offences under Canadian law the "grave breaches" listed in the 1949 Geneva Conventions, including torture and inhumane treatment. [...] It is not insignificant that neither the 1965 statute nor the 1990 amendment impose a specific duty on armed forces personnel to protect prisoners in their custody. [...]

CONCLUSION [...]

[70.] In closing, I would remark that although I am not prepared to extract from the relevant provisions of the Unit Guide a culpable military duty to safeguard prisoners where no custodial relationship exists between the accused and the prisoner, I would add that it remains open to the Chief of Defence Staff to define in more explicit terms the standards of conduct expected of soldiers in

respect of prisoners who are in Canadian Forces custody. It is open to the Chief of Defence Staff to specify that these standards apply equally in time of war as in time of peace, to impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge and to ensure that Canadian Forces members receive proper instructions not only during their general training but also prior to their departure on specific missions. Given Canada's traditional and ongoing role as a peacekeeping nation, and the possibility, of if not likelihood of similar circumstances arising in the future, this might prove a useful undertaking. [...]

STRAYER C.J.: I agree [...]

WEILER J.A. (dissenting): [...]

[83.] Torture is an offence of specific intent. The Crown must therefore prove that Brocklebank failed to act in order to assist Matchee in torturing Arone. Both the Crown and the defence agreed that if Brocklebank was guarding Arone then at common law he has a duty to protect him. If, however, Brocklebank was not guarding Arone, the Crown proceeded on the basis that Brocklebank could be guilty as a party under section 21 of the *Criminal Code* because he ought to have known that he had a duty to protect civilians, and his failure to do so aided and abetted the torture of Arone. The defence admitted that prisoners and civilians in Canadian Forces custody must be protected against all acts of violence as a matter of General Service Knowledge ("GSK"). As part of their battle training, soldiers were instructed on the provisions of the Geneva Convention for the treatment of prisoners of war as well as civilians. In materials provided to them (specifically those in Exhibit "J"), it was clear that the Geneva Convention specifically prohibits the torture or abuse of civilians. It was clear in these materials that the Geneva Convention "should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact with." The defence did not admit that the accused had specific knowledge of this duty. The position of the Crown is that evidence of Brocklebank's specific knowledge of the GSK was immaterial and the Judge Advocate erred in his summation in not clearly saying so.

[84.] Given the particular approach of the Crown, this ground of appeal must fail. In relation to the charge of torture, Brocklebank's specific knowledge of the GSK was relevant to his purpose in handing over his revolver to Matchee and to his intention in continuing to be present at the bunker. Clearly, if Brocklebank was under a duty to protect Arone and did not do so for the purpose of aiding Matchee to torture Arone, he could be found guilty as a party. At the opposite end of the spectrum, it is trite to say that had Brocklebank been unarmed, his mere presence while Arone was being tortured would not amount to aiding and abetting if Brocklebank had no duty towards Arone. These two extremes, which were put by the Judge Advocate, ignore a third position. Brocklebank was armed. If the purpose

of his presence was to ensure against Arone's escape, particularly when he was left alone with Arone while Matchee went for a cigarette, then there was evidence upon which he could have been found guilty as a party. [...]

[89.] [...] The Judge Advocate instructed the panel that before they could find that Brocklebank was guilty of a breach of a statutory duty of care under section 124 of the *National Defence Act*, they must find beyond a reasonable doubt that Brocklebank had actual knowledge of a duty under section 124 and actual knowledge of the provisions relating to the Geneva Convention. This was an error inasmuch as section 150 of the *Act* states:

> The fact that a person is ignorant of the provisions of this Act or of any regulations or of any order or instruction duly notified under this Act, is no excuse for any offence committed by the person.

[90.] This provision imposes liability on an objective standard. [...] Earlier in his ruling rejecting a motion by the defence that the prosecution had failed to make out a *prima facie* case, the Judge Advocate expressed the view that members of the Canadian Forces are under a duty to observe the provisions of chapter 5 of the Unit Guide to the Geneva Convention with respect to civilians with whom the Canadian Forces come into contact and that, specifically, the duty includes the protecting of civilians from all acts of violence where possible. In considering whether Brocklebank ought to have known that soldiers on a peacekeeping mission have a duty of care towards civilians, the panel should have been instructed that it was not necessary to prove that Brocklebank had actual knowledge of the duty in section 124 [...]. Evidence that Brocklebank was given notification of a duty to protect civilians, through lectures given to Brocklebank's platoon, was presented at trial. The average soldier would have been aware of this duty. In my opinion, a peacekeeping mission is a military operation carried out by armed forces with the aim of preventing hostilities and therefore within the Geneva Convention as enlarged by the 1977 Protocols. [...]

THE THIRD GROUND OF APPEAL

[96.] At trial, Brocklebank testified that he questioned Matchee about his torture of Arone and that Matchee responded that Sox told him to "[g]ive him a good beating, just don't kill him." In cross-examination, Brocklebank testified that he did not do anything about the beating because he thought it had been ordered. The appellant submits that the Judge Advocate erred in law when he directed the members of the panel in respect of the applicability of the defence of superior orders. Even if Brocklebank lacked the courage to point his pistol at Matchee and stop him, he could have sought help. He did not do so.

[97.] In *R. V. Finta*, [...] the Supreme Court recognized that the defence of obedience to superior orders was available to members of the military. The defence is not available where the orders in question were manifestly unlawful unless the circumstances of the offence were such that the accused had no moral choice as to whether to follow the orders. The

respondent concedes that Brocklebank had a moral choice but submits that the orders in question were not manifestly unlawful. To be manifestly unlawful the orders must offend the conscience of every right-thinking person. Because [of] Brocklebank's lower rank, the defence contends that he was not in a position to assess the lawfulness of the order.

[98.] If Brocklebank had been ordered to assist in abusing Arone, it would, in my opinion, have been a manifestly unlawful order. As a result, there was no evidentiary foundation for the defence of obedience to superior orders [...].

[99.] The defence raised does not appear at heart to be a defence based on Brocklebank's obedience to an order given by a superior: the only orders which Brocklebank received from Matchee were to go to the pit and to give him his gun. Rather, the defence is one of non-interference based on a belief that an order has been given to a superior officer. The defence raised here is that Brocklebank honestly believed that Matchee was entitled to beat Arone because Matchee told him that Sox had said it was O.K. so long as he did not kill him. In essence, the appellant raises the defence of honest belief as negating the *mens rea* of the offence. [...]

DISCUSSION

1. a. (paras. 62, 63, 89 and 90) Does the Court recognize that International Humanitarian Law (IHL) is applicable to acts committed against Arone? Does Judge Décary develop his reasoning as he says he will in para. 25? What is the opinion of Judge Weiler? What is your opinion? Was there an armed conflict in Somalia? Were there military operations there? Was there an armed conflict in which Canadian forces were involved? Was Canada a party to the armed conflict? If there was no armed conflict, is that sufficient to conclude that Convention IV did not apply? (*Cf.* Art. 2 of Convention IV.)

   b. (para. 62, note 32) Could the Court have decided that there was an armed conflict in Somalia in the absence of a certificate from the Secretary of State for External Affairs confirming it?

2. What rules of IHL did Canada violate with respect to the treatment of Arone? (*Cf.* Arts. 27, 31 and 32 of Convention IV.)

3. Was Brocklebank a hierarchical superior of those who tortured and killed Arone?

4. a. (paras. 5 and 49) Was Arone a prisoner of Canada? Was Canada responsible for Arone's treatment, or did the responsibility fall entirely on those detaining Arone? (*Cf.* Art. 29 of Convention IV.)

   b. Is Canada responsible for the behaviour of Seward, Sox, Brown, Matchee and Brocklebank? Even if they acted in violation of Canadian regulations? Even if they had acted in violation of their orders? (Art. 91 of Protocol I.) Was Canada's responsibility limited to ensuring that its agents did not mistreat Arone, or was it also required to ensure that third parties did not mistreat Arone? (*Cf.* Art. 27 of Convention IV.)

c. (paras. 5, 47 and 49-52) Among those implicated (Seward, Sox, Brown, Boland, Matchee and Brocklebank), who detained or kept watch over Arone? Did those who detained or kept watch over Arone only have a duty not to mistreat him, or did they also have a duty to protect him? (*Cf.* Art. 27 of Convention IV.)

d. (paras. 24, 25, 28, 53-67, 88 and 93) Was Arone in the custody of Brocklebank? In the Court's opinion? In the opinion of Judge Weiler? If this had not been the case, could Brocklebank have been punished if he had mistreated Arone? If he did not have Arone in his custody, did Brocklebank, as an agent of Canada, have to uphold Canada's obligation to protect prisoners in Canada's power? Is there, in addition, a general obligation for every soldier to protect all civilians, even those not detained? Only if they are in the power of the party to which the soldier belongs? (*Cf.* Art. 27 of Convention IV.) Is a failure to meet this obligation a grave breach? (*Cf.* Art. 147 of Convention IV and Art. 86 (1) of Protocol I.)

e. (paras. 48-61, 64, 86, 89 and 90) Did Brocklebank have "the task" of upholding Art. 27 of Convention IV? Under international law? Under Canadian law? Was this task sufficiently precise and verifiable to make its non-performance punishable? Is knowledge of the rule a prerequisite to any punishment in the event of a violation?

f. (para. 60) Does Art. 27 of Convention IV apply only to the inhabitants of occupied territories? Is a civilian held prisoner still a protected civilian? What is the difference between the text of Art. 27 and that of para. 5 of Chapter 5 of the manual quoted in para. 60?

g. (paras. 5 and 97-99) Could Brocklebank refuse when his superior, Matchee, ordered him to give him his pistol? Did he have an obligation to refuse? In the opinion of Judge Weiler? Would Brocklebank have been an accomplice in the murder of Arone if Matchee had killed that man with Brocklebank's pistol? Could what Matchee did with Brocklebank's pistol be termed torture? Was Brocklebank an accomplice in torture?

h. (paras. 11 and 99) If Brocklebank believed that Captain Sox had ordered the ill-treatment inflicted on Arone, could the order justify a failure to fulfil his obligation to protect Arone? (*Cf.* Art. 33 of the ICC Statute [*See* **Case No. 15**, p. 608.] and paras. 98-99 of the dissenting opinion of Judge Weiler.)

i. What should Brocklebank have done when he saw Arone?

j. (paras. 64-65) Would Brocklebank have been convicted if the Court had recognized the applicability of the Geneva Conventions?

5. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or the separate breach of negligently performing their duty as commanders?

6. What are the objective factors that might have led these individuals to commit the offences?

Case No. 170, Canada, R. v. Boland

THE CASE

[**Source:** Court Martial Appeal Court of Canada, CMAC-374, Ottawa, Ontario, May 16, 1995; footnotes omitted.]

Court Martial Appeal Court of Canada
Ottawa, Ontario, Tuesday, May 16, 1995

between:

HER MAJESTY THE QUEEN, Appellant
and

V89 944 991
SERGEANT BOLAND, MARK ADAM, Respondent

JUDGMENT

STRAYER C.J. [...]

FACTS

[...] The respondent Sergeant Boland was in command of one of the sections of 4 Platoon. Matchee and Brown were members of that section. 4 Platoon was commanded by Captain Sox. It was part of 2 Commando company commanded by Major Seward. [...]

Matchee was charged but was later found unfit to stand trial. Brown was convicted of manslaughter and torture. He was sentenced to five years imprisonment and both the conviction and sentence have been confirmed by this Court.

Boland was charged with two offences. The first charge was for the torture of Arone, an offence prohibited by section 269.1 of the *Criminal Code* as incorporated by section 130 of the *National Defence Act* as on offence under the latter Act. The second charge was that of negligently performing a military duty. Boland pleaded guilty to the charge of torture. The charge of torture was not proceeded with. [...]

The statement of circumstances, with Boland's differing evidence noted, was as follows. During the morning of March 16th Sergeant Boland, who was in poor health, had been told at a meeting of the "O" group, involving section heads and their platoon commander, that certain steps were to be taken concerning the threat of Somalian infiltrators coming into the compound. Section commanders were told that the company commander had said: "abuse them if you have to, just make the capture". Boland decided not to pass this on to his men. His section had responsibility for guard duty that evening, including the guarding of any prisoners that might be apprehended. Such prisoners were to be put in an unoccupied machine gun bunker near the compound gate. After Arone was apprehended outside the Canadian compound by a patrol headed by Captain Sox, he was delivered to Boland's section. At that time Matchee was on duty and Private Brown was present when the prisoner was put in the bunker. At this point the prisoner was bound by his ankles and his wrists and had a baton stuck

through his elbows behind his back. Boland arrived shortly before 2100 hours to relieve Matchee. Boland ordered Arone's ankles released and arranged for looser wrist binding. According to the statement of circumstances, while Boland was there "another soldier" secured the riot baton by putting a sash cord over one end of it, putting the cord over a roof beam, and tying it to the other end of the baton. (Boland states that Arone was sitting on the ground with his hands bound and the baton behind his elbows although the precise time of this state of affairs was not clear). While Boland was present Matchee retied Arone's ankles. He removed the "skirt" (some kind of light garment worn by Somalian males) from Arone and tied it around Arone's head. He then proceeded to pour water on Arone's head. Boland told Matchee to stop doing that or he would suffocate Arone. (Boland's version suggests that Matchee may have been trying to give Arone a drink by pouring water on his cheek. Boland also suggested that the blindfolding was proper as a security measure, although it was not explained why a prisoner would be led through Canadian lines without being blindfolded and then blindfolded after having seen the interior of the bunker). Matchee remained for some time during Boland's guard duty lasting from 2100 to 2200 hours. Matchee then left and later returned with Brown who arrived at about 2155 to relieve Boland. In Boland's presence Brown punched Arone in the jaw. (Boland in his account only referred to Brown saying something to Arone). As Boland went off duty at 2200 hours he said to Brown and Matchee: "I don't care what you do, just don't kill the guy." (According to Boland, he said "don't kill him", and this was said "in a facetious sort of way, sarcastic".)

Matchee stayed on with Brown for a time after 2200 hours during which time both are said to have hit and kicked Arone. Matchee left and went to the tent of Corporal McKay where he drank beer. Boland arrived at the same tent and had a beer with Matchee and McKay. Matchee said that Brown had been hitting Arone and that he, Matchee, intended to burn the soles of Arone's feet with a cigarette. Boland is reported to have said "Don't do that, it would leave too many marks. Use a phone book on him." (Boland confirmed this discussion took place, but said he did not believe Matchee and thought he was just trying to get a reaction. He said his own reply was sarcastic and the discussion of the phone book was "flip, banter", there being no phone books available.) In the same conversation Boland told Matchee of the instructions from senior officers that it was all right to abuse prisoners, on which Matchee commented "Oh, yeah!" Again, in parting, Boland said to Matchee "I don't care what you do, just don't kill him". (Boland admitted saying this but explained it thus: "I was sick and tired of the conversation and I just brushed him off with that"). At this point it should have been obvious that Matchee planned to go back to the bunker. Boland himself went to bed without returning to the bunker. Matchee did return to the bunker about 2245 and proceeded, with the acquiescence or assistance of Brown, to beat Arone to death.

Some other evidence introduced on behalf of Boland by examination or cross-examination indicated that in these circumstances a section commander was entitled to go to bed and that any problems experienced by a troop on duty was to be reported to the duty officer who in this case was Sergeant Gresty. Boland testified that he believed Brown to be a "weak" soldier from whom he would not have expected aggressive treatment of a prisoner. He also claimed that he was

not aware of the aggressive tendencies of Matchee who had just been assigned to his section. There was however other evidence that Boland "knew what he [Matchee] was like" and that "Matchee's reputation was quite well known within 4 Platoon [...]." This reputation was that "he could be quite a bully".

Boland did, during his evidence in chief, confirm that he had acted negligently. [...]

The Crown, as indicated above, more generally contends that the sentence of ninety days imposed by the General Court Martial was quite inadequate and it should have been at least eighteen months imprisonment. [...]

ANALYSIS

[...]

Adequacy of the Sentence

[...] Apart from the inadequate instructions given by the Judge Advocate, I do not believe it is possible to say that this panel of officers could reasonably have fixed the sentence at only ninety days, whatever view they took of the evidence properly before them. As a minimum it must be recognized that the respondent never disputed the particulars of his offence, namely that he failed to ensure, as it was his duty to do, that Arone was safeguarded. In his own examination in chief he confirmed on several occasions that he had been negligent. The sad but unalterable fact is that that negligence led to the death of a prisoner. Even taking the view of the evidence most favourable to the respondent, the panel was bound to conclude that Boland had strong reason to be concerned about the conduct of Matchee and Brown in respect of a helpless prisoner. Even if the panel believed he did not see Brown strike the prisoner on the first occasion and even if it concluded that Boland disbelieved Matchee's statement that Brown had struck the prisoner after he, Boland, had left, Boland had admitted that he considered Brown to be a "weak" soldier who could surely not be counted on to resist the initiatives of Matchee. He admitted having seen Matchee do life-threatening acts to the prisoner by covering his nose and pouring water on him. He had subsequently heard Matchee speak of intending to burn the prisoner with cigarettes. He thus had good grounds of apprehension as to Matchee's conduct. There was also evidence from even some defence witnesses that Matchee's reputation was well known. Yet, it was clear that Boland had said at least once and probably twice in the presence of Matchee: "I don't care what you do, just don't kill the guy". He gave no proper order to Matchee as to safeguarding the prisoner and left him unsupervised. Nor was it in dispute that it was Boland's responsibility to take all reasonable steps to see that the prisoner was held in a proper manner. Boland failed in that duty, with grave consequences.

I see nothing in the instructions of the Judge Advocate, nor in the sentence, to indicate the General Court Martial had a proper regard to the fundamental public policy which underlies the duty of a senior non-commissioned officer to safeguard the person or life of a civilian who is a prisoner of Canadian Forces, particularly from apprehended brutality or torture at the hands of our own troops. That is this case. There were here no mitigating circumstances such as the presence of an armed or

dangerous prisoner, or even one who was physically uncontrollable. These events did not happen in the heat of battle. There was nothing to suggest that this prisoner had caused any harm to any Canadian or to any Canadian military property: indeed he was captured, not in the Canadian compound, but in an abandoned adjacent compound. No one can dispute the difficult and sometimes hazardous circumstances under which Canadian forces were operating in Somalia in general, nor the physical problems which Boland himself was experiencing at this time. Nevertheless these circumstances call for the exercise of greater rather than less discipline particularly on the part of those in command of others.

It is only fair to note the good, and in some respects remarkably good, record of the respondent both prior to going to Somalia and in Somalia itself. He carried out some exercises involving great courage and initiative. Reports indicate that since his conviction and sentencing he has shown a positive attitude and received good performance evaluations. (Although automatically demoted, upon sentence of incarceration, to the rank of private, he has since earned a promotion to corporal). He has also suffered a major financial loss due to his demotion. Regrettably, none of this can adequately offset, for sentencing purposes, his very serious failure to ensure the safety of a prisoner.

The argument has also been made that more senior officers were even more responsible for this deplorable situation and that Boland should not bear the burden. Reference is made to the order or message said to have been passed on from the company commander that it was all right to abuse prisoners. In the case of Boland this argument as to the greater responsibility of superiors cuts two ways. Private Brown, one of the lowest ranking persons involved, has been convicted of manslaughter and torture and sentenced to five years. Boland, his immediate commanding officer who admitted to negligence in not preventing Brown's criminal actions, was sentenced to ninety days. There appears to be a disparity between these sentences. To the extent that justification is sought in the superior "order" to abuse prisoners, Boland to his credit recognized this to be an improper order and at one point at least decided not to pass it on. Therefore he can hardly invoke it as a defence. With respect to the responsibility of Boland's superiors, and the charges, verdicts, and sentences concerning various commissioned officers, at least some of these remain under appeal and will have to be dealt with on their own terms at the appropriate time.

It has also been argued since that since Boland has already served his sentence the court should not return him to prison. This is certainly a matter for serious consideration but it can not be elevated into a rule of law, particularly where the initial sentence was for only ninety days. To accept that in such circumstances such a person could not be returned to prison after an appeal would mean that Crown appeals against such sentences would normally be pointless, the processes of appeal necessarily consuming more time than the sentence itself. This circumstance is not of itself a sufficient reason for refusing to increase the sentence. At the same time it is obvious that Crown appeals from such short sentences should be expedited far more than has this one, and this Court stands ready to assist if so requested.

I agree with the Crown's submission that the offence itself could readily warrant a sentence of eighteen months. I believe however that, having regard to all the

circumstances, including the respondent's good record both before and after this event and the fact that returning him to prison will cause greater hardship than if he had served the whole of his sentence at one time, a sentence of one year incarceration should be imposed.

DISPOSITION

The Crown's application for leave to appeal the sentence will be granted, the appeal will be allowed, and the sentence of imprisonment will be increased to one year.

DISCUSSION

1. Which rules of International Humanitarian Law (IHL) did Canada violate with respect to the treatment of Arone? (*Cf.* Arts. 27, 31 and 32 of Convention IV.)
2. Was Boland a hierarchical superior of those who tortured and killed Arone?
3. a. Did Boland know or have information which should have enabled him to conclude that his subordinates were going to commit a breach of IHL? Did he take all feasible measures in his power to prevent the breach? (*Cf.* Art. 86 (2) of Protocol I.)
   b. Did Boland have only command responsibility for the crime or was he also a co-perpetrator, accomplice or instigator?
   c. How do you explain, taking into account the circumstances described in the Boland decision, that the authorities dropped the charge of torture, even though the Court considered in the case against Seward that Boland "had ample means of knowing that Arone was in immediate danger at the hands of his men and he had the opportunity to intervene but did not" (*See* **Case No. 171**, p. 1725.)?
   d. Did the Court apply the correct test under IHL for assessing the knowledge and intent of Boland? Does IHL lay down such tests? Does it leave States entirely free in this regard?
   e. Is torture a grave breach of IHL? (*Cf.* Arts. 50/51/130/147, respectively, of the four Geneva Conventions.) Did Canada violate IHL by not prosecuting Boland for torture? (*Cf.* Arts. 49/50/129/146, respectively, of the four Geneva Conventions.)
4. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or may be punished for the separate breach of negligently performing their duty as commanders?
5. Does Boland's sentence seem appropriate to you? What factors need to be taken into consideration?
6. What are the objective factors that might have led these individuals to commit the crimes?

Case No. 171, Canada, R. v. Seward

THE CASE

[**Source:** Court Martial Appeal Court of Canada, CMAC-376; footnotes omitted.]

Court Martial Appeal Court of Canada [...]

between:

HER MAJESTY THE QUEEN, Appellant

and

MAJOR A.G. SEWARD, Respondent

REASONS FOR JUDGMENT

CHIEF JUSTICE STRAYER

FACTS

The respondent was the Officer Commanding the 2 Commando unit of the Canadian Airborne Regiment when it was deployed to Somalia in December, 1992 as part of a peace-keeping or peace-making assignment. It was generally responsible for maintaining security in the town of Belet Huen and a surrounding area of about 100 square kilometres, its camp being outside the town.

There had been some problems of Somalians infiltrating the Canadian camp. When captured they were normally detained until there was a patrol going into the town which would take them and turn them over to the local police.

On the morning of March 16, 1993 the respondent Major Seward conducted an Orders Group in which he gave orders and "taskings" to his platoon commanders. This included Captain Sox as commander of 4 platoon which was responsible for providing front gate security and the capture of infiltrators in the area. Captain Sox testified that he was told by Major Seward on this occasion that with respect to the capture of infiltrators "I was tasked with to capture and abuse the prisoners". Captain Reinelt, the respondent's second-in-command, who was also present, said that Major Seward said 'you could abuse them'." Captain Sox was surprised at this directive and asked for clarification. He testified that the clarification he received was as follows:

> I was told simply that it meant to rough up and there was something to the effect of "teach them a lesson".

According to the respondent what he said initially, after instructing Captain Sox to patrol for infiltrators, was:

> I don't care if you abuse them but I want those infiltrators captured.

He further testified that upon Captain Sox requesting clarification as to whether he wanted infiltrators to be abused, his reply was:

> No. Abuse them if you have to. I do not want weapons used. I do not want gun fire [...].

Captain Reinelt testified that while he thought the word "abuse" was a "poor choice of words" he understood Major Seward's intention to be that

> [w]hatever force was necessary in the apprehension of the prisoner could be used in terms of capturing.

When one of his section commanders, Sergeant Hillier, asked him what "abuse" meant Sox said that he told Hillier "that it was explained to me as again to rough up".

Seward admitted in testimony at his trial that nothing during his "training as an infantry officer or [in] Canadian doctrine [...] would permit the use of the word 'abuse' during the giving of orders."

Captain Sox later held his own orders group with the section commanders and Warrant Officer of his platoon, including Sergeant Boland who was in charge of section 3. He testified that in passing on information from the orders group held by Major Seward, he told his group that

> We were to send out standing patrols and that we had been tasked to capture and abuse prisoners.

According to Sergeant Boland, commander of section 3 which had been assigned responsibility for gate security from 1800 to 2400 that night, Captain Sox had passed on the information that "the prisoners were to be abused". After the meeting of this "O" group he discussed this instruction with Sergeant Lloyd, another section commander, and they both said they were not going to pass on that information to their respective sections. However later that evening, after a young Somalian named Shidane Abukar Arone had been captured and was being held by Boland's section, Boland said to Master Corporal Matchee, a member of his section that Captain Sox had given orders that the prisoners were to be abused.

According to Boland, Matchee's response to this was to say "Oh yeah!".

Unfortunately Matchee returned to the bunker where Arone was being held and he and Private Brown proceeded to beat Arone to death. According to Brown, at one point he urged Matchee to stop the beating. Matchee refused, "[b]ecause Captain Sox wants him beaten for when we take him to the police station tomorrow".

The respondent Major Seward was charged on two counts: that he had unlawfully caused bodily harm to Arone contrary to section 130 of the *National Defence Act* and section 269 of the *Criminal Code* of Canada; and that he had negligently performed a military duty imposed on him contrary to section 124 of the *National Defence Act*. The particulars of this negligence were stated to be that he

> by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.

He entered pleas of not guilty to both charges. The General Court Martial found him not guilty on the first charge but guilty on the second charge and in respect to the latter he was sentenced to a severe reprimand.

The Crown initially filed a notice of appeal against the acquittal on the first count and with respect to the sentence on the second count. The respondent cross-appealed against the conviction on the second count. However when the appeal came on for hearing the only issue argued by either party was that of the fitness of the sentence on the second count. Although in its factum the Crown had proposed that this sentence should be increased from severe reprimand to that of dismissal from Her Majesty's service, during argument Crown counsel asked that the sentence be increased to dismissal with disgrace, the maximum sentence provided for an offence under section 124. [...]

ANALYSIS [...]

Disposition of application for leave and of sentence appeal

The Court is of the view that the appeal raises substantial issues and therefore leave to appeal sentence must be granted. [...]

In interpreting the panel's findings of fact from the record in a manner most favourable to the respondent, it is legitimate to note some of the instructions given by the Judge Advocate to the panel on the requirements of a finding of guilt on count 2. For example he stated to the panel:

> If you have a reasonable doubt that the conduct of or words used by Major Seward, in the context of all the circumstances of this case, did amount to an instruction to his subordinates to abuse prisoners then you must give him the benefit of that doubt and the prosecution will not have proven this essential ingredient of the offence charged.

The panel nevertheless convicted on count 2. To instruct the panel on the concept of "negligence" in section 124 on which the second count was based, the Judge Advocate stated:

> To go further into the factors which constitute negligence I tell you that as a matter of law the alleged negligence must go beyond mere error in judgement. Mere error in judgement does not constitute negligence. The alleged negligence must be either accompanied by a lack of zeal in the performance of the military duty imposed or it must amount to a measure of indifference or a want of care by Major Seward in the matter at hand or to an intentional failure on his part to take appropriate precautionary measures.

The panel obviously found there to be such negligence. [...]

In short the panel must be taken to have concluded that the respondent did issue an "abuse" order and that his doing so was no mere error in judgment. He himself confirmed that he was taking a "calculated risk" in doing so and that nothing in his training or in Canadian doctrine would permit the use of that word during the giving of orders.

A major issue in this appeal has been the extent, if any, to which the panel of the General Court Martial or this Court on appeal should take into account, with respect to sentence, the disastrous events which followed the giving of this order. It is said on behalf of the respondent that since he was acquitted on count 1 (the charge of causing bodily harm to Shidane Abukar Arone) the death of Arone through abuse at the hands of the respondent's subordinates could not be a circumstance to be taken into account with respect to sentence. While the panel was excluded, the prosecutor argued forcefully that it should be instructed, in the matter of sentence, that the consequences which followed upon the giving of the respondent's order were relevant, particularly because they reflected a breakdown in discipline to which the order must be taken to have contributed. Part of that breakdown in discipline involved the beating to death of Arone. The Judge Advocate did not accept this position and in fact instructed the panel as follows:

> [...] Mr. President and Members of the Court, I instruct you as a matter of law that because of your finding of not guilty on the first charge that you are not to consider as an aggravating factor when deciding punishment the bodily harm or death suffered by Mr Arone and the prosecutor's comments in respect thereof.

The only reference the Judge Advocate made to the prosecutor's position was the lengthy enumeration of some eighteen factors the panel should consider in sentencing, including "consequences of his negligence". This was neither explained nor elaborated upon.

In my view this was a serious defect in the instruction by the Judge Advocate to the panel. In this respect he did not, I believe, have adequate regard to the stated particulars of the offence upon which the respondent had just been convicted: namely, that he had negligently performed a military duty in that he [...] by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.

This count addressed a failure in command. The evidence when interpreted reasonably and in a way most favourable to the respondent amply demonstrates that this failure resulted in, at best, confusion in 2 Commando and must be taken to have led ultimately to excesses by some of the respondent's subordinates. This not only contributed to the death, of which the respondent was acquitted of being a party, but also contributed to several members of the Canadian Armed Forces committing serious lapses of discipline and ultimately finding themselves facing serious charges. Some have gone to prison as a result. These matters all properly related to the charge, as particularized, that the respondent "failed to properly exercise command over his subordinates". This was never specifically and seriously addressed by the Judge Advocate in his instructions on sentence. I am of the view that given the obvious findings of fact which the panel did make, and taking the most benign view of the evidence, it is impossible to think that a properly instructed panel would have accorded the derisory sentence of a severe reprimand.

The Judge Advocate failed to give any direction to the panel with respect to another relevant matter, namely the sentences of other service personnel already convicted in respect of the same chain of events. He did, at the request of the prosecutor, place before the panel the fact that Private Elvin Kyle Brown and former Sergeant Boland had been convicted of what he described as "breaches of discipline" for which Brown was sentenced to five years imprisonment and Corporal Boland was sentenced to ninety days detention. [...] The Judge Advocate gave no hint as to what use the panel might make of this information. In fact the circumstances of conviction and sentence of former Sergeant Boland were highly relevant. Both he and Seward were convicted under section 124 of negligent performance of a military duty. Like the respondent, Boland was not directly involved in the infliction of injury on Arone. Like the respondent, Boland was guilty of a failure to exercise properly his command, but neither was convicted of being a party to the actual torture and death of Arone. In the case of the respondent, by his acquittal on count 1 he must be taken to have been found neither to have intended nor to have been capable or reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian prisoner. In one important aspect of course the respondent's position was less reprehensible than Boland's: Boland was found by this Court to have had ample means of knowing that Arone was in immediate danger at the hands of his men and he had the opportunity to intervene but did not. Indeed some of his comments to Matchee and Brown directly condoned extreme abuse short of killing Arone.

Boland's sentence was therefore an important point of comparison which should have been explained to the panel, unless one is to believe that there can be no comparison between the sentences of officers and of non-commissioned officers. Boland's sentence being relevant to the fixing of a sentence for the respondent, it is also important to note that, since the respondent's trial and sentencing, Boland's sentence was increased from three months detention to one year imprisonment. If Boland's sentence is to influence that of the respondent's, it should now be seen as indicating an increase in the sentence of the latter.

I have concluded that the sentence of a severe reprimand should be set aside because it is not a fit sentence. It is clearly unreasonable and clearly inadequate on the facts which the General Court Martial must be taken to have found, on facts which were amply proven but not referred to in the faulty instruction by the Judge Advocate, and on the criteria which were or should have been put before the panel by the Judge Advocate. To reiterate, the panel found him guilty of negligently performing a military duty as particularized in count 2 namely:

> "[i]n that he [...] by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so." [...]

In a passage frequently quoted by military lawyers, Lamer C.J.C in *R v. Généreux* said:

> "to maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, *frequently punished*

more severly than would be the case if a civilian engaged in such conduct". (emphasis added.)

I think it is fair to assume that in any well-run civilian organisation an order given by a mid-level executive, leading to such disastrous consequences for his subordinates and the organisation, would rate more than a negative comment in his personnel file, the equivalent of a "severe reprimand".

The Crown asked at trial for a sentence including dismissal with disgrace and a "short period of imprisonment commensurate with the gravity of his offence". While its factum filed in this Court proposed an increase of sentence from severe reprimand to that of dismissal from Her Majesty's service, at the hearing of the appeal Crown counsel said that the sentence should instead be increased further to dismissal with disgrace, which is the maximum sentence provided under section 124. As noted earlier we ensured that counsel had a further opportunity, in response to our questions, to react to the possibility of the maximum sentence being imposed or some lesser sentence which would still represent an increase.

After considering all the submissions, I have concluded that an appropriate sentence would be a short term of imprisonment which I would fix at three months together with dismissal from Her Majesty's Service. This is not the maximum sentence, as called for by the Crown, of dismissal with disgrace, nor is it the maximum term of imprisonment possible for this offence which could be any term for less than two years. I believe this falls within the acceptable range of sentences, having particular regard to the sentence imposed on Boland by this Court of one year imprisonment. Certainly a severe reprimand as imposed by the General Court Martial does not fall within such a range when one considers the perilous circumstances in which this relatively senior officer deliberately pronounced what was an ambiguous, and a dangerously ambiguous, order. He not only pronounced it but essentially repeated it when questioned as to his meaning. While it was found that he had no direct personal connection with the beating and death of Arone, unlike Boland's proximity and means of knowledge of what was likely to occur, Seward was of a much superior rank as an officer and commander of the whole of 2 Commando. His education, training, and experience and his much greater responsibilities as commanding officer put on him a higher standard of care, a standard which he did not meet.

While I recognize from the evidence before the court martial that 2 Commando was working under great difficulties, those difficulties did not include active warfare. Nothing suggests that the infiltrator problem represented any serious threat to the lives or security of Major Seward's unit. What the evidence did show was the existence of a difficult situation for the maintenance of morale and discipline in which the giving of orders required particular care. Any sentence must provide a deterrent to such careless conduct by commanding officers which in the final analysis is a failure in meeting their responsibilities both to their troops and to Canada. [...]

I believe that the sentence of three months imprisonment with dismissal would be a fit sentence. [...]

Signed by B.L.Strayer C.J.

DISCUSSION

1. Which rules of IHL did Canada violate with respect to the treatment of Arone? (*Cf.* Arts. 27, 31 and 32 of Convention IV.)
2. Was Seward a hierarchical superior of those who tortured and killed Arone?
3. a. Did Seward know or have information which should have enabled him to conclude that his subordinates were going to commit a breach of IHL? In the Court's opinion? In your opinion? How can Seward be considered "neither to have intended nor to have been capable of reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian prisoner" if he told them to "abuse them"? Did the Court apply the correct test under IHL for assessing the knowledge and intent of Seward? (*Cf.* Arts. 86 (2) and 87 (3) of Protocol I.)
   b. Did Seward take all feasible measures in his power to prevent the breach?
   c. Did Seward have only command responsibility for the breach or was he also a co-perpetrator, accomplice or instigator? Did he not actually order his subordinates to commit the breach?
   d. How do you explain, taking into account the circumstances described in the three cases (*see* **Case No. 169**, p. 1707 and **Case No. 170**, p. 1720), that Seward was found not guilty of the charge that "he had unlawfully caused bodily harm to Arone"? Did Canada violate IHL by acquitting him? Can a State violate its international obligations by means of an acquittal delivered by an independent and impartial court? Is it not sufficient to prosecute in order to uphold international law? (*Cf.* Arts 49/50/129/146 respectively of the four Geneva Conventions.)
4. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or may be simply punished for the separate breach of negligently performing their duty as commanders?
5. Does Seward's sentence seem appropriate to you? What factors need to be taken into consideration?
6. What are the objective factors that might have led these individuals to commit the crimes?

XXVIII. Armed Conflicts in the Former Yugoslavia

1. Development of the Conflicts

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia

THE CASE

[Case Study prepared by Marco Sassòli, first presented by the authors in August 1998 at Harvard University.]

[N.B. The purpose of this Case Study is not to discuss the history of the conflicts or the facts but only the applicable International Humanitarian Law, its relevance for the humanitarian problems arising in recent armed conflicts, and the dilemmas faced by humanitarian actors. If any facts are insinuated by the following questions, this is only done for training purposes. In addition, this Case Study is entirely based upon public documents and statements made by the ICRC and other institutions to the general public.]

The maps have no political connotations.

1. In the late eighties tension rises in the Socialist Federative Republic of Yugoslavia:
   - Economic crisis of the Yugoslav system of self-governing economy and economic tension between the richer northern and the poorer southern Republics.
   - Bloody riots in Kosovo (1981, 1989, 1990) by the large Albanian majority living in the historical heartland of Serbia. Kosovo was an autonomous province within Serbia, but also a member of the Federative Republic of Yugoslavia. It held a population of 1,585,000 in-habitants in 1981 - date of the last census - 77% ethnic Albanians and 13% ethnic Serbs. The 1974 constitution gave Kosovo considerable autonomy. During the 80's, the Serb minority suffered discrimination in the hands of the provincial authorities controlled by Albanians, who demanded more power and the status of a Republic for Kosovo. In 1989, constiutional reforms withdrawing jurisdiction from the government of Kosovo over certain issues were adopted, despite strong opposition from the Kosovo Albanian population which organised protests and strikes in response. In 1990, the Serbian parliament suspended the Kosovo Assembly when the latter adopted a resolution declaring Kosovo to be independent from Serbia.
   - The publication of a Serb nationalist Memorandum by the Serbian Academy of Sciences and the rise to power of the Serb nationalist politician Slobodan Milosevic in Serbia (1986).
   - The disbanding of the communist one-party system with the formation of opposition parties in the Republics of Slovenia and Croatia (1988) and multiparty elections in all six Republics bringing nationalist parties to power.

   In 1991, the fragmentation increases to such a degree that the Republics of Slovenia and Croatia want to secede; the central Yugoslav institutions are increasingly blocked by a stalemate between the "Serb block" and those Republics wanting to secede.

   a. Before conflict breaks out openly and as tensions continue to rise, what can humanitarian organizations do to lower the tensions, to prevent the outbreak of an armed conflict, or to prevent violations of international humanitarian law if a conflict breaks out?

   b. What are the limits to such preventive action for an organization like the ICRC wanting to make sure that it will be able to fulfil its mandate and be accepted by all sides if a conflict breaks out?

   c. What are the likely reactions of the Croat and Yugoslav authorities to proposals:
      - to start a general information campaign on Human Rights?
      - to train the Yugoslav Peoples Army, the Croat forces, and local Serb forces in Croatia in international humanitarian law?
      - to visit Kosovo Albanians detained by the authorities of Serbia?

- to visit Croats detained by the Yugoslav central authorities or local Serb forces as well as Serbs detained by the Croat authorities in order to monitor their treatment?

d. According to IHL, once the resolution declaring Kosovo's independence was adopted, did Kosovo become a terriory occupied either by the Socialist Federative Republic of Yugoslavia or by Serbia? (*Cf.* Art. 42 of the Hague Regulations; Art. 2 (2) of Convention IV; Art. 1 (4) of Protocol I.)

2. On June 26, 1991, Croatia declares its independence. In Croatia, the Serb minority living in Eastern Slavonia, Western Slavonia, and the Krajinas does not agree with a secession of Croatia and is ready to oppose it violently. The Yugoslav People's Army tries to hinder Slovenia and Croatia from seceding and to maintain itself at least in parts of Croatia controlled by the Serb minority; first trying to intercede between Croat and local Serb forces and later more and more openly supporting local Serb forces. As a result, the Yugoslav People's Army obtained or maintained in fierce fighting control over one third of the territory of Croatia, while in other parts of Croatia its troops had to retreat into their barracks where they were besieged.

   a. Was the conflict in Croatia in fall 1991 an international or a non-international armed conflict? (*Cf.* Arts. 2 and 3 common to the four Conventions.)

   b. What role has the constitution of the former Yugoslavia (arguably implying a right for republics to secede), the declaration of independence of Croatia of 26 June 1991, and the recognition of Croatia by third States (30 on 17.1.1992) in answering question a.? Is the ICRC competent to answer this question? Should the UN Security Council answer this question?

   c. What are the dilemmas involved for any humanitarian organization in answering this question? Are the dilemmas of a Human Rights organization different?

   d. Would you answer this question if you were the ICRC? How could the ICRC otherwise mandate the application of rules of the Geneva Conventions and Additional Protocols?

   e. Were Croatian soldiers captured in December 1991 by the Yugoslav People's Army prisoners of war? Were members of local Serb militias in Eastern Slavonia fighting with the Yugoslav People's Army prisoners of war if captured by Croatian forces? (*Cf.* Arts. 2 and 4 of Convention III.)

   f. Was the Croatian territory under control of the Yugoslav People's Army an occupied territory under Convention IV?

3. In fall 1991, the Yugoslav People's Army and local Serb militias besieged and constantly bombarded the town of Vukovar in the easternmost part of Croatia.

   a. As a result, the Croatian soldiers defending Vukovar run short of ammunition and they, as well as the local Croat and Serb civilian population, run short of medical supplies and food. For which of those goods had the Yugoslav People's Army an obligation to permit

passage, and which conditions could it attach in allowance of such passage? (*Cf.* Art. 23 of Convention IV and Art. 70 of Protocol I.)

b. Would you, as a humanitarian organization, take the initiative of suggesting the evacuation towards the west of local Croat civilians? Which criteria should those civilians fulfil? What reactions to such a proposal can be expected from the Croat and from the Yugoslav authorities? Do they have an obligation to allow such an evacuation? under what conditions? What reaction can be anticipated from local and international public opinion?

c. The hospital of Vukovar is unable to cope any longer with the number of wounded soldiers and civilians. The Croatian and Yugoslav authorities are ready to allow the evacuation of the wounded in the framework of an agreement under which Croatia simultaneously allows Yugoslav soldiers stuck since the beginning of the conflict in their barracks in Croatian towns to leave for Yugoslav controlled territory. As a humanitarian organization would you suggest such an agreement? Let it be negotiated under your auspices? Implement the evacuation of wounded? Supervise the simultaneous withdrawal of Yugoslav soldiers from their barracks? Under what conditions? Which legal, political, and humanitarian considerations have to be taken into account?

4. Facing difficulties to qualify the conflict and the resulting inability to invoke the protective rules of IHL in its operations and trying to establish a humanitarian dialogue of the parties far from the cease-fire and political negotiations, the ICRC invites plenipotentiaries of the belligerent sides to Geneva in order to agree on rules to be respected in their armed conflict as close as possible to those IHL provides for international armed conflicts and to discuss any other humanitarian problems.

   a. What are the difficulties for the Croat and the Yugoslav authorities in accepting such an invitation? How can the ICRC try to overcome them? Which difficulties can be expected during the negotiations?

   b. Which rules of the law of international armed conflict can be expected to meet particular resistance by each side? Would you suggest Art. 3 (3) common to the Geneva Conventions as a legal basis for the agreement to be negotiated? Does not an agreement falling short of the whole of the law of international armed conflict violate Arts. 6/6/6/7 respectively of the four Conventions?

   c. What are the advantages and disadvantages of the "Memorandum of Understanding" finally concluded on 27 November 1991? For the war victims in the former Yugoslavia? For the ICRC? For IHL in the long run?

(*See* **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [*Cf.* Section A.], p. 1761.)

5. After the fall of Vukovar, the front-line approaches Ossijek. Again the wounded flow towards the local hospital, which is not spared during indiscriminate bombardments by the Yugoslav People's Army and local Serb militias. The Yugoslav authorities claim that the Croatian army systematically places artillery positions around the hospital to either shield

them from Yugoslav attacks or to mobilize international public opinion when the hospital is hit during Yugoslav attacks against those positions.

a. What is your legal evaluation of the bombardments and of the alleged Croat behaviour? May the alleged Croat behaviour justify the Yugoslav attacks? (*Cf.* Art. 21 of Convention I, Arts. 18 and 19 of Convention IV, and Arts. 12 and 13 of Protocol I.)

b. What can a humanitarian organization suggest in such a situation? Should it establish the facts and find out whether the hospital is actually targeted and also whether the Croats actually use it to shield artillery positions? What are the chances that a humanitarian organization comes to definite findings? Should it make them public? Should it suggest the constitution of a hospital zone under Art. 14 or of a neutralized zone under Art. 15 of Convention IV? What are the arguments in favour of each solution? What are the advantages and disadvantages to constituting any such zone: for the war victims? For a humanitarian organization? For the belligerents? Which difficulties can be expected in negotiating such an agreement? How would you prepare for those negotiations?

6. On January 4, 1992, the 15th cease-fire agreement between Croatia and the Yugoslav People's Army entered into force and is long-lasting. On February 21, the UN Security Council establishes through Resolution 743 (1992) the United Nations Protection Forces (UNPROFOR), deployed, in particular, in the Serb held territories in Croatia, with the mandate of ensuring that the "UN Protected Areas" (UNPAs) are demilitarized through the withdrawal or disbandment of all armed forces in them and that all persons residing in them are protected from fear of armed attack. In reality, UNPROFOR could only partly fulfil this mandate as local Serb forces remained in control of the areas.

a. When UNPROFOR deployed in spring 1992 in the Serb held territories of Croatia, did it have to respect the rules of Convention IV on occupied territories?

b. Could those UNPAs be considered Croatian territories occupied by Yugoslavia through local Serb forces?

7. At the end of 1991 and the beginning of 1992, mutual accusations of war crimes between Croatia and Yugoslavia increased sharply in the international media, international fora, the regular sessions of the parties' plenipotentiary representatives under ICRC auspices (in which the atmosphere deteriorates due to such accusations), and in letters of both sides addressed to the ICRC. Croatia refers in particular to the evacuation (under the eyes of an ICRC delegate) and assassination of hundreds of patients of the Vukovar hospital by the Yugoslav People's Army.

a. What follow-up would you give to such accusations if you were the ICRC? Which humanitarian arguments are in favour or against a follow-up? Would you accept requests by one side to enquire into such allegations? At least if the request comes from the side against which the allegation is made? If both sides request the ICRC to enquire?

b. What would you do with the mutual letters of accusation addressed to the ICRC?
c. Chairing the meetings of the parties' plenipotentiary representatives, how would you deal with the mutual accusations? Would you allow a discussion? Suggest the establishment of a commission of enquiry?
d. Would you suggest the parties to submit their allegations to the International Humanitarian Fact-Finding Commission provided for by Art. 90 of Protocol I?
e. If you had to draft a proposal for the constitution of an *ad hoc* fact-finding commission along the lines of Art. 90 of Protocol I, on which issues could you expect the greatest resistance and by which side?
f. If a Fact-Finding Commission is established, should the ICRC delegate having witnessed the "evacuation" of the patients of Vukovar hospital testify? Under what circumstances? Should this delegate testify today before the International Criminal Tribunal for the Former Yugoslavia? What arguments could the ICRC employ not to let him testify?

(*See* **Case No. 183**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. p. 1900.)

8. In spring 1992, when the prisoners of the conflict in Croatia had to be repatriated, Belgrade refused the repatriation of many of them claiming:
   - that they were under judicial proceedings for desertion and high treason (as members of the Yugoslav People's Army having "fought for the enemy");
   - that they had committed war crimes.

   Zagreb refused repatriation for similar arguments.
   a. What do you think about those arguments from a legal point of view? (*Cf.* Arts. 85, 119 (5), and 129 of Convention III.)
   b. How would you have dealt with this deadlock if you had been the ICRC? What does "repatriation" mean for a Serb member of the Serb minority in Croatia, who lived before the conflict in Zagreb, was drafted in the Yugoslav People's Army, and was captured by Croatian forces?

9. Bosnia and Herzegovina is ethnically divided between a relative majority of Bosniac Muslims (considered as a nationality called "Muslims" in the former Yugoslavia), Serbs, and Croats. In April 1992, it declared its independence following a referendum, boycotted by Serbs, in which Muslims and Croats voted in favour of independence. An armed conflict broke out between (Muslim and Croat) forces loyal to the government, supported by Croatia, on the one hand, and Bosnian Serb forces opposing the independence of Bosnia and Herzegovina, supported by the Yugoslav Peoples' Army, in particular its units made up of Bosnian Serbs, on the other.
   a. How would you qualify the conflict in Bosnia-Herzegovina: Is it an international or a non-international armed conflict? (*Cf.* Arts. 2 and 3 common to the Conventions and Arts. 1 and 2 of Agreement No. 1.) Does the involvement of Belgrade (and Zagreb) change your qualification? What form of outside involvement could change the qualification?

(*See* **Case No. 180**, ICTY, The Prosecutor v. Tadic. p. 1804.)

b. Would you qualify the conflict if you were a humanitarian organization? If you had to negotiate an *ad hoc* agreement between the parties on the applicable international humanitarian law, would you base it on Art. 3 (3) common to the Geneva Conventions?

c. Who is a protected civilian in Bosnia-Herzegovina under Convention IV? (*Cf.* Art. 4 of Convention IV.) Under Agreement No. 1? (*Cf.* Art. 2 (3) of Agreement No. 1.) Is the forced displacement of Bosnian Muslims from Serb-held Banja Luka to government-held Tuzla unlawful (*Cf.* Arts. 35 and 49 (1) of Convention IV, Art. 17 of Protocol II, and Art. 2 (3) of Agreement No. 1.) Is the forced recruitment of Muslims by the Bosnian Serbs unlawful? Is the forced recruitment of Bosnian Serbs by the Sarajevo government unlawful? (*Cf.* Arts. 51 and 147 of Convention IV.) When is it lawful for the Sarajevo government to compel Serb inhabitants of Sarajevo to dig trenches on the front-line? (*Cf.* Arts. 40 and 51 of Convention IV.)

(For the text of Agreement No. 1, *see* **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts, p. 1761.)

10. Beginning in late April 1992 and continuing throughout the whole conflict, the belligerent parties of the three ethnic groups in Bosnia and Herzegovina, but in the beginning in particular the Bosnian Serb authorities, undertook a campaign of "ethnic cleansing" against civilians of other ethnic groups living in the regions they controlled. Sometimes villages inhabited by other ethnic groups were indiscriminately bombed to make the civilians flee; often men were rounded up and arrested as "terrorists" and potential combatants, while women were sometimes raped and often sent together with children and the elderly either in organized transports or on their own to areas controlled by "their own" ethnic group. Property belonging to these people was being systematically burned or razed to the ground, thus precluding all hope of return for the ousted families. In other cases, members of another ethnic group simply lost their jobs and were harassed with non-violent means by the local authorities and their neighbours until they saw no more future in their home region and fled. It was not always clear whether those acts of "ethnic cleansing" were planned by the authorities or spontaneous acts of the local population in a generalized atmosphere of inter-ethnic hatred. In later phases of the conflict additional waves of ethnic cleansing broke out in reaction to such practices, and the main actors were those forced to flee their homes in territory controlled by other ethnic groups and sought refuge in territory controlled by their ethnic group.

a. Are all the above-mentioned practices prohibited by IHL? Equally by IHL of international and IHL of non-international armed conflicts? (*Cf.* Arts. 3 and 4 of Convention III, Arts. 3, 27, 32, 33, 35-43, 49, 52 and 53 of Convention IV, Arts. 48, 51, 52 and 75 of Protocol I, Arts. 4 and 17 of Protocol II and Arts. 23, 25 and 28 of the Hague Regulations.)

b. What can humanitarian organizations do against such practices? May they organize suitable transport and negotiate passage through the front lines for civilians wishing to leave under the pressure of such

practices? Do they not contribute thus to ethnic cleansing? May they do it at least when the concerned civilians fear for their lives?

11. In May 1992, the ICRC's head of delegation in Sarajevo was killed during a deliberate attack on the Red Cross convoy in which he was travelling in Sarajevo. Since it was no longer able to provide sufficient protection and assistance for the victims and failed to obtain security guarantees from the parties, the ICRC withdrew from Bosnia and Herzegovina.
    a. May the ICRC withdraw from a country affected by an armed conflict? (*Cf.* Arts. 9 and 126 of Convention III and Arts. 10 and 143 of Convention IV.)
    b. May a humanitarian organization withdraw from a conflict area because one of its staff is killed? At least if no sufficient security guarantees are offered for the future? Even if the side responsible for the attack is unknown? Is that not a kind of collective punishment? Does the organization not thus take the victims as hostages against their authorities? Could an organization not help at least some victims even without security guarantees? Does that mean that the life of an expatriate aid worker is worth more than that of a local victim?
    c. May a humanitarian organization leave a conflict area because IHL is too blatantly violated?
    d. May a humanitarian organization withdraw from a conflict area because it cannot sufficiently fulfil its mandate of protecting and assisting victims? If it is denied access to some victims? If it can no longer assist the local population because its relief convoys are not let through by the other side? If its confidential or public steps have no impact on the behaviour of the parties? If its prison visits do not lead to any improvement of unacceptable conditions of detention of prisoners? What if the organization could nevertheless help some victims? Is such withdrawal not a kind of collective punishment? Does the organization not thus take the victims as hostages against their authorities? May a neutral and impartial humanitarian organization continue to act in a conflict if only one side gives it access to victims ("belonging" to the other side), while the other side denies access?

12. When the ICRC returned to Bosnia and Herzegovina in the summer of 1992 it was finally allowed to visit, in particular in the "Manjaca Camp", large numbers of the (surviving) men rounded up by Bosnian Serb forces during ethnic cleansing operations in Eastern and Central Bosnia. Its delegates found appalling conditions of detention, seriously undernourished prisoners who could not expect to survive the Bosnian winter, and collected highly disturbing allegations of summary executions. It tried to draw the attention of the international community and public opinion on those facts, but succeeded only when TV Crews were allowed by the Bosnian Serbs to film detainees in Manjaca.

    Through a considerable relief effort and frequent visits the ICRC managed to improve the conditions, but it came to the conclusion that only a release of

all prisoners before the Bosnian winter could solve the humanitarian problem. Relief efforts in favour of the inmates were hampered by violent demonstrations of the local Serb population in villages around Manjaca camp who were suffering from the consequences of international sanctions against Serbs and did not want to let the relief convoys pass. On September 15, 1992, 68 injured and sick detainees were evacuated to London to receive medical attention. Thanks to the pressure of international public opinion and by constant negotiations with the parties, the ICRC got them to conclude on October 1 an agreement under which until mid-November more than 1,300 detainees were released (925 by the Bosnian Serbs, 357 by Bosnian Croats, and 26 by Bosnian government forces). Under the agreement the detainees to be released could choose in individual interviews with ICRC delegates without witnesses, whether they wanted to be released on the spot, to be transferred to regions controlled by their ethnic group, or to be transferred to a refugee camp in Croatia in view of (temporary) resettlement abroad. Affected by what they had undergone and in view of the generalized atmosphere of ethnic cleansing, practically all inmates from Manjaca chose to leave the country.

a. Why did the Bosnian Serb authorities give TV cameras access to Manjaca? Did the world media by airing the images from Manjaca not increase the fear among ethnic minority groups and thus contribute to "ethnic cleansing"?
b. Should a humanitarian organization provide food and shelter to detainees? Is that not under IHL the responsibility of the detaining authorities? Should a humanitarian organization ask detaining authorities to release prisoners if they do not treat them humanely?
c. May a humanitarian organization distribute relief to the local population of villages surrounding Manjaca in order to get them to let through the relief convoys to Manjaca? Is that an application of the Red Cross principles of neutrality and impartiality or is that a case of pure operational opportunism? Does a humanitarian organization thus not cede to blackmail? How would you judge the situation if the Bosnian Serbs were asking for fuel for heating (which could however also be used for tanks) - as they later successfully asked UNPROFOR?
d. Was the detention of men between 16 and 60 years old, militarily trained as territorial defence in the former Yugoslavia and ready to join Bosnian government forces, necessarily unlawful? (*Cf.* Arts. 4 and 21 of Convention III and Arts. 4, 42 and 78 of Convention IV.) Could the ICRC ask for their release? Does the ICRC not visit detainees only out of concern for their humane treatment, without interfering into the reasons for their detention or asking for their release? Do massive requests for releases not accredit in the minds of the parties the (wrong) idea that if they give the ICRC access to prisoners they have to release or exchange them, thus increasing the tendency to hide prisoners from the ICRC?
e. Did the releases of the Bosnian Muslim detainees, most of whom understandably chose to be transferred abroad, not contribute to

"ethnic cleansing"? Should the inmates remain detained, for their protection, until they can safely return to their homes? Has the party controlling the territory to where the released prisoners are transferred an obligation not to enrol them (again) into military service against the party which released them? (*Cf.* Art. 117 of Convention III.)

f. How would you have reacted to claims (*prima facie* not totally unreasonable) by the parties during negotiations on the releases that many of the persons detained had committed war crimes?

13. During the whole conflict Sarajevo was (practically) encircled by Bosnian Serb forces, but defended by Bosnian government troops. It was constantly bombarded by Bosnian Serb artillery. The survival of the inhabitants of Sarajevo or, more precisely, their ability not to surrender to the Bosnian Serbs) was made possible mainly by relief flights of UNPROFOR (offering its logistics to and acting for the UNHCR), which were often interrupted following attacks by Bosnian Serb or unknown forces or due to lack of security guarantees.

a. Was it lawful to bomb Sarajevo? (*Cf.* Arts. 48 and 51 of Protocol I and Art. 2 (5) of Agreement No. 1.) Does your appreciation of those bombardments under IHL change after Sarajevo had been declared a "safe area" by the UN Security Council (as described *infra*, point 14.)?

(*See* also **Case No. 187**, ICTY, The Prosecutor v. Galic. p. 1986.)

b. Is the stopping, by Bosnian Serbs, of relief convoys to Sarajevo unlawful? (*Cf.* Arts. 23 and 59 of Convention IV, Art. 70 of Protocol I, and Art. 2 (6) of Agreement No. 1.) Has neighbouring Croatia and the UN Security Council (in case of an embargo) similar obligations towards the Bosnian Serbs? To what conditions may the Bosnian Serb authorities subordinate the passage of relief convoys:
   - the checking of the convoy?
   - the distribution of the relief to civilians only?
   - the distribution of the relief to both Serbs and Bosnian Muslims?
   - the distribution of the relief under outside supervision?
   - the simultaneous agreement by Bosnian government forces to allow passage of relief convoys to Serb controlled areas?
   - the release of prisoners by the Bosnian government?
   - the respect of cease-fire agreements by the Bosnian Muslims?

c. What are the advantages and disadvantages of bringing relief by airlift to Sarajevo? What advantages and risks do you see for the UNHCR by the fact that the airlift is under the full operational responsibility of UNPROFOR?

d. What legitimate and what illegitimate interests could the Bosnian Serbs have to hinder relief supplies to Sarajevo?

e. Could the Bosnian government have reasons to hinder relief supplies to Sarajevo?

14. Confronted with continuing practices of "ethnic cleansing" by all parties (the Bosnian Muslim population being, however, the main victims), threatening

all prisoners before the Bosnian winter could solve the humanitarian problem. Relief efforts in favour of the inmates were hampered by violent demonstrations of the local Serb population in villages around Manjaca camp who were suffering from the consequences of international sanctions against Serbs and did not want to let the relief convoys pass. On September 15, 1992, 68 injured and sick detainees were evacuated to London to receive medical attention. Thanks to the pressure of international public opinion and by constant negotiations with the parties, the ICRC got them to conclude on October 1 an agreement under which until mid-November more than 1,300 detainees were released (925 by the Bosnian Serbs, 357 by Bosnian Croats, and 26 by Bosnian government forces). Under the agreement the detainees to be released could choose in individual interviews with ICRC delegates without witnesses, whether they wanted to be released on the spot, to be transferred to regions controlled by their ethnic group, or to be transferred to a refugee camp in Croatia in view of (temporary) resettlement abroad. Affected by what they had undergone and in view of the generalized atmosphere of ethnic cleansing, practically all inmates from Manjaca chose to leave the country.

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e. Did the releases of the Bosnian Muslim detainees, most of whom understandably chose to be transferred abroad, not contribute to

Security Council? May they, under the resolutions and IHL, launch attacks out of the safe areas against Bosnian Serb forces?

e. Were the zones open to occupation by the adverse party? Is such a requirement inherent in protected zones under IHL? Would such a requirement have been realistic?

f. Does the ICRC proposal come under *ius ad bellum* or under *ius in bello*? Does it respect the Red Cross Principles of neutrality and impartiality? Does it not suggest the use of force against one side of the conflict? What is the legal basis for the ICRC proposal?

g. On which essential points do the safe areas established by the Security Council differ from the protected zones suggested by the ICRC?

h. Do the safe areas established by the Security Council come under *ius ad bellum* or under *ius in bello*? Is it appropriate to charge peacekeeping forces with the mandate they get under the Resolutions?

i. Which elements of the "safe areas" established by Resolutions 819 and 824 recall or implement *ius in bello*? Which *ius ad bellum*?

15. In the beginning of 1992, the Co-presidents of the International Conference on the Former Yugoslavia, C. Vance and Lord Owen, presented a peace plan for Bosnia and Herzegovina (the Vance-Owen Plan), which involved dividing Bosnia into 10 nationally defined cantons. Bosnian Croats were delighted by the plan which increased their territory, while Bosnian Serbs rejected it coolly. The Bosnian (Muslim) president was undecided. The Bosnian Croats tried to implement it forcefully in central Bosnia. They demanded that the Bosnian government forces withdraw within the borders of their assigned cantons and that the joint command of the forces of Croat Defence Council (HVO) and the BH Army be established. If not, HVO threatened to implement the Vance-Owen Plan itself. After the deadline expired, on April 16, 1993, HVO forces carried out a co-ordinated attack on a dozen villages in the Lasva Valley (belonging to the Croatian canton of the Vance-Owen Plan). Troops from Croatia were present on HVO-controlled territory but did not fight in the Lasva Valley. Croatia financed, organized, supplied, and equipped HVO.

    a. Was there an international armed conflict between Bosnia and Herzegovina and Croatia? If there was one, did IHL of international armed conflicts also apply in the fighting in the Lasva Valley between HVO and Bosnian government forces? Were the parts of the Lasva Valley falling under HVO control during the fighting occupied territories under IHL? Were its Bosnian Muslim inhabitants protected persons? Were the Bosnian Croats living in parts of the Lasva Valley which remained under government control protected persons too? (*Cf.* Arts. 2 and 4 of Convention IV.)

    b. Was Agreement No.1 applicable to the fighting in the Lasva Valley?

(*See* **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* section B.] p. 1761.)

16. In the Bihac area in the Western-most part of Bosnia Herzegovina, inhabited nearly exclusively by Bosnian Muslims, Mr. Fikret Abdic, a Muslim

businessman and politician, and his followers (mainly the employees of his "Agrokommerc" industry near Velika Kladusa) were not ready to follow the politics of the Bosnian government; they claimed autonomy and aligned themselves with the Bosnian Serbs and the neighbouring Croatian Serbs. An armed conflict between Bosnian government forces in the Bihac enclave surrounded by Bosnian and Croatian Serb forces and by those of Mr. Abdic followed. In 1995, the two-and-a-half-year siege of the Bihac enclave was ended by an offensive of Croatian forces against the Croatian Serb forces. When Bosnian government forces subsequently took Velika Kladusa, the followers of Mr. Abdic fled into neighbouring Croatia where they were halted in Kupljensko by the Croatian authorities.

a. How do you qualify this conflict under IHL? Which instruments of IHL apply (taking into account that Bosnia and Herzegovina is a party to all instruments of IHL)? (*Cf.*, *e.g.*, Art. 3 common to the Conventions and Art. 1 of Protocol II.)
b. Was Agreement No. 1 applicable to that conflict?
c. Could the Bosnian authorities punish followers of Mr. Abdic for the sole fact that they took part in the rebellion, even if they respected IHL?
d. Had the Croatian authorities an obligation to let the followers of Mr. Abdic into Croatia?
e. Could the Croatian authorities forcibly drive those persons back from Kupljensko to Bosnia and Herzegovina?
f. Could the Croatian authorities deny any relief entering into Kupljensko camp in order to drive its inhabitants back to Bosnia and Herzegovina?

17. Following widely publicized and credible reports by the media, different human rights organizations, and by representatives of the international community about widespread atrocities committed in the framework of practices of "ethnic cleansing", including rapes allegedly committed on a systematic basis and as a policy, in particular by Bosnian Serb forces, international public opinion and the international community insisted on the punishment of those responsible for such serious violations of IHL and of Human Rights. Particularly outraged about the rapes, a specific instrument against such practices was desired and it was said that contemporary IHL does not sufficiently prohibit rape. First, the UN Security Council established in Resolution 780 (1992) a Commission of Experts enquiring into alleged violations which later published a very extensive report, but on May 25, 1993, it went further establishing by Resolution 827 (1993), acting under Chapter VII of the UN Charter, an "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" (ICTY) in The Hague. The ICTY is competent to prosecute grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. It has concurrent jurisdiction with national courts, but primacy over them when it so decides. All States have to cooperate with the ICTY.

(*See* **Case No. 179**, UN, Statute of the ICTY. p. 1791 and **Case No. 186**, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic. p. 1974.)

a. Why did the media, public opinion, and the Security Council react so strongly against violations of IHL in the former Yugoslavia? Because they were more serious than those committed in Cambodia, Afghanistan, Zaire, Liberia, or Chechnya? Because they were more widespread and systematic? Because the media had access? Because they were seen as having been mainly committed by the party seen as the aggressor? Because the international community was not ready to stop the war? Because it happened in Europe?

b. Is rape prohibited by IHL of international armed conflicts? By IHL of non-international armed conflicts? Is it a grave breach of IHL? A war crime? Even in non-international armed conflicts? Are there any grave breaches of IHL in non-international armed conflicts? If the law of international armed conflicts is applicable, is rape of a Bosnian Muslim woman by a Bosnian Serb soldier in Bosnia and Herzegovina a grave breach? Is the rape of a Bosnian Serb woman by a Bosnian government soldier a grave breach? (*Cf.* Art. 147 of Convention IV, Art. 85 (5) of Protocol I, and Art. 5 of Agreement No. 1.)

c. Who has an obligation to prosecute persons having committed grave breaches in Bosnia and Herzegovina? (*Cf.* Art. 146 of Convention IV and Art. 5 of Agreement No. 1.) Does IHL provide for the possibility of prosecuting war criminals before an international tribunal? Are the prosecution of war criminals before an international tribunal and its concurrent jurisdiction compatible with the obligation of States under IHL to search for and prosecute war criminals? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

d. Will the ICTY have to qualify the conflict in fulfilling its mandate?

e. Were the different armed conflicts in the former Yugoslavia, even those of a purely internal character, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the establishment of a tribunal to prosecute violations of IHL a proper measure to stop that threat? Can we today say whether it contributed to the restoration of peace in the former Yugoslavia? Does that (the end result) actually matter? Does the prosecution of (former) leaders not make peace and reconciliation more difficult? Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Could the same be said of gross violations of Human Rights outside armed conflicts?

f. May the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a "court established by law"? Is the creation of a tribunal competent to try acts committed before it was established itself violating the prohibition (in IHL and Human Rights Law) of retroactive penal legislation? How else than by a resolution of the Security Council could the ICTY have been established? What are the advantages and disadvantages of those other methods?

g. Is the establishment of an International Tribunal only for the former Yugoslavia a credible measure to increase respect for IHL? At least if the Security Council is willing to establish additional tribunals in similar,

businessman and politician, and his followers (mainly the employees of his "Agrokommerc" industry near Velika Kladusa) were not ready to follow the politics of the Bosnian government; they claimed autonomy and aligned themselves with the Bosnian Serbs and the neighbouring Croatian Serbs. An armed conflict between Bosnian government forces in the Bihac enclave surrounded by Bosnian and Croatian Serb forces and by those of Mr. Abdic followed. In 1995, the two-and-a-half-year siege of the Bihac enclave was ended by an offensive of Croatian forces against the Croatian Serb forces. When Bosnian government forces subsequently took Velika Kladusa, the followers of Mr. Abdic fled into neighbouring Croatia where they were halted in Kupljensko by the Croatian authorities.

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(*See* **Case No. 179**, UN, Statute of the ICTY. p. 1791 and **Case No. 186**, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic. p. 1974.)

and trying to ensure a minimum of humane treatment during such exchanges. The ICRC was also ready to be present at exchanges if certain conditions for the detainees were respected and if the institution was allowed to interview detainees in private to ensure that their choice of destination was respected by the parties.

a. Which of the mentioned categories of prisoners may be detained under IHL? When must they be released? Is it acceptable under IHL to exchange prisoners who have to be released? To exchange prisoners who do not have to be released? (*Cf.* Art. 118 of Convention III, Arts. 37, 41-43, 76, 78 and 132 of Convention IV and Art. 85 (4) (b) of Protocol I.)

b. From a humanitarian and moral point of view, what are the advantages and disadvantages of prisoner exchanges? If two parties exchange all (known) prisoners (of a certain category)? If they exchange prisoners "one for one"? How can the risk that persons are rounded up just in view of an exchange be avoided? Have hidden or unregistered prisoners a greater or a smaller "value" on the "exchange market"?

c. Should humanitarian organizations be present during exchange negotiations? During the actual exchanges? Which are the advantages and disadvantages of their presence? Which minimum conditions should be fulfilled before a humanitarian organization or representatives of the international community accept to organize, supervise, or monitor exchanges?

d. What are the reasons for the ICRC to register the prisoners it visits? Should lists drawn up after such registration be transmitted to the detaining authorities? To the adverse side? Even if it is in view of exchange negotiations? Is that foreseen in IHL? Are there exceptions? Do such lists reduce the risk that persons are rounded up just in view of exchanges? Does a transmission to the adverse party not incite the detaining party to hide prisoners it does not want to exchange from the ICRC? (*Cf.* Arts. 122 and 123 of Convention III and Arts. 137 and 140 of Convention IV.)

19. In the spring of 1995, Sarajevo was again entirely cut off from vital supplies and came under heavy fire from Bosnian Serbs violating thus once more a heavy weapons exclusion zone established by the UN Security Council in February 1994. This time, however, after a UN ultimatum went unacknowledged, NATO reacted with air strikes against Bosnian Serb ammunition stocks in the Pale area. Bosnian Serb forces responded by arresting some 350 UN military observers and UNPROFOR personnel stationed on territory they controlled. Some of those persons were held on or near possible military objectives. ICRC delegates gained access to only some of them and to Bosnian Serb soldiers captured by UNPROFOR when they tried to attack one of UNPROFOR's outposts. The UN personnel were finally released after long negotiations.

After a further shelling of the Sarajevo marketplace, a joint British/French rapid reaction force was deployed on Mount Igman to enforce access for relief convoys to Sarajevo, and NATO launched air strikes against Bosnian

Serb communication posts, arms depots, weapons factories, and strategic bridges. A water reservoir was also touched, and a pregnant mother was wounded by glass splinters of the window of a hospital which broke under the shock created by the bombing of one of the aforementioned aims. Two French NATO pilots who had to abandon their military aircraft by parachute after it had been shot down by Bosnian Serb forces were captured by Bosnian Serb forces.

a. Is IHL applicable to the NATO air strikes? Although they only enforce UN Security Council resolutions and act in self-defence of the inhabitants of Sarajevo? Is IHL of international armed conflicts applicable or IHL of non-international armed conflicts? (*Cf.* Art. 2 common to the Conventions and preamble para. 5 and Art. 1 of Protocol I.) Did all the mentioned NATO air strikes conform with IHL? Even when a water reservoir was damaged and a pregnant mother hurt? (*Cf.* Arts. 51, 56 and 57 of Protocol I.) Are hospitals and pregnant mothers not specially protected by IHL? (*Cf.*, *e.g.*, Arts. 16 and 18 of Convention IV.)

b. Is the UN a Party to the Conventions and Protocols? Can the UN conceivably be a Party to an international armed conflict in the sense of Art. 2 common to the Conventions? Can the UN forces be considered for the purposes of the applicability of IHL as armed forces of the contributing States (which are Parties to the Conventions), and can any hostilities be considered an armed conflict between those States and the party responsible for the opposing forces?

c. Are members of UNPROFOR detained by Bosnian Serb forces prisoners of war or hostages? (*Cf.* Art. 4 of Convention III and Arts. 4 and 34 of Convention IV.) May they be detained? May they be held in a military objective? (*Cf.* Art. 22 of Convention III and Art. 28 of Convention IV.) Has the ICRC a right to visit them? Even if they are not prisoners of war? If they are hostages? If IHL is not applicable? If IHL of non-international armed conflicts is applicable? Must they be released? When? Why would the UN object to their personnel being qualified as prisoners of war?

d. Are Bosnian Serb soldiers captured by UNPROFOR prisoners of war? Even if UNPROFOR captured them in self-defence?

e. Did the shooting down of the French NATO aircraft violate IHL? May the Bosnian Serb soldiers having shot them down be punished for that attack?

f. Are the French pilots detained by Bosnian Serb forces prisoners of war, "UN experts on mission" (protected by the relevant multilateral convention), or hostages? (*Cf.* Art. 4 of Convention III and Arts. 4 and 34 of Convention IV.) Is France engaged in an international armed conflict against the Bosnian Serbs?

g. May the French pilots be detained? Has the ICRC a right to visit them? Must they be released? When? Why would France object to their qualification as prisoners of war? If you were the French pilots, would you prefer to be treated as a prisoner of war under Convention III or to

be protected under the UN Convention on the Safety of UN and Associated Personnel which makes it a crime to attack UN personnel and establishes a duty not to detain them? What are the advantages and disadvantages of both options from the point of view of your treatment, repatriation, and the chances that your status is accepted and respected by the enemy?

(*See* **Case No. 14**, Convention on the Safety of UN Personnel. p. 602.)

20. Since 1992, Srebrenica and its surroundings, with nearly 40,000 inhabitants and displaced persons, were an enclave held by Bosnian government forces, surrounded and regularly attacked by (but sometimes also attacking) Bosnian Serb forces. In 1993, Srebrenica was declared a "safe area" by the UN Security Council, but it was not demilitarized, continued to be submitted to indiscriminate attacks and only insufficient relief was brought in. The only expatriate presence were some 300, mainly Dutch, peace-keepers of UNPROFOR. International humanitarian organizations failed to establish a permanent expatriate presence, or abandoned it because they lacked opportunities to develop serious assistance or protection activities. In summer 1995, peace negotiations showed a tendency to divide Bosnia and Herzegovina into a Serb entity in the North and the East and a Croat-Muslim entity in the West and the Centre. Srebrenica is located in the East.

In July 1995, military pressure on Srebrenica increased into a full-fledged offensive with tanks and indiscriminate artillery bombardment. Despite requests by Bosnian government forces (also taking the form of threats, hostage-taking, and attacks against peace-keepers), the Dutch UNPROFOR battalion refused to respond to the Bosnian Serb offensive against Srebrenica. Only on July 11, when Srebrenica had practically already fallen, US military aeroplanes destroyed one Bosnian Serb tank outside Srebrenica.

12,000 - 15,000 men fled Srebrenica, many of them with their weapons, through the woods towards Bosnian-government-controlled territory. At least 5000 of those men never arrived to that territory, but were killed during Bosnian Serb attacks on the column, which also occurred after men surrendered. Some of them even committed suicide in despair.

On July 12, Srebrenica fell. Nearly 26,000 men, women, and children tried to take refuge at the UNPROFOR base of Potocari. There, however, Bosnian Serb forces rounded up women and children and sent them by bus toward the front-line, which they had often to cross on foot in their exhausted states and amid fighting. More than 3000 boys and men of military age were separated from the women and children and arrested, before the eyes of Dutch UNPROFOR soldiers, by the Bosnian Serb forces allegedly to check whether they had committed war crimes. Only some who were wounded and later visited by the ICRC and those who managed to escape and report that all others had been summarily executed were ever seen again.

The ICRC, which had not been allowed by Bosnian Serb forces to be present during the events, concentrated on the reception of the displaced on Bosnian government controlled territory and registered all names of

missing men given by their families. The ICRC assumed that at least the more than 3000 men arrested at Potocari must be in Bosnian Serb detention and undertook all possible bilateral steps with the Bosnian Serb authorities to gain access to those prisoners, to monitor their conditions of detention, to register them, and to inform their anxious families. The Bosnian Serb authorities however gave evasive answers and used delaying tactics, as all parties had often done during the conflict. Towards the end of July, when the ICRC was finally given access to Bosnian Serb prisons, it found only very few detainees from Srebrenica. The ICRC, however, did not yet abandon the hope that the others were secretly detained and continued to press Bosnian Serb authorities for access. Only when the ICRC was able to see all prisoners in Bosnia and Herzegovina after the conclusion of the Dayton Peace Agreement (See *infra*, point 21.), did it come to the conclusion that the overwhelming majority of the (as of July 1997) more than 7000 missing people from Srebrenica had been killed, mainly after arrest or capture.

a. Should humanitarian organizations have maintained an expatriate presence in Srebrenica, even when the activities they were able to develop did not justify such a presence? At least for reasons of "passive protection" of the population and to show them that they were not forgotten? Does such "passive protection" work?
b. How could the UN Security Council have avoided the deaths of 7000 inhabitants of Srebrenica? By not declaring Srebrenica a safe area? By demilitarizing it? By changing the mandate of UNPROFOR? By drastically increasing the number of UNPROFOR personnel to be stationed in Srebrenica? Could it have avoided the massacre without avoiding the fall of Srebrenica? How should it have reacted to the fall in order to avoid the massacre?
c. Has IHL failed in Srebrenica? How could one have made sure that it worked? Does the case of Srebrenica show the limits of IHL and that in certain cases of non-respect of *ius in bello* only *ius ad bellum* contains a solution?
d. How should the Dutch peace-keepers have reacted to the separation between women and children on the one hand and men on the other and to the arrest of the latter? Was that a violation of IHL?
e. How could humanitarian organizations and Human Rights organizations have reacted to the news about the fall of Srebrenica in order to avoid the massacre? Particularly if their analysis of the situation led them to the conclusion that the Bosnian Serb forces will massacre any Bosnian Muslim men they arrest?
f. Was the reaction of the ICRC to the events of Srebrenica wrong? What could it have done if it had correctly analysed the situation and arrived at the conclusion that the Bosnian Serb forces massacred any Bosnian Muslim men they arrested? Should the ICRC at least have abandoned its line when the first allegations of massacres by survivors were collected? Would that have helped any victim of the conflict?

21. Following the NATO airstrikes and successful military offensives of Croatian and Bosnian government forces in the Croatian Krajinas and Western and

Central Bosnia, the international community, led by the US, persuaded the parties to conclude a cease-fire on October 5, 1995, and after considerable pressure and exhausting negotiations with the Presidents of Bosnia and Herzegovina, Croatia, and Serbia (the latter two also representing the Bosnian Croats and Serbs) the Dayton Peace Agreement was reached in Dayton, Ohio on November 21 and signed in Paris on December 14. Military aspects of the agreement had to be implemented by IFOR, a NATO-led international implementation force, with powers and manpower much greater than UNPROFOR and a mandate clearly permitting it to use force in implementing the Agreements.

One of the crucial humanitarian points on the agenda of those having to implement the peace agreement was the release of all detainees. Annex 1A of the Dayton Agreement on the Military Aspects of the Peace Settlement contains Article IX on "*Prisoner Exchanges*", which obliges the parties to release and transfer by January 19, 1996 all prisoners in conformity with IHL. They are bound to implement a plan to be developed for this purpose by the ICRC and fully cooperate with the latter. They must provide a comprehensive list of all prisoners they hold and give full and unimpeded access not only to all places where prisoners are kept but also to all prisoners by private interview at least 48 hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner. Notwithstanding those obligations, "each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities."

Despite this commitment of the parties, the process lasted well beyond the agreed time frame and was made all the more arduous by the parties reluctance to abandon their practice of exchanging detainees and the continuation of negotiations at the local level. The Bosnian government, in addition, objected to a global release on the grounds that no light had yet been shed on the fate of thousands of people who had disappeared after the fall of Srebrenica. Throughout the process ICRC delegates visited and registered new detainees held by all the parties, building up a comprehensive view of the detention situation in Bosnia and Herzegovina, establishing lists of their own and carrying out private interviews. In January, some 900 prisoners about which the parties had notified the ICRC were released by the stated deadline. However, the ICRC had thereafter to initiate a phase of intensive diplomatic pressure in order to obtain the release of the remainder, informing the political and military representatives of the international community, including IFOR, NATO, and the US of the failure of the parties to fulfil their obligations. Detainees still behind bars were declared by the detaining parties to be held on suspicion of war crimes, although in most of the cases the ICRC was not aware of any proceedings

against them either at the national level or through the ICTY. A breakthrough was finally achieved at the Moscow ministerial meeting of March 23, 1996, at which the ICRC President and the High Representative (of the international community, a post created by the Dayton Peace Agreement to oversee civilian aspects of its implementation), placed the issue of release of detainees clearly on the table. The international community was not ready to pledge money for the reconstruction of Bosnia and Herzegovina before this important aspect of the Dayton peace agreement was implemented. The results were almost immediate. On April 5, the parties finally agreed that the remaining detainees against whom there were no substantiated allegations of war crimes would be released within a day, while accusations of war crimes were checked by ICTY. This was implemented.

(*See* **Case No. 175**, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities. p. 1778.)

a. Taking into account its title reading "prisoner exchanges", does Art. IX of Annex 1-A provide for a unilateral obligation to release prisoners? Is that obligation unilateral under IHL or may it be subject to reciprocity? May the Dayton Agreement deviate from IHL subjecting the obligation to reciprocity? (*Cf.* Arts. 6 and 118 of Convention III, Arts. 7 and 133 of Convention IV and Art. 2 (3) (2) of Agreement No. 1.)

b. Does Art. IX go beyond the obligations provided for by IHL? (*Cf.* Arts. 118, 122, 123 and 126 of Convention III and Arts. 133, 134, 137, 138, 140 and 143 of Convention IV.)

c. Is Art. IX compatible with the obligations provided for by IHL in the case of grave breaches? Has a Party to release a prisoner it suspects of a war crime but for whom the ICTY does not request arrest, detention, surrender, or access at the end of the "period of consultations" under Art. IX (1)? Under IHL? May a Party release such a person under IHL? Was the further agreement of the parties, concluded in Rome, under which no person may be retained or arrested under war crimes charges, except with the permission of ICTY, compatible with IHL? Can you imagine why the US pressed the Parties to conclude such an agreement? (*Cf.* Arts. 118, 119 (5) and 129-131 of Convention III and Arts. 133 and 146-148 of Convention IV.)

d. Why did the ICRC refuse to link the release of prisoners with the problem of missing persons? Is not a missing person for whom a testimony of arrest by the enemy exists or who the ICRC once visited a prisoner to be released under IHL?

e. What are the risks for a humanitarian organization like the ICRC when it succeeds in a humanitarian operation like the release of all prisoners (which is also an implementation of IHL) only thanks to massive international political, economic, and even military pressure? In particular, if that pressure is mainly directed at one side? Is that compatible with the Red Cross principles of neutrality and impartiality? Could the ICRC have avoided constantly informing the international community about the (extent of) non-compliance of each party with its

obligations? Could the ICRC have pursued its traditional bilateral and confidential approach with each party separately?

22. When the conflict in Bosnia and Herzegovina ended, families continued to report nearly 20,000 persons unaccounted for (among them, as of July 1997, 16,152 Bosnian Muslims (including more than 7000 from Srebrenica), 2331 Bosnian Serbs, and 621 Bosnian Croats). Article V in Annex 7 of the Dayton Peace Agreement stipulates that: "The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for." Art. IX (2) of its above mentioned Annex 1A furthermore obliged the parties to give each other's grave registration personnel, "within a mutually agreed period of time", access to individual and mass graves "for the limited purpose of proceeding to such graves, to recover and evacuate the bodies of deceased military and civilian personnel of that side, including deceased prisoners."

    On this basis, the ICRC proposed that the former belligerents set up a Working Group on the Process for Tracing Persons Unaccounted for in Connection with the Conflict on the Territory of Bosnia and Herzegovina - a convoluted title reflecting the nature of the political negotiations that led to the establishment of this body. While the parties endorsed the proposal itself, they engaged in endless quibbling over the wording of the Rules of Procedure and of the Terms of Reference drafted by the ICRC. Nevertheless, the Working Group, which is chaired by the ICRC, has met ten times in 1996 in the presence of representatives of other international institutions involved, Croatia, and the Federal Republic of Yugoslavia. Most of the tracing requests registered by the families have been submitted, during sessions of the Working Group, to the party responsible (16,000 to the Bosnian Serbs, 1700 to the Bosnian Muslims, and 1200 to the Bosnian Croats). The Working Group has adopted a rule whereby the information contained in the tracing requests, as well as the replies that the parties are called on to provide, are not only exchanged bilaterally between the families and the parties concerned through the intermediary of the ICRC, but are also communicated to all the members of the Working Group, that is, to all the former belligerents and to the High Representative. Since 1996, the ICRC has submitted to the concerned parties close to 20 000 names of missing persons, requesting them to provide the information necessary to clarify their fate, in conformity with their obligations under the Dayton Agreement. (*Cf.* http://www.icrc.org/eng/missing)

    a. Which elements of the ICRC action to trace missing persons in Bosnia and Herzegovina go beyond IHL? Under IHL, does a party of an international armed conflict have, at the end of the conflict, an obligation:
        - to search for persons reported missing by the adverse party?
        - to provide all information it has on the fate of such persons?
        - to identify mortal remains of persons it must presume to have belonged to the adverse party?

against them either at the national level or through the ICTY. A breakthrough was finally achieved at the Moscow ministerial meeting of March 23, 1996, at which the ICRC President and the High Representative (of the international community, a post created by the Dayton Peace Agreement to oversee civilian aspects of its implementation), placed the issue of release of detainees clearly on the table. The international community was not ready to pledge money for the reconstruction of Bosnia and Herzegovina before this important aspect of the Dayton peace agreement was implemented. The results were almost immediate. On April 5, the parties finally agreed that the remaining detainees against whom there were no substantiated allegations of war crimes would be released within a day, while accusations of war crimes were checked by ICTY. This was implemented.

(*See* **Case No. 175**, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities. p. 1778.)

a. Taking into account its title reading "prisoner exchanges", does Art. IX of Annex 1-A provide for a unilateral obligation to release prisoners? Is that obligation unilateral under IHL or may it be subject to reciprocity? May the Dayton Agreement deviate from IHL subjecting the obligation to reciprocity? (*Cf.* Arts. 6 and 118 of Convention III, Arts. 7 and 133 of Convention IV and Art. 2 (3) (2) of Agreement No. 1.)

b. Does Art. IX go beyond the obligations provided for by IHL? (*Cf.* Arts. 118, 122, 123 and 126 of Convention III and Arts. 133, 134, 137, 138, 140 and 143 of Convention IV.)

c. Is Art. IX compatible with the obligations provided for by IHL in the case of grave breaches? Has a Party to release a prisoner it suspects of a war crime but for whom the ICTY does not request arrest, detention, surrender, or access at the end of the "period of consultations" under Art. IX (1)? Under IHL? May a Party release such a person under IHL? Was the further agreement of the parties, concluded in Rome, under which no person may be retained or arrested under war crimes charges, except with the permission of ICTY, compatible with IHL? Can you imagine why the US pressed the Parties to conclude such an agreement? (*Cf.* Arts. 118, 119 (5) and 129-131 of Convention III and Arts. 133 and 146-148 of Convention IV.)

d. Why did the ICRC refuse to link the release of prisoners with the problem of missing persons? Is not a missing person for whom a testimony of arrest by the enemy exists or who the ICRC once visited a prisoner to be released under IHL?

e. What are the risks for a humanitarian organization like the ICRC when it succeeds in a humanitarian operation like the release of all prisoners (which is also an implementation of IHL) only thanks to massive international political, economic, and even military pressure? In particular, if that pressure is mainly directed at one side? Is that compatible with the Red Cross principles of neutrality and impartiality? Could the ICRC have avoided constantly informing the international community about the (extent of) non-compliance of each party with its

2,000 people died and almost 300,000 fled as a result. In March 1998, the Security Council reacted by adopting resolution 1160 (1998) condemning the excessive use of force by the Serbian police forces against civilians and establishing an arms embargo. On 23 September, it adopted resolution 1199 (1998), in which it demanded a cease-fire in Kosovo, the withdrawal of Serbian forces and the opening of direct negotiations. The resolution referred to the conflict as a threat to peace and security in the region.

a. Can this situation be termed an armed conflict? If so, is it a non-international or an international armed conflict? Can the UCK now be considered a national liberation movement? Did the Security Council resolutions influence your answer? (*Cf.* Arts. 2 and 3 common to the Conventions; Preamble para. 5 and Art. 1 (4) of Protocol I; Art. 1 of Protocol II.)

b. Could civilians be expelled on the grounds that the UCK fighters had to be isolated? If the expulsion was intended to shield them from the fighting? Is expulsion a war crime? (*Cf.* Arts. 49 and 147 of Convention IV; Art. 17 of Protocol II; Art. 8 (2) (a) (vii) and (2) (e) (viii) of the ICC Statute, in **Case No. 15**, The International Criminal Court. [*Cf.* A., The Statute.] p. 608.)

25. The period between April and August 1998 saw no let-up in the fighting between Yugoslav troops and ethnic Albanian independence fighters on the territory of Kosovo. On 15 May 1998, Yugoslav President Milosevic and Kosovo Albanian leader Ibrahim Rugova met under the auspices of American mediator Richard Holbrooke. Under the threat of NATO bombardments, in October the mediation resulted in Mr Milosevic's agreement to withdraw Serbian forces, to call a halt to the fighting and to accept the deployment of 2,000 unarmed OSCE monitors in Kosovo. The UCK rejected the agreement. Nevertheless, on 26 October 10,000 Serbian policemen withdrew from Kosovo and NATO suspended its threat to conduct air raids. In December 1998, renewed fighting broke out between the UCK and Serbian forces.

On what principles of IHL can third States or international organizations propose or demand the deplovment of monitors? (*Cf.* Art. I common to the Conventions; Arts. 8/8/8/9 and 10/10/10/11 respectively of the four Conventions; Art. 89 of Protocol I.) What was the point in dispatching unarmed monitors to ascertain compliance withe IHL? What could the monitors do if the Serbian authorities violated IHL? If UCK did so? What would have been the advantages and disadvantages of deploying armed monitors?

26. On 30 January 1999, NATO announced that it would carry out air strikes against the territory of the Federal Republic of Yugoslavia (FRY) if the latter did not meet the demands of the international community. Negotiations were held between the parties to the conflict from 6 to 23 February in Rambouillet and from 15 to 18 March in Paris. The resulting peace agreement was agreed by the Kosovo Albanian delegation. The Serbian delegation rejected it.

NATO considered that all efforts to reach a negotiated political settlement to the crisis in Kosovo had failed and decided to launch air strikes against the FRY, a step announced by the NATO Secretary General on 23 March 1999. On the same day, the Federal Republic of Yugoslavia published a decree stating that the threat of war was imminent; the next day it declared a state of war.

(*See* also **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention. p. 2077.)

a. Was there an international armed conflict between Yugoslavia and NATO? Between Yugoslavia and each of the NATO member States? Between Yugoslavia and each of the States participating in the air strikes? Was there a declaration of war? Is a declaration of war needed for international humanitarian law to apply?
b. Was the law of international armed conflict applicable to the NATO forces, even though their objective was to protect the Kosovo Albanians from Serbian repression? Would the answer be the same on the hypothesis that the bombardments were the only means of protecting the Kosovars from genocide? (*Cf.* Arts. 1 and 2 common to the Conventions; Preamble para. 5 of Protocol I.)
c. Does the disputed lawfulness of the NATO air strikes in the absence of armed aggression on the part of Yugoslavia and of Security Council authorization lay the applicability of IHL to those attacks open to question? (*Cf.* Preamble para. 5 of Protocol I.)

27. The air strikes lasted a little less than three months, from 24 March to 8 June 1999. They gave rise to several controversial incidents, some of which are described below.

A. On 12 April, a passenger train was destroyed as it came out of a tunnel on a bridge near Grdelica; 10 civilians were killed and at least 15 wounded. The United States said that its intention had been to destroy the bridge, which was part of Serbia's communications network, and that the pilot would not have seen the train while aiming at the bridge.

B. On 14 April, a convoy of ethnic Kosovo Albanians fleeing to Djakovica was attacked (according to the Yugoslav authorities, between 70 and 75 civilians were killed and more than one hundred wounded). NATO explained that the British pilot, who was flying at high altitude to avoid Yugoslav anti-aircraft guns, thought he was attacking a convoy of armed and security forces that had just burnt a number of Albanian villages to the ground.

C. The Pancevo petrochemical complex was bombed on 15 and 18 April, with no loss of life.

D. Electricity-generating and transmitting stations were repeatedly attacked, the aim being, according to some NATO officials, to cut off power to Yugoslavia's military communications system; according to others, it was to stir civilian unrest against President Milosevic by depriving the population of electrical power.

E. The bridge over the Danube in Novi Sad (located hundreds of kilometres from Kosovo) was destroyed.

F. The Chinese embassy in Belgrade was destroyed (three civilians killed, 15 wounded). The United States explained that this was a mistake caused by their intelligence services failing to accurately situate the Yugoslav government's supply office, which was the intended target of the attack.

G. On 23 April, just after 2 a.m., NATO deliberately bombed a Radio Television Serbia building in Belgrade; 16 people died and another 16 were seriously wounded. Certain NATO representatives justified the attack on the grounds that the building was also used for military transmissions. Others, including the British Prime Minister, said that Yugoslav media propaganda enabled President Milosevic to stay in power and encouraged the population to take part in the violence against the Kosovars.

   a. Analyse each of the above attacks from the point of view of whether the controversy they gave rise to concerned whether or not they were aimed at a military objective, whether or not collateral civilian losses were admissible or whether or not the necessary precautions had been taken in the attack. Where different versions of the facts or different explanations have been given, deal with each separately. (*Cf.* Arts. 51, 52 (2) and 57 of Protocol I.)
   b. Can an attack that "mistakenly" (contrary to the attacker's intent) targets or affects civilians violate IHL? Can it constitute a grave breach of IHL? A war crime? (*Cf.* Arts. 57 and 85 (3) of Protocol I; Arts. 30 and 32 of the ICC Statute.)
   c. Given that there was no international armed conflict between the United States and China, were the Chinese diplomats in Belgrade protected under IHL? Were they protected persons? (*Cf.* Art. 2 common to the Conventions; Art. 4 of Convention IV; Art. 50 of Protocol I.)

28. Furthermore, throughout the campaign, NATO forces used projectiles containing depleted uranium and fragmentation bombs against military objectives. After the conflict, the remnants of those munitions were deemed to put the civilian population and NATO's international staff and troops deployed in Kosovo in danger.

    Are such munitions prohibited by IHL? Can the use of a means of warfare be prohibited against military objectives or combatants because of its long-term effects on the combatants? On the region's civilian population? On the environment? (*Cf.* Arts. 35, 36, 51 (4) (a) and (5) (b) and 55 of Protocol I.)

29. During the NATO air strikes, three US soldiers stationed in Macedonia fell into the power of Yugoslavia. It was not known whether they were abducted in Macedonia or had mistakenly crossed into Kosovo. The ICRC was able to visit them only after four weeks of intense representations.

    Are the US soldiers prisoners of war? Do doubts about the circumstances of their arrest in any way affect their status? When should they have been repatriated? If they were abducted in Macedonia, should they have been

released before the end of the hostilities? (*Cf.* Arts. 2, 4, 118 and 126 (5) of Convention III.)

30. With the launch of air strikes, the forces of the Federal Republic of Yugoslavia and of the Republic of Serbia stepped up their attacks against the Kosovo Albanians; in the following months they forcibly expelled over 740,000 ethnic Albanian Kosovars, about one third of the total ethnic Albanian population. An undetermined number of ethnic Albanian Kosovars were killed during operations conducted by the Yugoslav and Serbian forces. A smaller number were killed in the NATO air strikes.
    a. Was it unlawful for the Yugoslav and Serbian forces to forcibly expel the population of Kosovo? (*Cf.* Arts. 49 and 147 of Convention IV; Art. 17 of Protocol II; Arts. 8 (2) (a) (vii) and 2 (e) (viii) of the ICC Statute.)
    b. If so, was the forced displacement of the population a war crime or a crime against humanity? (*Cf.* Arts. 7 (1) (d) and (2) (d) and 8 (2) (a) (vii) and (2) (e) (viii) of the ICC Statute.)
    c. Can it be said that acts of genocide were committed against the population of Kosovo? (*Cf.* Art. 6 of the ICC Statute.)
    d. Can the expulsions be justified by the NATO air strikes and by the fact that the UCK was allied with NATO and the Albanian population of Kosovo wanted to be liberated by NATO? Since the massacres and population displacements intensified when the air strikes started, can part of the responsibility for the plight of the civilian population be laid at NATO's door?
    e. Does IHL also protect the Kosovars against NATO? (*Cf.* Arts. 49 (2) and 50 of Protocol I.)

31. The ICRC withdrew its 19 representatives from Kosovo on 29 March 1999 because of the worsening security situation brought about by the Serb paramilitary forces. It remained active, however, in the neighbouring republics, attending to the refugees from Kosovo. After having negotiated its return to Kosovo with the Serbian authorities and following a survey of security conditions, the ICRC re-opened its office and resumed its humanitarian activities in the province in late May 1999.
    a. Was the ICRC entitled to be present in Kosovo? In Belgrade? (*Cf.* Art. 3 common to the Conventions; Arts. 9/9/9/10 respectively of the four Conventions; Art. 126 (5) of Convention III; Art. 143 (5) of Convention IV.)
    b. Was the ICRC entitled to be in Kosovo by virtue of IHL or by virtue of a bilateral agreement with Yugoslavia? Was Yugoslavia obliged to ensure adequate conditions of security for ICRC delegates? (*Cf.* Art. 126 (5) of Convention III; Art. 143 (5) of Convention IV.)
    c. Was the ICRC mission in Kosovo a failure because it withdrew? Should the ICRC have withdrawn from all of Yugoslavia? In what circumstances does the ICRC withdraw from a country?
    d. If the ICRC had been able to stay in Kosovo throughout the conflict, what could it have done in aid of the Albanian population?

32. On 27 May 1999, the Chief Prosecutor of the ICTY, Ms Louise Arbour, issued an indictment against Slobodan Milosevic, charging him with crimes against humanity and violations of the law and customs of war in Kosovo. (*Cf.* the ICTY web site: http://www.icty.org/milosevic)
    a. Why was Mr Milosevic not indicted for grave breaches of the Geneva Conventions in Kosovo? (Cf. Arts. 2, 4 and 147 of Convention IV.)
    b. Given that Slobodan Milosevic in person did not necessarily commit the crimes against humanity and the violations of the laws and customs of war, by virtue of what principle was the ICTY Chief Prosecutor able to indict him for those crimes? (*Cf.* Art. 7 of the ICTY Statute, *see* **Case No. 179**. p. 1791.)
    c. As head of State, did Slobodan Milosevic not benefit from immunity for the acts committed while he was in office?

33. On 3 June 1999, the Serbian parliament agreed to an international plan that brought an end to the conflict in Kosovo. The plan provided for the deployment of an international force under United Nations auspices, the withdrawal of Serbian forces from Kosovo and the return of refugees. On 10 June 1999, the Serbian forces left Kosovo, to be replaced by an international NATO force of 35,000 men mandated by United Nations Security Council resolution 1244 (1999): KFOR. The Security Council resolution also established the United Nations Interim Administration Mission in Kosovo (UNMIK) to administer the territory on a provisional basis. Kosovo was thus placed under international administration but remained under Yugoslav sovereignty. On 21 June, an agreement to demilitarize the UCK was signed between the prime minister of the "provisional government" and the KFOR Commander. All legislative and executive authority relating to Kosovo, including the administration of justice, was conferred on UNMIK and exercised by the Secretary-General's Special Representative (initially Bernard Kouchner, at present [in 2005] Soren Jessen-Petersen).

    The end of the bombardments did not spell an end to the climate of political violence in Kosovo. Non-Albanians were the victims of acts of violence referred to by some people as "reverse ethnic cleansing". It was in this context that the bodies of 14 murdered Serbs were discovered in the village of Gracko, on 23 July 1999. Although almost 800,000 ethnic Albanian refugees were able to return to their homes, about 200,000 Serbs and Roma had to leave.
    a. How would you qualify the situation in Kosovo after the withdrawal of the Serbian forces? (*Cf.* Arts. 2 and 3 common to the Conventions; Art. 1 of Protocol II.)
    b. Did the "reverse ethnic cleansing" violate IHL? (*Cf.* Arts. 3, 27 and 32 of Convention IV; Arts. 4 (2) (a) and (b) and 17 of Protocol II.)
    c. Does the fact that the Serb victims of "reverse ethnic cleansing" previously tolerated much harsher abuse of the Albanian population justify the abuse to which they were subjected? Justify a degree of understanding on the part of KFOR and UNMIK for that subsequent abuse? (*Cf.* Arts. 3, 27 and 33 (3) of Convention IV; Art. 4 (2) (a) and (b) of Protocol II.)

d. Is Kosovo a territory occupied by KFOR? Even though its deployment was provided for in a Security Council resolution? Even though that deployment was in the interests of the local population? Even though it was agreed to by Yugoslavia? (*Cf.* Art. 2 of Convention IV; Preamble para. 5 of Protocol I.)

e. What rules of the Fourth Geneva Convention on occupied territories are incompatible with the objectives of the KFOR and UNMIK presence? What rules might UNMIK find useful? If IHL were applicable, would UNMIK be obliged to prevent the attacks against the minorities in Kosovo? In that case, could all legislative and executive authority relating to Kosovo, including the administration of justice, be conferred on an international civil servant? (*Cf.* Arts. 42 and 43 of the Hague Regulations; Arts. 64-66 of Convention IV.)

34. At the end of 2000, ethnic Albanians in Presevo Valley (southern Serbia) formed the *Ushtria Clirimtare e Presheva, Medvegja e Bujanovc* (UCPMB), an armed movement that mirrored the UCK. The movement sought to make Presevo Valley, a 5-kilometre-wide strip of land bordering on Kosovo, a part of the province. Although the valley was situated in Serbia, the Yugoslav army had had to withdraw from it under the agreements with KFOR. The population was about 80 per cent Albanian. The UCPMB launched a guerrilla war pitting its forces against those of Serbia.

What status does this situation have in IHL? What status would it have if the allegations that the UCPMB was equipped and financed by the UCK were true? If the UCK had overall control of the UCPMB? What were KFOR's and UNMIK's obligations in respect of the UCPMB? (*Cf.* Arts. 1-3 common to the Conventions; Art. 1 of Protocol II.)

35. In the former Yugoslav Republic of Macedonia, the Albanian minority considered that it was not equitably represented on State bodies. There were few Albanian-speakers, for example, in the security forces, even in areas where Albanian-speakers were in the majority. On 16 February 2001, the UCKM (the Macedonian faction of the UCK) started to occupy a few Albanian-speaking villages situated near the borders with Kosovo and Serbia. In March 2001, it started to promote the secession of the north-western part of Macedonia and its Albanian majority. On 14 March 2001, during an Albanian demonstration on the streets of Tetovo, a dozen UCKM members dispersed among the demonstrators shot at the police. The next day, the UCKM shelled the centre of Tetovo, which was controlled by Macedonian forces.

a. How would you qualify this situation under IHL? How would it be qualified if the allegations that the UCKM was equipped and financed by the UCK were true? If the UCK had overall control of the UCKM? (*Cf.* Arts. 2 and 3 common to the Conventions; Art. 1 of Protocol II.)

b. Does IHL prohibit UCKM members from mixing in with the demonstrators? From attacking, thus scattered among the demonstrators, the Macedonian police forces? (*Cf.* Arts. 37 (1) (c), 44 (3) and 51 (7) of Protocol I.)

36. Civilians suffered in the hostilities, in particular in the Tetovo region, where it was extremely difficult to obtain food, medicines and other basic necessities. Hundreds of people were forced by the fighting to flee their homes. Issuing an ultimatum, the Macedonian security forces encouraged the Albanian-speaking civilians to leave the villages controlled by the UCKM so that they could attack the combatants without endangering the civilian population. The UCKM often prevented the civilians from leaving.
    a. Were the Macedonian authorities obliged to allow supplies into the villages controlled by the UCKM? What prior conditions could they set? Would those conditions have been realistic? (*Cf.* Art. 23 of Convention IV; Art. 70 of Protocol I; Art. 18 (2) of Protocol II.)
    b. Were the authorities' efforts to make civilians living in the villages controlled by the UCKM flee lawful under IHL? (*Cf.* Arts. 49 and 147 of Convention IV; Art. 17 of Protocol II.)
    c. Can the UCKM prevent civilians from leaving the villages it controls? (*Cf.* Arts. 51 (7) and 58 of Protocol I.)

37. On 13 August 2001, after seven months of clashes between the UCKM rebels and the security forces, all the parties concerned signed a peace agreement that provided for enhanced rights for the Albanian-speaking minority, the disarmament of the UCKM and an amnesty for the rebels. On 22 August, the first NATO contingents were deployed in Macedonia as part of Operation "Essential Harvest", to collect the rebels' weapons. The first UCKM weapons were collected on 27 August 2001.

[The length of this case study reflects the endless waves of conflict that ravaged the Balkans for many years. The authors are hopeful that future events will not add to it.]

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts

THE CASE

A. Yugoslavia/Croatia, Memorandum of Understanding of November 27, 1991

[**Source:** Mercier, M., *Without Punishment, Humanitarian Action in Former Yugoslavia,* Appendix: Document IV, London, East Haven, 1995, pp.195-198.]

MEMORANDUM OF UNDERSTANDING

We the undersigned,

H.E. Mr. Radisa Gacic, Federal Secretary for Labour, Health, Veteran Affairs and Social Policy

Lt. General Vladimir Vojvodic, Director General, Medical Service of the Yugoslav People's Army

Mr. Sergej Morsan, Assistant to the Minister of Foreign Affairs, Republic of Croatia

Prim. Dr. I. Prodan, Commander of Medical Headquarters of Ministry of Health, Republic of Croatia

Prof. Dr. Ivica Kostovic, Head of Division for information of Medical Headquarters, Ministry of Health, Republic of Croatia

Dr. N. Mitrovic, Minister of Health, Republic of Serbia

taking into consideration the Hague statement of 5 November 1991 undertaking to respect and ensure respect of international humanitarian law signed by the Presidents of the six Republics; having had discussions in Geneva under the auspices of the International Committee of the Red Cross (ICRC) on 26 and 27 November 1991 and with the participation of:

Mr. Claudio Caratsch, Vice-President of the ICRC

Mr. Jean de Courten, Director of Operations, Member of the Executive Board of the ICRC

Mr. Thierry Germond, Delegate General for Europe (Chairman of the above mentioned meeting)

Mr. Francis Amar, Deputy Delegate General for Europe

Mr. François Bugnion, Deputy Director of Principles, Law and Relations with Movement

Mr. Thierry Meyrat, Head of Mission, ICRC Belgrade

Mr. Pierre-André Conod, Deputy Head of Mission, ICRC Zagreb

Mr. Jean-François Berger, Taskforce Yugoslavia

Mr. Vincent Lusser, Taskforce Yugoslavia

Mr. Marco Sassoli, Member of the Legal Division

Mrs. Cristina Piazza, Member of the Legal Division

Dr. Rémy Russbach, Head of the Medical Division

Dr. Jean-Claude Mulli, Deputy Head of the Medical Division

Mr. Jean-David Chappuis, Head of the Central Tracing Agency

have agreed to the following:

(1) *Wounded and sick*

All wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention of August 12, 1949

(2) *Wounded, sick and shipwrecked at sea*

All wounded, sick and shipwrecked at sea shall be treated in accordance with the provisions of the Second Geneva Convention of August 12, 1949.

(3) *Captured combatants*

Captured combatants shall enjoy the treatment provided for by the Third Geneva Convention of August 12, 1949.

(4) *Civilians in the power of the adverse party*

[1] Civilians who are in the power of the adverse party and who are deprived of their liberty for reasons related to the armed conflict shall benefit from the rules relating to the treatment of internees laid down in the Fourth Geneva Convention of August 12, 1949 (Articles 79 to 149).

[2] All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I.

(5) *Protection of the civilian population against certain consequences of hostilities*

The civilian population is protected by Articles 13 to 26 of the Fourth Geneva Convention of August 12, 1949.

(6) *Conduct of hostilities*

Hostilities shall be conducted in accordance with Article 35 to 42 and Articles 48 to 58 of Additional Protocol I, and the Protocol on Prohibition or Restrictions on the Use of Mines, Booby Traps and Other Devices annexed to the 1980 Weapons Convention.

(7) *Establishment of protected zones*

The parties agree that for the establishment of protected zones, the annexed standard draft agreement shall be used as a basis for negotiations.

(8) *Tracing of missing persons*

The parties agree to set up a Joint Commission to trace missing persons; the Joint Commission will be made up of representatives of the parties concerned, all Red Cross organizations concerned and in particular the Yugoslav Red Cross, the Croatian Red Cross and the Serbian Red Cross with ICRC participation.

(9) *Assistance to the civilian population*

[1] The parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively for the other party's civilian population, it being understood that both parties are entitled to verify that the consignments are not diverted from their destination.

[2] They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

(10) *Red Cross emblem*

[1] The parties undertake to comply with the rules relating to the use of the Red Cross emblem. In particular, they shall ensure that these rules are observed by all persons under their authority.

[2] The parties shall repress any misuse of the emblem and any attack on persons or property under its protection.

(11) *Forwarding of allegations*

[1] The parties may forward to the ICRC any allegations of violations of international humanitarian law, with sufficient details to enable the party reportedly responsible to open an enquiry.

[2] The ICRC will not inform the other party of such allegations if they are expressed in abusive terms of if they are made public. Each party undertakes, when it is officially informed of such an allegation made or forwarded by the ICRC, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

(12) *Request for an enquiry*

[1] Should the ICRC be asked to institute an enquiry, it may use its good offices to set up a commission of enquiry outside the institution and in accordance with its principles.

[2] The ICRC will take part in the establishment of such a commission only by virtue of a general agreement or an ad hoc agreement with all the parties concerned.

(13) *Dissemination*

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence, and to paramilitary or irregular units not formally under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- via articles in the press, and radio and television programmes prepared also in cooperation with the ICRC and broadcast simultaneously;
- by distributing ICRC publications.

(14) *General provisions*

[1] The parties will respect the provisions of the Geneva Conventions and will ensure that any paramilitary or irregular units not formally under their command, control or political influence respect the present agreement.

[2] The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

(15) *Next meeting*

The next meeting will take place in Geneva on 19-20 December 1991.

[The signatures of the abovementioned persons follow.]

Geneva, November 27, 1991

B. Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992

[**Source:** Mercier, M., *Crimes Without Punishment, Humanitarian Action in Former Yugoslavia*, London, East Haven, 1995, pp. 203-207.]

AGREEMENT

At the invitation of the International Committee of the Red Cross,

Mr. K. Trnka, Representative of Mr. Alija Izetbegovic
President of the Republic of Bosnia-Herzegovina

Mr. D. Kalinic, Representative of Mr. Radovan Karadzic
President of the Serbian Democratic Party

Mr. J. Djogo, Representative of Mr. Radovan Karadzic
President of the Serbian Democratic Party

Mr. A. Kurjak, Representative of Mr. Alija Izetbegovic
President of the Party of Democratic Action

Mr. S. Sito Coric, Representative of Mr. Miljenko Brkic
President of the Croatian Democratic Community

Met in Geneva on the 22 May 1992 to discuss different aspects of the application and of the implementation of international humanitarian law within the context of the conflict in Bosnia-Herzegovina, and to find solutions to the resulting humanitarian problems. Therefore

- conscious of the humanitarian consequences of the hostilities in the region;
- taking into consideration the Hague Statement of November 5, 1991;
- reiterating their commitment to respect and ensure respect for the rules of International Humanitarian Law;

the Parties agree that, without any prejudice to the legal status of the parties to the conflict or to the international law of armed conflict in force, they will apply the following rules:

1. General Principles

The parties commit themselves to respect and to ensure respect for the Article 3 of the four Geneva Conventions of August 12, 1949, which states, in particular:

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

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

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

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

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

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

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

2. Special agreement

In accordance with the Article 3 of the four Geneva Conventions of August 12, 1949, the Parties agree to bring into force the following provisions:

2.1. Wounded, sick and shipwrecked

The treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of August 12, 1949, in particular:

- All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
- 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.

2.2. Protection of hospitals and other medical units

[1] Hospitals and other medical units, including medical transportation may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attacks.

[2] The protection shall not cease unless they are used to commit military acts. However, the protection may only cease after due warning and a reasonable time limit to cease military activities.

2.3. Civilian population

[1] The civilians and the civilian population are protected by Articles 13 to 34 of the Fourth Geneva Convention of August 12, 1949. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. They shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

[2] All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I. Civilians who are in the power of an adverse party and who are deprived of their liberty for reasons related to the armed conflict shall benefit from the rules relating to the treatment of internees laid down in the Fourth Geneva Convention of August 12, 1949.

[3] In the treatment of the civilian population there shall be no adverse distinction founded on race, religion or faith, or any other similar criteria.

[4] The displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

[5] The International Committee of the Red Cross (ICRC) shall have free access to civilians in all places, particularly in places of internment or detention, in order to fulfil its humanitarian mandate according to the Fourth Geneva Convention of August 12, 1949.

2.4. Captured combatants

[1] Captured combatants shall enjoy the treatment provided for by the Third Geneva Convention.

[2] The International Committee of the Red Cross (ICRC) shall have free access to all captured combatants in order to fulfil its humanitarian mandate according to the Third Geneva Convention of 12 August 1949.

2.5. Conduct of hostilities

Hostilities shall be conducted in the respect of the laws of armed conflict, particularly in accordance with Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I, and the Protocol on the prohibition or Restriction on the Use of Mines, Booby Traps and other Devices annexed to the 1980 Weapons Convention. In order to promote the protection of the civilian population, combattants are obliged to distinguish themselves from the civilian population.

2.6. Assistance to the civilian population

[1] The Parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively to the civilian population.

[2] They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

3. Red Cross Emblem

The Red Cross emblem shall be respected. The Parties undertake to use the emblem only to identify medical units and personnel and to comply with the other rules of international humanitarian law relating to the use of the Red Cross emblem and shall repress any misuse of the emblem or attacks on persons or property under its protection.

4. Dissemination

The Parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- by distributing ICRC publications.

5. Implementation

[1] Each party undertakes to designate liaison officers to the ICRC who will be permanently present in meeting places determined by the ICRC to assist the ICRC in its operations with all the necessary means of communication to enter in contact with all the armed groups they represent. Those liaison officers shall have the capacity to engage those groups and to provide guarantees to the ICRC on the safety of its operations. Each party will allow the free passage of those liaison officers to the meeting places designated by the ICRC.

[2] Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

6. General provisions

[1] The parties undertake to respect and to ensure respect for the present agreement in all circumstances.

[2] The present agreement will enter in force on May 26, at 24h00 if all parties have transmitted to the ICRC their formal acceptance of the agreement by May 26, 1992 at 18h00.

DISCUSSION

1. Do the two agreements qualify the conflicts? Could the ICRC have suggested the Memorandum of Understanding of November 27, 1991 (MoU) if it had qualified the conflict between Croatia and Yugoslavia as an international one? Could Agreement No. 1 of May 22, 1992 (A1) concern an international armed conflict? (*Cf.* Arts. 2, 3 and 6/6/6/7 common to the Conventions and Art. 1 of Protocol I.)

2. a. Why does the ICRC suggest such agreements? Why do the parties conclude such agreements? Who are the parties to the two agreements? Who is bound by the two agreements?

   b. Is the MoU binding for the Socialist Federative Republic of Yugoslavia and Croatia? Is A1 binding on Bosnia and Herzegovina? Is it acceptable that A1 puts "the Republic of Bosnia-Herzegovina" and political parties on an equal footing? (*Cf.* Art. 3 (3) common to the Conventions.)

   c. What difficulties could the ICRC foresee when it invited the parties to negotiate those agreements? How did it overcome those difficulties?

3. Does Art. 3 of the MoU give captured combatants prisoner-of-war status? May Croatian soldiers who formerly served in the Yugoslav People's Army and fall into the power of Yugoslavia be sentenced for high treason?

4. a. Do Art. 4 (1) of the MoU and Art. 2. 3 (2) of A1 provide the same protection to civilians deprived of their liberty as IHL of international armed conflicts, a lesser protection, or a better protection? (*Cf.* Arts. 37, 41, 76, 78 and 79 of Convention IV.)

   b. Is a Serb inhabitant of Western Slavonia, whose ancestors lived for 400 years in that part of Croatia, who is arrested by the Croatian police, "in the power of the adverse party" in the sense of Art. 4 (1) of the MoU? Is a Bosnian Muslim inhabitant of Banja Luka, whose ancestors lived for 400 years in that part of Bosnia and Herzegovina, who is arrested by the Bosnian Serb police "in the power of the adverse party" in the sense of Art. 2.3 (2) of A1? Is a Serb inhabitant of Sarajevo, whose ancestors lived for 400 years in the capital of Bosnia and Herzegovina, who is arrested by the Bosnian police "in the power of the adverse party" in the sense of Art. 2.3 (2) of A1? What are the advantages and disadvantages of thus labelling persons as "protected persons" according to their ethnic origin? Is there any other way to apply the law of international armed conflict?

5. a. Is there any prohibition of forced displacements in the MoU? Is there any prohibition of forced displacements in IHL of international armed conflicts? Where? Why was that provision not integrated into the MoU? Did the practice

of "ethnic cleansing" therefore not violate IHL in the conflict between Croatia and Yugoslavia? (*Cf.* Art. 49 of Convention IV.)

b. Is there a prohibition of forced displacements in A1? Does its wording come from the law of international armed conflicts or from the law of non-international armed conflicts? (*Cf.* Art. 49 of Convention IV, Art. 85 (4) of Protocol I and Art. 17 of Protocol II.)

6. a. Can you imagine why Art. 6 of the MoU and Art. 2.5 of A1 exclude Arts. 43-47 from their reference to the rules of Protocol I concerning the conduct of hostilities?

b. Was there any obligation for combatants to distinguish themselves from the civilian population in the conflict between Croatia and Yugoslavia? (*Cf.* Art. 1 of the Hague Regulations, Art. 4 (A) of Convention III, Arts. 44 (3) and 48 of Protocol I and Art. 13 of Protocol II.)

7. Do Art. 9 of the MoU and Art. 2.6 of A1 on humanitarian assistance correspond to IHL of international armed conflicts or does it go further? If yes, on which points? (*Cf., e.g.,* Arts. 10, 23, 59-61, 108-109 and 142 of Convention IV and Arts. 69, 70 and 81 of Protocol I.)

8. a. Which rules on implementation are foreseen in the two agreements? Which mechanisms of implementation foreseen in IHL of international armed conflicts are not mentioned? Can you imagine why the parties did not want to mention those mechanisms?

b. Are there any provisions on war crimes in the two agreements? Which elements of the regime of IHL on grave breaches do the agreements lack? Are those gaps crucial, taking into consideration that the national legislation of the Former Yugoslavia, which implemented the rules of IHL on grave breaches, was taken over by its successor States? Did a party, accepting in the agreements a rule of behaviour of IHL of international armed conflicts, necessarily also undertake to treat a violation of that rule as a grave breach if it is so qualified by IHL? Can the International Criminal Tribunal for the Former Yugoslavia prosecute, under those agreements, any violation of IHL of international armed conflicts qualified as a grave breach? Only if the rule violated is contained in the agreements? Only if it also violates customary IHL?

c. What are the differences between the rules on implementation contained in the two agreements? Can you explain them?

d. Why does the ICRC show in Art. 12 of the MoU such a reticence towards an enquiry into allegations of violations? Are enquiries not an important means of implementing IHL? Should the ICRC not conduct an enquiry itself, due to its knowledge of the field, its expertise in IHL and its well recognized neutrality and impartiality, at least if both parties agree that it does so? Can you imagine the reasons for the extreme prudence of the ICRC in this field?

e. What is the sense of a mechanism like the one foreseen in Art. 5 (1) of A1?

f. Does Art. 14 (1) of the MoU incorporate all of the Geneva Conventions into the MoU? What units does Art. 14 (1) intend to target? Does that provision make any sense?

9. a. Which are the advantages and disadvantages of such agreements? Can they be read and applied without reference to the whole of IHL?

b. Was the MoU applicable in the conflict between local Serbs inhabiting parts of Croatia (in particular the Krajinas) and the government of Croatia? Even if Yugoslavia had no more control over the activities of those local Serbs?

c. Was A1 applicable in the armed conflict in the Bihac area between Bosnian Muslim autonomists following Mr. Abdic and Bosnian government forces?

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993

THE CASE

A. ICRC, Position Paper, The Establishment of Protected Zones for Endangered Civilians in Bosnia-Herzegovina

[**Source:** *ICRC position paper.* Distributed on 30 October 1992 to the governments concerned, the Co-chairmen of the London Conference on the former Yugoslavia and the Office of the UN High Commissioner for Refugees.]

POSITION PAPER

THE ESTABLISHMENT OF PROTECTED ZONES FOR ENDANGERED CIVILIANS IN BOSNIA-HERZEGOVINA

The main aspects of the "ethnic cleansing" process in Bosnia-Herzegovina are well known: intimidation, threats, harassment, brutality, expropriation, torture, large-scale hostage taking and internment of civilians, larger-scale deportations, summary executions, etc.

For months the situation has become more and more tragic and desperate for the civilians belonging either to ethnic minorities or to the defeated sides, as in northern Bosnia-Herzegovina or more recently in the central part of the country (Jajce-Travnik-Prozor area), where the situation is deteriorating daily.

Today there are at least 100,000 Muslims living in the north of Bosnia-Herzgovina, who are terrorized and whose only wish is to be transferred to a safe haven. If the international community wants to assist and protect these people, the "safe haven" concept must be transformed into reality.

As no third country seems to be ready, even on a provisional basis, to grant asylum to one hundred thousand Bosnian refugees, an original concept must be devised to create protected zones in Bosnia-Herzegovina which are equal to the particular requirements and the sheer scale of the problem.

In view of the extremely alarming situation currently prevailing in the country, the ICRC recommends the international community to set up protected zones in Bosnia-Herzegovina. As a matter of priority, a protected zone should be set up in northern Bosnia-Herzegovina to shelter the endangered civilians. The creation of other such zones might also have to be considered in central Bosnia-Herzegovina in the near future.

The concept of a safety zone is included in international humanitarian law, which provides for various kinds of zones. However, the present situation calls for the creation of zones adapted to its specific requirements and, in particular, which need an international protection.

It is now up to the international community to diligently study the feasibility of protected zones which, as mentioned, could not in the present situation be left under the sole responsibility of the parties controlling the territory in which the zones are located. The setting up of protected zones for tens of thousands of civilians is far beyond the capacity of the ICRC alone.

Conditions to be met

- The protected zone(s) must meet appropriate hygiene standards.
- The protected zone(s) must be in an area where the necessary protection may be assumed.
- The international responsibility for such zone(s) must be clearly established.
- The parties concerned must give their agreement to the concept and to the location of the protected zone(s).
- Duly mandated international troops, such as UNPROFOR, must assure the internal and the external security of this zone(s), as well as for part of the logistics.
- International organizations must help with the entire installation of the zone(s) - housing, shelter, heating, sanitation - and with the logistics. In addition, the organizations involved must take responsibility for the food deliveries, the cooking and the medical services.

The ICRC is willing and ready to offer its services to help with the establishment and running of such zones.

In accordance with its mandate, the ICRC will in particular be in charge of tracing activities in the zone(s) and, at least partly, of their relief and medical infrastructures.

Despite the obvious difficulties and the financial, material and logistical burden, not to mention the whole security aspect, that the establishment of such a zone(s) would entail for the international community, the ICRC is of the opinion that there is currently no alternative to this plan. Winter is approaching and it is likely that it will reach Bosnia-Herzegovina before any peace agreement is signed and implemented.

Forced and unprotected massive transfers of the population to central Bosnia-Herzegovina are totally unacceptable and cannot go on. Too many civilians, while forced to cross the frontlines on foot, have already been killed either in the crossfire of combatants, as there is no cease-fire, or deliberately by snipers.

In order to establish protected zones, UNPROFOR should be deployed as soon as possible in Bosnia-Herzegovina. The ICRC furthermore strongly hopes that the United Nations Security Council will soon consider extending the UNPROFOR mandate in Bosnia-Herzegovina, thus enabling its troops to guarantee the security of such zones.

B. Security Council, Resolution 819 (1993)

[**Source:** UN Doc. S/RES/819 (April 16, 1993).]

The Security Council,

[...] Reaffirming the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina,

Reaffirming its call on the parties and others concerned to observe immediately the cease-fire throughout the Republic of Bosnia and Herzegovina,

Reaffirming its condemnation of all violations of international humanitarian law, including, in particular, the practice of "ethnic cleansing",

Concerned by the pattern of hostilities by Bosnian Serb paramilitary units against towns and villages in eastern Bosnia [...]

Deeply alarmed at the information provided by the Secretary-General to the Security Council on April 16, 1993 on the rapid deterioration of the situation in Srebrenica and its surrounding areas, as a result of the continued deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary units,

Strongly condemning the deliberate interdiction by Bosnian Serb paramilitary units of humanitarian assistance convoys,

Also strongly condemning the actions taken by Bosnian Serb paramilitary units against UNPROFOR, in particular, their refusal to guarantee the safety and freedom of movement of UNPROFOR personnel,

Aware that a tragic humanitarian emergency has already developed in Srebrenica and its surrounding areas as a direct consequence of the brutal actions of Bosnian Serb paramilitary units, forcing the large-scale displacement of civilians, in particular women, children and the elderly,

Recalling the provisions of resolution 815 (1993) on the mandate of UNPROFOR and in that context acting under Chapter VII of the Charter of the United Nations,

[The only paragraph in resolution 815 (1993) pertinent to our concern reads as follows: "The Security Council [...] determined to ensure the security of UNPROFOR and its freedom of movement for all its missions, and to these ends acting under Chapter VII of the Charter of the United Nations [...]. "Later, Security Council resolution 836 (1993) of June 4, 1993 however authorized UNPROFOR "acting in self-defence, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties [....]."]

1. Demands that all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act;

2. Demands also to that effect the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica;

3. Demands that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia and Herzegovina;

4. Requests the Secretary-General, with a view to monitoring the humanitarian situation in the safe area, to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings; demands that all parties and others concerned cooperate fully and promptly with UNPROFOR towards that end; and requests the Secretary-General to report urgently thereon to the Security Council;

5. Reaffirms that any taking or acquisition of territory by threat or use of force, including through the practice of "ethnic cleansing", is unlawful and unacceptable;

6. Condemns and rejects the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of "ethnic cleansing";

7. Reaffirms its condemnation of all violations of international humanitarian law, in particular the practice of "ethnic cleansing" and reaffirms that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts;

8. Demands the unimpeded delivery of humanitarian assistance to all parts of the Republic of Bosnia and Herzegovina, in particular to the civilian population of Srebrenica and its surrounding areas and recalls that such impediments to the delivery of humanitarian assistance constitute a serious violation of international humanitarian law;

9. Urges the Secretary-General and the United Nations High Commissioner for Refugees to use all the resources at their disposal within the scope of the relevant resolutions of the Council to reinforce the existing humanitarian operations in the Republic of Bosnia and Herzegovina in particular Srebrenica and its surroundings;

10. Further demands that all parties guarantee the safety and full freedom of movement of UNPROFOR and of all other United Nations personnel as well as members of humanitarian organizations;

11. Further requests the Secretary-General, in consultation with UNHCR and UNPROFOR, to arrange for the safe transfer of the wounded and ill civilians from Srebrenica and its surrounding areas and to urgently report thereon to the Council;

12. Decides to send, as soon as possible, a mission of members of the Security Council to the Republic of Bosnia and Herzegovina to ascertain the situation and report thereon to the Security Council; [...]

C. Security Council Resolution 824 (1993)

[**Source:** UN Doc. S/RES/824 (May 6, 1993).]

The Security Council,

[...]

Having considered the report of the Mission of the Security Council to the Republic of Bosnia and Herzegovina (S/25700) authorized by resolution 819 (1993), and in particular, its recommendations that the concept of safe areas be extended to other towns in need of safety,

Reaffirming again its condemnation of all violations of international humanitarian law, in particular, ethnic cleansing and all practices conducive thereto, as well as the denial or the obstruction of access of civilians to humanitarian aid and services such as medical assistance and basic utilities, [...]

Taking also into consideration the formal request submitted by the Republic of Bosnia and Herzegovina (S/25718),

Deeply concerned at the continuing armed hostilities by Bosnian Serb paramilitary units against several towns in the Republic of Bosnia and Herzegovina and determined to ensure peace and stability throughout the country, most immediately in the towns of Sarajevo, Tuzla, Zepa, Gorazde, Bihac, as well as Srebrenica,

Convinced that the threatened towns and their surroundings should be treated as safe areas, free from armed attacks and from any other hostile acts which endanger the well-being and the safety of their inhabitants,

Aware in this context of the unique character of the city of Sarajevo, as a multicultural, multi-ethnic and pluri-religious centre which exemplifies the viability of coexistence and interrelations between all the communities of the Republic of Bosnia and Herzegovina, and of the need to preserve it and avoid its further destruction, [...]

Convinced that treating the towns referred to above as safe areas will contribute to the early implementation of the peace plan, [...]

Recalling the provisions of resolutions 815 (1993) on the mandate of UNPROFOR and in that context acting under Chapter VII of the Charter, [...]

3. Declares that the capital city of the Republic of Bosnia and Herzegovina, Sarajevo, and other such threatened areas, in particular the towns of Tuzla,

Zepa, Gorazde, Bihac, as well as Srebrenica, and their surroundings should be treated as safe areas by all the parties concerned and should be free from armed attacks and from any other hostile act;

4. Further declares that in these safe areas the following should be observed:
   (a) The immediate cessation of armed attacks or any hostile act against these safe areas, and the withdrawal of all Bosnian Serb military or paramilitary units from these towns to a distance wherefrom they cease to constitute a menace to their security and that of their inhabitants to be monitored by United Nations military observers [Later Security Council Resolution 836, para. 5 is even more explicit: *"5. Decides to extend (...) the mandate of UNPROFOR in order to enable it (...) to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina..."*];
   (b) Full respect by all parties of the rights of the United Nations Protection Force (UNPROFOR) and the international humanitarian agencies to free and unimpeded access to all safe-areas in the Republic of Bosnia and Herzegovina and full respect for the safety of the personnel engaged in these operations;

5. Demands to that end that all parties and others concerned cooperate fully with UNPROFOR and take any necessary measures to respect these safe areas;

6. Requests the Secretary-General to take appropriate measures with a view to monitoring the humanitarian situation in the safe areas and to that end, authorizes the strengthening of UNPROFOR by an additional 50 United Nations military observers [...];

7. Declares its readiness, in the event of the failure by any party to comply with the present resolution, to consider immediately the adoption of any additional measures necessary with a view to its full implementation, including to ensure respect for the safety of the United Nations personnel; [...]

DISCUSSION

Please assume for the discussion of questions 1 to 5 that IHL of international armed conflicts is applicable, at least thanks to the Agreement of the parties of May 23, 1992 (*See* **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* B., Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992.] p. 1761.)

1. a. What humanitarian problems motivated the ICRC to suggest the establishment of protected zones and the UN Security Council to establish safe areas? How does IHL normally deal with those problems?

b. What are the special reasons and what are the particular dangers of establishing any kind of safety zones in a situation of "ethnic cleansing" like the one in Bosnia and Herzegovina?

2. a. Does the ICRC suggest the establishment of one of the types of protected zones foreseen by IHL? Does IHL foresee an international supervision of such a zone? Is international protection of such a zone foreseen by IHL? Is it compatible with IHL? Why does the ICRC suggest international military protection? (*Cf.* Art. 23 of Convention I, Arts. 14 and 15 as well as Annex I of Convention IV and Arts. 59 and 60 of Protocol I.)

b. Does the ICRC suggest that the protected zone be demilitarized (from Bosnian government forces)? Is this condition implied in the spirit of IHL on protected zones? Would such a condition have been realistic? Would a zone without such demilitarization have been realistic? (*Cf.* Art. 23 of Convention I, Arts. 14 and 15 as well as Annex I of Convention IV and Arts. 59 and 60 of Protocol I.)

c. Were the zones suggested by the ICRC open to occupation by the adverse party? Is such a requirement inherent in protected zones under IHL? Would such a requirement have been realistic? (*Cf.* Art. 23 of Convention I, Arts. 14 and 15 as well as Annex I of Convention IV and Arts. 59 and 60 of Protocol I.)

d. Does the ICRC proposal come under *ius ad bellum* or under *ius in bello*? Does it respect the Red Cross Principles of neutrality and impartiality? Does it not suggest the use of force against one side of the conflict? What is the legal basis for the ICRC proposal?

3. On which essential points do the safe areas established by the Security Council differ from the protected zones suggested by the ICRC?

4. a. Does the Security Council establish one of the types of protected zones foreseen by IHL? Does IHL foresee an international protection of such a zone? Is such international protection compatible with IHL? (*Cf.* Art. 23 of Convention I, Arts. 14 and 15 as well as Annex I of Convention IV and Arts. 59 and 60 of Protocol I.) What is the mandate of UNPROFOR in the safe areas? Does the Security Council give UNPROFOR the mandate to defend the safe areas? Are 50 additional military observers sufficient to monitor the situation in the safe areas? To protect the safe areas? To defend the safe areas?

b. Are the zones established by the Security Council to be demilitarized? May Bosnian government forces stay in the safe areas? May they, under the resolutions and IHL, launch attacks out of the safe areas against Bosnian Serb forces? (*Cf.* Art. 23 of Convention I, Arts. 14 and 15 as well as Annex I of Convention IV and Arts. 59 and 60 of Protocol I.)

c. Are the safe areas established by the Security Council open to occupation by the Bosnian Serb forces?

d. Do the safe areas established by the Security Council come under *ius ad bellum* or under *ius in bello*? Is it appropriate to charge peacekeeping forces with the mandate they get under the resolutions?

e. What impression do the Security Council resolutions give to the Bosnian Muslim inhabitants of the safe areas? To the government of Bosnia and Herzegovina? Are those impressions justified?

5. Which elements of Resolutions 819 and 824 recall or implement *ius in bello*? Which *ius ad bellum*? How do you qualify in particular operative para. 5 of Resolution 819?

6. *Please answer the following questions by applying alternatively the law of international and the law of non-international armed conflicts.*

   a. Are deliberate actions by the Bosnian Serbs to force the evacuation of the civilian population from (Bosnian government controlled) Srebenica violating IHL? (*Cf.* Art. 49 of Convention IV and Art. 17 of Protocol II.)

   b. Is the hindering of humanitarian assistance to the civilian population of Srebenica a violation of IHL? Under IHL, have UNPROFOR and the international humanitarian agencies free access to all safe areas? (*Cf.* Arts. 23, 30 and 59 of Convention IV, Arts. 70 and 81 of Protocol I and Art. 18 of Protocol II.)

   c. Have the Bosnian Serbs under IHL an obligation to permit the evacuation of wounded and ill civilians from Srebenica? (*Cf.* Art. 17 of Convention IV.)

Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities

THE CASE

A. General Framework Agreement for Peace in Bosnia and Herzegovina

[**Source:** Reproduced *in extenso* in *ILM*, vol. 35, 1996, p. 75.]

Concluded on November 21, 1995 in Dayton (United States) and signed in Paris on December 14, 1995 by the Presidents of the Republic of Bosnia and Herzegovina, the Federal Republic of Yugoslavia and the Republic of Croatia (This Agreement brought the hostilities on the territory of Bosnia and Herzegovina to an end.)

Annex 1A: Agreement on the Military Aspects of the Peace Settlement

Article IX: Prisoner Exchanges

1. The Parties shall release and transfer without delay all combatants and civilians held in relation to the conflict (hereinafter "prisoners"), in conformity with international humanitarian law and the provisions of this Article.

(a) The Parties shall be bound by and implement such plan for release and transfer of all prisoners as may be developed by the ICRC, after consultation with the Parties.

(b) The Parties shall cooperate fully with the ICRC and facilitate its work in implementing and monitoring the plan for release and transfer of prisoners.

(c) No later than thirty (30) days after the Transfer of Authority [which had to take place on December 19, 1995], the Parties shall release and transfer all prisoners held by them.

(d) In order to expedite this process, no later than twenty-one (21) days after this Annex enters into force, the Parties shall draw up comprehensive lists of prisoners and shall provide such lists to the ICRC, to the other Parties, and to the Joint Military Commission and the High Representative. These lists shall identify prisoners by nationality, name, rank (if any) and any internment or military serial number, to the extent applicable.

(e) The Parties shall ensure that the ICRC enjoys full and unimpeded access to all places where prisoners are kept and to all prisoners. The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (48) hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner.

(f) The Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred.

(g) Notwithstanding the above provisions, each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities.

2. In those cases where places of burial, whether individual or mass, are known as a matter of record, and graves are actually found to exist, each Party shall permit graves registration personnel of the other Parties to enter, within a mutually agreed period of time, for the limited purpose of proceeding to such graves, to recover and evacuate the bodies of deceased military and civilian personnel of that side, including deceased prisoners.

B. Tracing Missing Persons in Bosnia-Herzegovina

[**Source:** Girod C., "Bosnia-Herzegovina: Tracing Missing Persons", in *International Review of the Red Cross,* No. 312, 1996, pp. 387-391.]

Every war brings its share of missing persons, whether military or civilian. And every individual reported missing is then sought by a family anxiously awaiting news of their loved one. These families cannot be left in such a state of anguish.

For the truth, however painful it may be, is preferable to the torture of uncertainty and false hope. In Bosnia and Herzegovina civilians were especially affected by a conflict in which belligerents pursued a policy of ethnic cleansing by expelling minority groups from certain regions. Thousands of people who disappeared in combat or were thrown into prison, summarily executed or massacred, are still being sought by their families.

What is a missing person?

International humanitarian law contains several provisions stipulating that families have the right to know what has happened to their missing relatives and that the warring parties must use every means at their disposal to provide those families with information [...]. Taking these two cardinal principles in particular as a basis for action, the International Committee of the Red Cross (ICRC) has set up various mechanisms to assist families suffering the agony of uncertainty, even after the guns have fallen silent.

In any conflict the ICRC starts out by trying to assess the problem of persons reported missing. Families without news of their relatives are asked to fill out tracing requests describing the circumstances in which the individual sought was last seen. Each request is then turned over to the authorities with whom the person in question last had contacts. This working method means that the number of people gone missing does not correspond to the actual number of conflict victims - a gruesome count which the ICRC does not intend to perform. In Bosnia and Herzegovina, more than 10,000 families have so far submitted tracing requests to the ICRC or to the National Red Cross or Red Crescent Societies in their countries of asylum.

Agreements for Peace in Bosnia and Herzegovina [...]

Prior to the drafting of the General Framework Agreement for Peace in Bosnia and Herzegovina, which the parties negotiated in Dayton, Ohio, in autumn 1995, the United States consulted the main humanitarian organizations. With the ICRC it discussed the release of detainees and the tracing of missing persons. The first of these issues is dealt with in the Annex on Military Aspects of the Peace Settlement, and the second is covered in the Framework Agreement's provisions pertaining to civilians. Thus Article V, Annex 7, of the Agreement stipulates that: "The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for". The terms of this Article take up and confirm the core principles of international humanitarian law.

The Framework Agreement also confers on the ICRC the task of organizing, in consultation with the parties involved, and overseeing the release and transfer of all civilian and military prisoners held in connection with the conflict. The ICRC performed this task in cooperation with the Implementation Force (IFOR) entrusted with carrying out the military provisions of the Framework Agreement.

ICRC action

Despite resistance from the parties, over 1,000 prisoners were returned home. Throughout the operation, which lasted about two months, the ICRC firmly refused to link the release process with the problem of missing persons, just as it had refused to become involved in the reciprocity game the parties used to play during the conflict. The success of the operation was also ensured by the international community, which was convinced that the ICRC was taking the right approach and pressured the parties to cooperate. Since many detainees had been withheld from the ICRC and were therefore being sought by their families, it was important to empty the prisons before addressing the issue of missing persons.

On the basis of the General Framework Agreement for Peace in Bosnia and Herzegovina, the ICRC thus proposed that the former belligerents set up a Working Group on the Process for Tracing Persons Unaccounted for in Connection with the Conflict on the Territory of Bosnia and Herzegovina - a convoluted title reflecting the nature of the political negotiations that led to the establishment of this body. While the parties endorsed the proposal itself, they engaged in endless quibbling over the wording of the Rules of Procedure and of the Terms of Reference drafted by the ICRC. Nevertheless, the Working Group, which is chaired by the ICRC, has already met three times in the Sarajevo offices of the High Representative for Bosnia and Herzegovina [2] in the presence of the ambassadors of the Contact Group on Bosnia and Herzegovina [3], the representative of the presiding member of the European Union [4] and the representatives of Croatia and the Federal Republic of Yugoslavia. These meetings were also attended by IFOR and the United Nations Expert on Missing Persons in the Former Yugoslavia [5].

Despite numerous plenary and bilateral working sessions, it has not been possible to bring the parties to agree on matters of participation and representation (the question under discussion is whether or not the former belligerents are the same as the parties that signed the Framework Agreement) or formally to adopt the Rules of Procedure. However, these Rules have been tacitly agreed on in the plenary meetings, making it possible to begin practical work: more than 10,000 detailed cases of persons reported missing by their families have already been submitted to the parties, which must now provide replies.

In a remarkable departure from the procedure normally followed in such cases, the Working Group has adopted a rule whereby the information contained in the tracing requests, as well as the replies that the parties are called on to provide, are not only exchanged bilaterally between the families and the parties concerned through the intermediary of the ICRC, but are also communicated to all the members of the Working Group, that is, to all the former belligerents, and to the High Representative. Such a policy of openness is meant to prevent further politicization of the issue and the ICRC intends to pursue it, in particular by issuing a gazette that lists the names of all missing persons and by publishing these names on the Internet. This should prompt possible witnesses to approach the ICRC with confidential information concerning the fate of individuals who

have gone missing, which the organization could then pass on to the families concerned.

Indeed, after every war families seek news of missing relatives and the settlement of this question is always a highly political issue. One reason is that for a party to provide information is to admit that it knows something, which may give it the feeling that it is owning up to some crime. Another reason is that the anguish of families with missing relatives is such that they generally band together and pressure their authorities to obtain information from the opposite party, which may be tempted to use these families to destabilize the other side.

The issue of exhumations

As the tragic result of more than three years of conflict, Bosnia and Herzegovina is strewn with mass graves in which thousands of civilians were buried like animals. The graves in the region of Srebrenica are a horrifying example. Displaced families in Tuzla interviewed by the ICRC allege that more than 3,000 people were arrested by Bosnian Serb forces immediately after the fall of the enclave in mid-July 1995. Since the authorities in Pale have persistently refused to say what happened to these people, the ICRC has concluded that all of them were killed.

Families now wish to recover the bodies of their missing relatives in the wild hope of being able to identify them. Before this can be done, however, an *ante mortem* database [6] must be set up so as to have a pool of information with which forensic evidence can later be compared. Between the two operations, the bodies must be exhumed, knowing that most of the mass graves in Bosnia and Herzegovina are situated on the other side of ethnic boundaries, which prevents families and the relevant authorities from gaining access to them.

Families are also demanding that justice be done. That is the role of the International Criminal Tribunal for the Former Yugoslavia, set up by the United Nations Security Council while the fighting was still raging in Bosnia and Herzegovina. The Tribunal intends to exhume a number of bodies to establish the cause of death and gather evidence and proof of massacres. However, it is not the Tribunal's responsibility to identify the bodies or to arrange for their proper burial.

Between the families' need and right to know what has become of their missing relatives, and that justice must be done, lie thousands of bodies in the mass graves. While it would probably be unrealistic to imagine that all the bodies buried in Bosnia and Herzegovina could ever be exhumed and identified, [7] the moral issue of their proper burial must still be addressed. Without the cooperation of the former belligerents and of IFOR, however, all discussion remains purely theoretical. Only when people have peace in their hearts and when justice has been done will thoughts of revenge be forgotten and belief in peace and justice be restored in every individual and every community.

Notes: [...]

2. Former Swedish Prime Minister Carl Bildt's appointment to this post was confirmed by the United Nations Security Council shortly before the General

Framework Agreement for Peace in Bosnia and Herzegovina was signed in Paris on December 14, 1995. Just as IFOR, which is made up of NATO troops and Russian troops, is entrusted with implementing the military provisions of the Framework Agreement, so it is the task of the High Representative to implement the Agreement's provisions pertaining to civilians.

3. France, Germany, the Russian Federation, the United Kingdom and the United States.
4. Italy at the time of writing.
5. Manfred Nowak, who in 1994 was appointed by the UN Commission on Human Rights as the Expert in charge of the Special Process on Missing Persons in the Territory of the Former Yugoslavia.
6. A database containing all pertinent medical information that can be obtained from families with missing relatives.
7. According to the forensic experts of the American organization, *Physicians for Human Rights*, who exhumed bodies for the International Criminal Tribunal that was set up following the horrific massacres in Rwanda, the success rate for identifying remains exhumed from a grave containing several hundred bodies is no higher than 10 to 20 percent, providing a detailed *ante mortem* database is available.

DISCUSSION

1. a. Taking into account its title reading "prisoner exchanges," does Art. IX of Annex 1-A provide for a unilateral obligation to release prisoners? Is that obligation unilateral under IHL or may it be subject to reciprocity? May the Dayton Agreement deviate from IHL subjecting the obligation to reciprocity? (*Cf.* Arts. 6 and 118 of Convention III and Arts. 7 and 133 of Convention IV; *see* also **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* B., Bosnia and Herzegovina, Agreement No. 1 of 22 May 1992, at Art. 2.3 (2).] p. 1761.)

   b. Which provisions of Art. IX (1) go beyond the obligations provided for by IHL? (*Cf.* Arts. 118, 122, 123 and 126 of Convention III and Arts. 133, 134, 137, 138, 140 and 143 of Convention IV.)

   c. Is Art. IX (1) (g) compatible with the obligations provided for by IHL in the case of grave breaches? Has a Party to release a prisoner it suspects of a war crime but for whom the ICTY does not request arrest, detention, surrender, or access at the end of the "period of consultations": Under Art. IX (1)? Under IHL? May a Party release such a person under IHL? Was the further agreement of the parties, concluded in Rome, under which no person may be retained or arrested under war crimes charges, except with the permission of ICTY compatible with IHL? Can you imagine why the US pressed the Parties to conclude such an agreement? (*Cf.* Arts. 118, 119 (5) and 129-131 of Convention III and Arts. 133 and 146-148 of Convention IV.)

d. Why did the ICRC refuse to link the release of prisoners with the problem of missing persons? Is not a missing person for whom a testimony of arrest by the enemy exists or who was once visited by the ICRC a prisoner to be released under IHL?

2. Which elements of the ICRC action to trace missing persons in Bosnia and Herzegovina go beyond IHL? Under IHL, does a party of an international armed conflict have, at the end of the conflict, an obligation:
   - to search for persons reported missing by the adverse party?
   - to provide all information it has on the fate of such persons?
   - to identify mortal remains of persons it must presume to have belonged to the adverse party?
   - to provide the cause of death of a person whose mortal remains it has identified?
   - to inform unilaterally of the results of such identification?
   - to return identified mortal remains to the party to which the persons belonged?
   - to properly bury identified and non-identified mortal remains ?
   - to provide families of the adverse side access to graves of their relatives?

   (*Cf.* Arts. 15-17 of Convention I, Arts. 120, 122 and 123 of Convention III, Arts. 26 and 136-140 of Convention IV and Arts. 32-34 of Protocol I.)

3. a. Why does the ICRC only submit cases of missing persons submitted by their families? Does IHL support that decision? Does IHL also give a party the right to submit tracing requests? Has the ICRC an obligation to accept such requests? (*Cf.* Art. 32 of Protocol I, Art. 16 of Convention I, Arts. 122 (3), (4), and (6) and 123 of Convention III and Arts. 137 and 140 of Convention IV.)

   b. Which reasons, advantages, and risks exist regarding the solution to communicate all tracing requests and replies to all members of the ICRC chaired Working Group? Does that prevent politicization?

4. Does Art. IX (2) go beyond the obligations provided for by IHL? Does this provision provide for a unilateral obligation of each side to give the other side's grave registration personnel access? May a party use evidence for war crimes obtained by its grave registration personnel acting under Art. IX (2) in war crimes trials? (*Cf.* Art. 34 of Protocol I.)

Case No. 176, Bosnia and Herzegovina, Using Uniforms of Peacekeepers

THE CASE

[**Source:** Martin, H., *Financial Times*, May 31, 1995.]

UN Troops Put on Alert for Serb Infiltrators

Troops on the ground in Sarajevo are on heightened alert because of the threat of Serb infiltration into their camps.

In taking nearly 400 UN hostages, the Serbs have also managed to secure 21 armoured personnel carriers, six light tanks and three armoured cars.

Serbs, dressed in stolen French uniforms and flack jackets, took over a UN-controlled bridge in the heart of Sarajevo on Saturday; now the motto is: trust no one. All UN soldiers are on amber alert, donning flack jackets and helmets and blocking the main gates of their various bases with armoured personnel carriers.

In the leafy grounds of the UN headquarters, the Danish guards were taking extra security measures because of the Serb threat. Lt Tomas Malling, who is in charge of the guards, said: "Of course it's a worry to us and we're checking vehicles very carefully". [...]

At the French main base, a young guard on the gate claims that "everybody is quite relaxed" as he nervously searches your bag and scrutinises your face. One captain said: "We were sent here as peacekeepers. What has been done is scandalous but that doesn't mean we feel angry enough to become aggressive." [...]

Another said the UN should withdraw. "Then we should come back and take the Serbs out, because they are the enemy now." A colleague added: "If we are peacekeepers let's be peacekeepers. But if we are peacemakers, let's turn nasty."

DISCUSSION

1. a. Is IHL applicable to these events? Is the UN a Party to the Conventions and Protocols? Can the UN conceivably be a Party to an international armed conflict in the sense of Art. 2 common to the Conventions? Can the UN forces be considered for the purposes of the applicability of IHL as armed forces of the contributing States (which are Parties to the Conventions), and can any hostilities be considered an armed conflict between those States and the party responsible for the opposing forces? (*See, e.g.,* **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696.)

   b. If IHL is applicable to these events, is it the law of international or the law of non-international armed conflicts?

   c. Would IHL prohibit UN soldiers from disguising themselves in Serb uniforms? At least for the purpose of maintaining peace?

2. a. Under IHL may a belligerent never wear the uniform of the enemy? (*Cf.* Art. 39 of Protocol I; *see* also **Case No. 76**, US Military Court in Germany, Trial of Skorzeny and Others. p. 1027.)

   b. Is wearing the uniforms of peacekeepers by members of Bosnian Serb armed forces prohibited under IHL? Even if peacekeepers are not bound by IHL? Even if there is no armed conflict between the peacekeepers and the Bosnian Serb forces? (*Cf.* Arts. 37 and 38 of Protocol I.)

   c. Did the wearing of French uniforms and flack jackets by the Serbs when taking over a UN-controlled bridge violate IHL? Is it a war crime? (*Cf.* Arts. 37, 38 (2) and 39 of Protocol I.)

   d. Do the answers differ if UN soldiers are no longer considered by a belligerent party as peacekeepers but enemies? (*Cf.* Art. 39 of Protocol I.)

2. Positions of Third Countries

Case No. 177, Germany, Government Reply on Rapes in Bosnia

THE CASE

[**Source:** German Bundestag, Document 12/4048, 12th legislative period, December 29, 1992; original in German, unofficial translation.]

REPLY by the Federal Government to the written question submitted by Bundestag members [...] - Document 12/3838 - Systematic rape as a means of Serb warfare, inter alia in Bosnia

[*The reply was issued on behalf of the Federal Government in a letter signed by Ursula Seiler-Albring, Minister of State at the Federal Ministry of Foreign Affairs, and dated 15 December 1992. The document also sets out - in small type - the text of the questions.*]

1. What knowledge does the Federal Government have of the systematic rape of predominantly Muslim girls and women by Serb soldiers and irregulars, principally in Bosnia?
   Has the Federal Government made representations to the Serbian government in Belgrade in connection with such rape?

According to the information at the disposal of the Federal Government, based on concurrent first-hand accounts, it must be assumed that mass rape is being committed against predominantly Muslim girls and women. Precise figures relating to the actual extent of this serious violation of fundamental human rights are not available. There are growing indications that this is a case of systematic rape aimed at destroying the identity of another ethnic group. The Federal Government has therefore made vigorous and repeated representations to the "Yugoslav" government, both bilaterally and within the framework of the European Community, in connection with these rapes and other grave human rights violations.

2. In what way does the Federal Government intend to play its part in ensuring the investigation, prosecution and worldwide proscription of such rape?

Rape is already a criminal offence under the international law of war, which also applies to the region of the former Yugoslavia. The Federal Government is currently looking into possible ways in which those fundamental rules for the safeguard of human dignity can be widely implemented.

The Federal Government was the first to take practical measures to assist and counsel the girls and women concerned. The discussions held with the victims during that process are also serving to advance the investigation into the facts of each individual case. In addition, the Federal Government has asked UN Special Rapporteur Mazowiecki to devote particular attention to the issue of rape. Further investigation work is being carried out by self-help groups on the ground.

3. In what way will the Federal Government push for rape to be incorporated as a war crime in the international conventions relating to the protection of the [civilian] population in war zones and civil war zones?

The rape of women and girls is already prohibited in armed conflict and to be deemed a war crime under the existing provisions of international humanitarian law. In that respect reference must be made in particular to the provisions of Article 27, para. 2, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 and of Article 4, para. 2 (e), of the Protocol additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts. Should the reports of systematic mass rape of predominantly Muslim women and girls be confirmed, this would, moreover, meet the statutory definition for systematic harm to an ethnical group within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948. [...]

DISCUSSION

1. Is rape by a belligerent and its agents prohibited in international armed conflicts? In non-international armed conflicts? (*Cf.* Arts. 3 and 50/51/130/147 respectively of the four Conventions, Art. 27 (2) of Convention IV, Art. 76 (1) of Protocol I and Art. 4 (2) (e) of Protocol II.)
2. Are all deliberately committed violations of IHL war crimes? (*Cf.* Arts. 50/51/130/147 respectively of the four Conventions and Art. 85 of Protocol I.)
3. Is rape by a belligerent and its agents committed in an international or a non-international armed conflict a grave breach of IHL? Otherwise a war crime? (*Cf.* Arts. 50/51/130/147 respectively of the four Conventions and Art. 85 of Protocol I.)

Case No. 178, UK, Misuse of the Emblem

THE CASE

[**Source:** *Shropshire Star*, February 8, 1996, p. 4.]

Mercy Trucker Getting Cross ...

Shropshire mercy trucker Mike Taylor has been told he faces legal action unless he removes the British Red Cross emblem from his lorry.

Charity bosses say the Newport aid worker is committing a crime by using the red cross emblem without authorisation.

But Mr Taylor, who delivers food and emergency supplies to the war torn Bosnia, has pledged to keep the symbol on his trucks.

"I'm very annoyed about the whole thing but I refuse to take the emblems off. It's all very petty."

He said the International Red Cross had given him permission to use the symbol. In the past three years he has taken 24 loads over to the former Yugoslavia.

"The symbol is internationally recognised and I use it for protection when I cross the front line," he said.

"The International Red Cross in Geneva let me use the emblem but this problem is with the British branch," he said.

In a letter received by Mr Taylor, the head of international law at the British Red Cross states: "Unless I hear from you by February 13, that you are making arrangements to have the red cross signs removed as a matter of urgency, I shall have no alternative but to take further action."

Mr Taylor added: "I can't believe the Red Cross, is making such a fuss about this."

A spokesperson for the British Red Cross, Colin McCallum, said Mr Taylor was breaking UK law.

He added only people working for the Red Cross could use the symbol, otherwise it would be impossible to control who was using it.

DISCUSSION

1. Who may use the red cross emblem? For which purposes? (*Cf.* Art. 23 (f) of the Hague Regulations, Arts. 38 and 53 of Convention I, Arts. 41-43 of Convention II, Arts. 8 (l) and 18 of Protocol I, Arts. 4-5 of Annex I of Protocol I and Art. 12 of Protocol II.)

2. a. For what purpose did the trucker wish to use the emblem? Is the emblem ever to be used for protection in such circumstances ? When is it to be used as a protective device? When as an indicative device? Is it true that only people working for the Red Cross can use the emblem? In general? Specifically for transport of food aid in conflict areas? (*Cf.* Art. 44 of Convention I and Art. 18 of Protocol I.)

   b. Does the trucker's use of the emblem thus constitute misuse? If so, is this misuse of the emblem a war crime? Would any misuse of the emblem constitute a war crime? If so, when? (*Cf.* Art. 34 of the Hague Regulations, Art. 53 of Convention I and Arts. 37 (1) (d), 38 and 85 (3) (f) of Protocol I.)

3. a. Was the trucker here authorized to use the emblem? Even assuming the ICRC granted him permission? Who authorizes protective use of the emblem? International Red Cross and Red Crescent organizations? The National Societies? The States Parties? Who has the responsibility to punish misuse and abuse of the emblem? (*Cf.* Art. 54 of Convention I, Art. 45 of Convention II and Art. 18 of Protocol I.)

   b. Which obligations have States Parties to the Conventions and Additional Protocols regarding the emblem? Must each State Party adopt implementing

legislation, such as the United Kingdom's Geneva Conventions Act of 1957? Which issues should this legislation encompass? (*Cf.* Art. 54 of Convention I, Art. 45 of Convention II and Art. 18 of Protocol I.)

4. a. Is not, as the trucker said, the British Red Cross making a fuss about this? Should the Red Cross still push for his punishment under the UK's Geneva Conventions Act of 1957 even when his safety is dependent on using the emblem? After all, is his mission not for a humanitarian purpose? Is this a sufficient justification?

   b. What concerns the British Red Cross about the trucker's use of the emblem? Is the Red Cross only concerned because he did not receive prior authorization? Because he is in competition with the Red Cross in the "humanitarian business" and uses the "trademark" of the Red Cross? What dangers to the emblem's authority arise with such misuse of the emblem? How does this impact the emblem's essential neutrality? Its impartiality? Does such use undermine the protection it provides?

   c. May or must a National Red Cross Society strive against abuses of the emblem? Because it is a violation of IHL or because the same emblem is also used by the National Society? May or must a National Red Cross Society more generally strive against specific violations of IHL? Including seeing to it that violators are brought to court?

3. Reactions by the International Community

Case No. 179, UN, Statute of the ICTY

THE CASE

A. Security Council Resolution 827 (1993)

[**Source:** UN Doc. S/RES/827 (May 25, 1993).]

The Security Council,

[...]

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed, [...]

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, [...]

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;

2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between January 1, 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute; [...]

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law; [...]

B. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)

[**Source:** UN Doc. S/25704 (May 3, 1993); footnotes omitted.]

[...]

A. Competence *ratione materiae* (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945. [...]

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.

38. Each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.

39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law. [...]

Violations of the laws or customs of war

41. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.

42. The Nüremberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nüremberg Tribunal also recognized that war crimes defined in article 6(b) of the Nüremberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.

43. The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the

Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare.

44. These rules of customary law, as interpreted and applied by the Nüremberg Tribunal, provide the basis for the corresponding article of the statute [Article 3] [...]

C. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, May 25, 1993

[**Source:** Originally published as Annex to the *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, (S/25704), approved by the Security Council by Resolution 827 (1993), May 25, 1993.]

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2: Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3: Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Article 4: Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
   (a) killing members of the group;
   (b) causing serious bodily or mental harm to members of the group;
   (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   (d) imposing measures intended to prevent births within the group;
   (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
   (a) genocide;
   (b) conspiracy to commit genocide;
   (c) direct and public incitement to commit genocide;
   (d) attempt to commit genocide;
   (e) complicity in genocide.

Article 5: Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

Article 6: Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7: Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. 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.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8: Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9: Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10: *Non-bis-in-idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
   (a) the act for which he or she was tried was characterized as an ordinary crime; or
   (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11: Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) The Chambers, comprising two [three since a revision by UN Security Council Resolution 1166 (1998).] Trial Chambers and an Appeals Chamber;

(b) The Prosecutor, and

(c) A Registry, servicing both the Chambers and the Prosecutor.

Article 12: Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* judges appointed in accordance with article 13 ter, paragraph 2, of the Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members. [...]

Article 13: Qualifications of judges [...]

Article 13 bis: Election of permanent judges [...]

Article 13 ter: Election and appointment of *ad litem* judges [...]

Article 13 quater: Status of *ad litem* judges [...]

Article 14: Officers and members of the Chambers [...]

Article 15: Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. [...]

Article 17: The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required. [...]

Article 18: Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.
4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19: Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20: Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal. [...]

Article 21: Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
   (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (c) to be tried without undue delay;
   (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
   (g) not to be compelled to testify against himself or to confess guilt.

Article 22: Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25: Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
   (a) an error on a question of law invalidating the decision; or
   (b) an error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers. [...]

Article 27: Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28: Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29: Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
   (a) the identification and location of persons;
   (b) the taking of testimony and the production of evidence;
   (c) the service of documents;
   (d) the arrest or detention of persons;
   (e) the surrender or the transfer of the accused to the International Tribunal. [...]

D. Security Council Resolution 1534 (2004)

[**Source:** Resolution 1534 (2004) Adopted by the Security Council at its 4935th meeting, on 26 March 2004; available on http//www.un.org]

The Security Council,

[...]

Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21) endorsing the ICTY's completion strategy and its resolution 1503 (2003) of 28 August 2003,

Recalling that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and

to complete all work in 2010 (the Completion Strategies), and requested the Presidents and Prosecutors of the ICTY and ICTR, in their annual reports to the Council, to explain their plans to implement the Completion Strategies, [...]

Acting under Chapter VII of the Charter of the United Nations, [...]

4. *Calls* on the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;
5. *Calls* on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003); [...]
9. *Recalls* that the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular;
10. *Welcomes* in particular the efforts of the Office of the High Representative, ICTY, and the donor community to create a war crimes chamber in Sarajevo; encourages all parties to continue efforts to establish the chamber expeditiously; and encourages the donor community to provide sufficient financial support to ensure the success of domestic prosecutions in Bosnia and Herzegovina and in the region; [...]

DISCUSSION

1. a. Were the different armed conflicts in the Former Yugoslavia, even those of a purely internal character, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the establishment of a tribunal to prosecute violations of IHL a proper measure to stop that threat? Can we today say whether it contributed to the restoration of peace in the Former Yugoslavia? Does that (the end result) actually matter? Does the prosecution of (former) leaders not make peace and reconciliation more difficult?

   b. Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Could the same be said of gross violations of human rights outside armed conflicts?

2. a. May the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a "court established by law"? Is the creation of a tribunal competent to try acts committed before it was established itself violating the prohibition (in IHL and International Human Rights Law) of retroactive penal legislation?

b. How else than by a resolution of the Security Council could the ICTY have been established? What are the advantages and disadvantages of those other methods?

3. a. Does IHL provide for the possibility of prosecuting war criminals before an international tribunal? Is the prosecution of war criminals before an international tribunal and its concurrent jurisdiction as described in Article 9 compatible with the obligation of States under IHL to search for and prosecute war criminals? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

b. Under IHL and the Statute, does the ICTY relieve States of their obligation to search for and prosecute war criminals?

4. a. Are Arts. 2-5 and 7 penal legislation or simple rules of competence of the ICTY?

b. Is Art. 3 retroactive penal legislation, at least when applied to non-international armed conflicts?

5. Is the UN Secretary General right in stating that the principle *nullum crimen sine lege* requires that the ICTY applies rules of IHL which are beyond any doubt part of customary law? (*Cf.* para. 34 of Doc. B) Would an application of rules (such as those of Protocol I) accepted by all parties to a conflict violate that principle? Is a prosecution for a violation of a rule of customary law more or less problematic than a prosecution for a violation of clearly applicable treaty law from the point of view of the principle *nullum crimen sine lege*? Do you see here a divergence between civil law and common law traditions? Would an application of treaty law make the transfer of accused persons from third States non-parties to the respective treaty impossible?

6. a. Does Art. 2 cover all grave breaches of the Conventions? (*Cf.* Arts. 50/51/130/147 respectively of the four Conventions.)

b. Can you imagine why Art. 2 does not refer to grave breaches of Protocol I? Is there any possible justification of this omission, taking into account that the former Yugoslavia and all its successor States are Parties to Protocol I and that the parties to the conflicts have undertaken to respect large parts of it regardless of the qualification of the conflict? (*See* **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. p. 1761, and **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction, para. 143.] p. 1804.) How could the ICTY nevertheless try grave breaches of Protocol I?

7. a. Which elements in Art. 3 go beyond the grave breaches mentioned in Protocol I? Are any grave breaches of Protocol I not covered by Art. 3? (*Cf.* Arts. 11 (4) and 85 of Protocol I.)

b. Is the attack of an undefended building a grave breach of contemporary IHL? Is it always prohibited by IHL? Even if the building is uninhabited? Can an undefended building become a military objective? How would you formulate Art. 3 (c) under contemporary IHL? (*Cf.* Art. 25 of the Hague Regulations, Arts. 53 and 147 of Convention IV and Arts. 52, 59 and 85 (3) (d) of Protocol I.)

c. Is plunder of private property a grave breach of IHL? How would you formulate Art. 3 (e) under contemporary IHL? (*Cf.* Arts. 33 and 147 of Convention IV.)

8. a. Can Art. 7 (1) be inferred from the pertinent provisions of the Conventions and Protocol I? Does it correspond to a rule of customary IHL? Could it conceivably be a rule newly introduced by the ICTY Statute? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions and Arts. 85 (1) and 86 (2) of Protocol I.)

b. Do you see any substantive difference between Art. 7 (3) of the Statute and Art. 86 (2) of Protocol I?

9. Is Article 10 compatible with IHL?

10. a. Which rights granted to the accused under Art. 21 go beyond those granted by IHL to suspected war criminals? Which guarantees of IHL go further? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions, Arts. 105 - 107 of Convention III and Art. 75 of Protocol I.)

b. Has the ICRC a right to visit an accused? Has it to be notified of sentences as a *de facto* substitute of the Protecting Power? (*Cf.* Arts. 10 (3) of Conventions I and II, Arts. 10 (3), 107, and 126 of Convention III, and Arts. 11 (3), 30, 74 and 143 of Convention IV and Art. 5 (4) of Protocol I.)

11. Do those detained under the authority of the ICTY (pending trial or having been sentenced) lose IHL status as protected civilians or prisoners of war if they had such status before an arrest in the Former Yugoslavia? Are any provisions of the Statute incompatible with such status and treatment prescribed by IHL for its holders? Is it lawful to deport a civilian arrested in the Former Yugoslavia to The Hague to stand trial? (*Cf.* Art. 85 of Convention III, Art. 49 of Convention IV and Art. 44 (2) of Protocol I.)

4. Decisions by the ICTY

Case No. 180, ICTY, The Prosecutor v. Tadic

THE CASE

A. Jurisdiction

[**Source:** ICTY, The Prosecutor v. Dusko Tadic, IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995; available on http://www.un.org]

PROSECUTOR
v.
DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber [...] is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:
   a. illegal foundation of the International Tribunal;
   b. wrongful primacy of the International Tribunal over national courts;
   c. lack of jurisdiction *ratione materiae*.

   The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

   > "THE TRIAL CHAMBER [...] HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal
   >
   > HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." [...].

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL [...]

A. Meaning Of Jurisdiction [...]

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). [...]

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal [...]

1. Does The International Tribunal Have Jurisdiction? [...]

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (*see* United Nations Charter, Arts. 7(2) 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal. [...]

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council. [...]

C. The Issue Of Constitutionality [...]

27. The Trial Chamber summarized the claims of the Appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation

of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of *ad hoc* tribunals to try particular types of offences [...] " [...]

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." [...]

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law). [...]

30. [...] [A]n armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" [...]

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts. [...]

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII [...]

C. Was The Establishment Of The International Tribunal An Appropriate Measure?

39. [...] Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends [...]. [...]

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. [...] The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "[...]

[...]. Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, [...] and in Article 8(1) of the American Convention on Human Rights, [...].

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. [...]

This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. [...] The case law applying the words "established by law" in the European Convention on Human Rights [...] bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. [...]

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects. [...]

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter. [...]

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law.[...] This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. [...] [A]t the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law [...] The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness. [...]

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law.

The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost *verbatim* in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. [...]

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT DOMESTIC COURTS [...]

B. Sovereignty Of States [...]

58. [...] It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. [...]

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)). [...]

IV. LACK OF SUBJECT-MATTER JURISDICTION [...]

A. Preliminary Issue: The Existence Of An Armed Conflict [...]

67. International humanitarian law governs the conduct of both internal and international armed conflicts. [...]. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. [...]

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those

relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." [...]

Article 3(b) of Protocol I [...] contains similar language. [...] In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. [...] Article 2, paragraph 1, [protocole II] provides:

> "[t]his Protocol shall be applied [...] to all persons affected by an armed conflict as defined in Article 1."[...]

The same provision specifies in paragraph 2 that:

> "[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."[...]

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The *nexus* required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts.[...] Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed [...] international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. [...]

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. [...] Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict.[...] In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the

Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). [...]

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (*See* Memorandum of Understanding of November 27, 1991.) [*Cf.* A., Yugoslavia/Croatia, Memorandum of Understanding. [*See* **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. p. 1761.]] Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives [...] committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter Agreement No. 1).) [*See* **Case No. 173** [*Cf.* B., Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992.] p. 1761.] Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Con-ventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were internal, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. [...] If the conflicts were,

in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal. [...]

74. [...] The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter Report of the Secretary-General).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (Id. at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the

[Security] Council share our view regarding the following clarifications related to the Statute."(id.)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. [...] As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the

underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. [...]

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

[...] By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (*See, e.g.,* [*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, U.S. Amicus Curiae Brief), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. [...]

80. (...) The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." [...] [T]he reference to the Geneva Conventions contained in [the] Statute of the Tribunal, [...] to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions. [...]

83. [...] [T]he Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual [...], the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina [...] [and] a recent judgement by a Danish court [...] on the basis of the "grave breaches" provisions of the Geneva Conventions, [...] without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict [...].

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts. [...]

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

[*See* **Case No. 179**, UN, Statute of the ICTY. p. 1791.]

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is in casu an internal armed conflict; [...]. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). [...] considered *qua* customary law [...]. [T]he Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" [...]. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities. [...] Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such

infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. [...]

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point see below, para. 143). [...]

91. [...]. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. [...]

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, [*See* **Case No. 130**, ICJ, Nicaragua v. US. p. 1365.] Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [...] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter Nicaragua Case). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

> "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts

a. General

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent [...]. Secondly, internal armed conflicts have become more and more cruel and protracted [...]. Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof [...]. Fourthly, the impetuous development and propagation in the international community of human rights doctrines,

particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach [...]. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (*Nicaragua* Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. [...] Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined [...]. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity

and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

"[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:

(1) The intentional bombing of civilian populations is illegal;
(2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
(3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (League of Nations, O.J. Spec. Supp. 183, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. [...]

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (*Nicaragua* Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. [...] In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law. [...]

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the

formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict.

The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (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." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was

"declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (*See* 67 *American Journal of International Law* (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970) [...] The resolution stated the following:

"Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [... the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
4. Civilian populations as such should not be the object of military operations.
5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.
7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The *Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations*, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict

should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR.; 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

> "In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council [...].

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population" [...] and resolution 814. As for Georgia, see Resolution 993 [...].

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. [...]

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a corpus of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. [...] [F]or example, mention can be made of the stand taken in 1987

by El Salvador (a State party to Protocol II). [...] [T]he Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war [...]. Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place" (See Informe de la Fuerza Armata de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987), (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, American University Journal of International Law and Policy (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." [...]

119. [...] We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards means and methods of warfare. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." [...].

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.) [...]

121. A firm position to the same effect was taken by the British [...] [and] [...] German authorities. [...].

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, [...] strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. [...]

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. [...] It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons [...].

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly

emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts. [...]

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. [...]

(iv) Individual Criminal Responsibility In Internal Armed Conflict

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts [...]. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg [...] considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals [...]. Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." [...]

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. [...]

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. [...]

131 Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992,

DSK AV2073200065, at para. 1209) (unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3 [...]. Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States [...] may also lend themselves to the interpretation that "war crimes" [...] include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 [...].

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. [...] Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (infractions graves) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" [...]. [*See* **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937.]

133. Of great relevance to the formation of opinio juris to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed

conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (see para. 132) such violations were punishable under the *Criminal Code* of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that: [*See* **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* B. p.1761.]] [...].

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, [...] implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict. [...]

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into

by the conflicting parties. [...] It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of nullum crimen sine lege in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).). [...]

B. Trial Chamber, Merits

[**Source:** ICTY, The Prosecutor v. Dusko Tadic, IT-94-1, Trial Chamber II, Judgement, 7 May 1997; available on http://www.un.org]

[...]

I. INTRODUCTION [...]

C. The Indictment [...]

45. Paragraph 6 relates to the beating of numerous prisoners and an incident of sexual mutilation at the Omarska camp [...]. A number of prisoners were severely beaten, [...] [one of them] was sexually mutilated. It is charged that all but [...] died as a result of these assaults. The accused is alleged to have been an active participant and is charged with wilful killing, a grave breach recognized by Article 2 of the Statute; murder, as a violation of the laws or customs of war recognized by Article 3 of the Statute; murder, as a crime against humanity recognized by Article 5(a) of the Statute; torture or inhuman treatment, a grave breach under Article 2(b) of the Statute; wilfully causing grave suffering or serious injury to body and health, a grave breach under Article 2(c) of the Statute; cruel treatment, a violation of the laws or customs of war under Article 3 of the Statute; and inhumane acts, a crime against humanity under Article 5(i) of the Statute.

46. Paragraph 7 deals with an incident which is said to have occurred in the "white house", a small building at the Omarska camp, where on or about 10 July 1992 a group of Serbs beat Sevik Sivac, threw him onto the floor of a room and left him there, where he died. It is alleged that the accused participated in this beating [...].

47. Paragraph 8 deals with an incident outside the white house in late July 1992 when a group of Serbs from outside the camp, which is said to have included the accused, kicked and beat [...] and others so severely that only [...] survived. [...]

48. The white house was also the setting for the incidents in paragraph 9 of the Indictment. A number of prisoners were forced to drink water from puddles on the ground. As they did so, a group of Serbs from outside the camp are said to have jumped on their backs and beaten them until they were unable to move. The victims were then loaded into a wheelbarrow and removed. The Prosecution alleges that not only did the accused participate in this incident but that he discharged the contents of a fire extinguisher into the mouth of one of the victims as he was being wheeled away. [...]

49. Paragraph 10 of the Indictment relates to another beating in the white house, said to have taken place on or about 8 July 1992, when, after a number of prisoners had been called out individually from rooms in the white house and beaten. [...] was called out and beaten and kicked until he was unconscious. [...]

50. Paragraph 11 relates to the attack on Kozarac. It charges that, about 27 May 1992, Serb forces seized the majority of Bosnian Muslim and Bosnian Croat people of the Kozarac area. As they were marched in columns to assembly points for transfer to camps the accused is said to have ordered [...] from the column and to have shot and killed them. [...]

51. The final paragraph of the Indictment, paragraph 12, relates to an incident in the villages of Jaskici and Sivci, on or about 14 June 1992. Armed Serbs entered the area and went from house to house, calling out residents and separating the men from the women and children, during which [...] were killed in front of their homes; [...] were beaten and then taken away. The Prosecution alleges that the accused was one of those responsible for these killings and beatings. [...]

III. FACTUAL FINDINGS [...]

239. A witness spoke of subsequently hearing the sound of the engine of the truck that was used at the camp to bring in food and take away bodies and of then hearing a shot in the distance and stated that: "I believe one of them was alive, and therefore was finished up." Even assuming the witness to be correct in his assumption, there is neither evidence of who fired the shot nor which one, if any, of the four was shot. It is clear that none of the four prisoners returned to their room in the hangar and it may be that these prisoners are in fact dead but there is no conclusive evidence of that, although there was poignant testimony from [...] the father of [...] that: "Never again, from that day, never again", has he seen his son. Certainly it seemed to be the general practice at the camp to return to their rooms prisoners who had been beaten and survived and to remove from the camp the bodies of

those who were dead or gave that appearance; none of the four prisoners have been seen again.

240. The Trial Chamber is cognisant of the fact that during the conflict there were widespread beatings and killings and indifferent, careless and even callous treatment of the dead. Dead prisoners were buried in makeshift graves and heaps of bodies were not infrequently to be seen in the grounds of the camps. Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death. This the Prosecution has failed to do. Although the Defence has not raised this particular inadequacy of proof, it is incumbent upon the Trial Chamber to do so. When there is more than one conclusion reasonably open on the evidence, it is not for this Trial Chamber to draw the conclusion least favourable to the accused, which is what the Trial Chamber would be required to do in finding that any of the four prisoners died as a result of their injuries or, indeed, that they are in fact dead.

241. For these reasons the Trial Chamber finds that the Prosecution has failed to establish beyond reasonable doubt that any of these four prisoners died from injuries received in the assaults made on them in the hangar, as alleged in Counts 5, 6 and 7 contained in paragraph 6 of the Indictment. [...]

461. Based on the presence of the accused at the Trnopolje camp when surviving prisoners were being deported, as well as his support both for the concept and the creation of a Greater Serbia, necessarily entailing, as discussed in the preliminary findings, the deportation of non-Serbs from the designated territory and the establishment of the camps as a means towards this end, the Trial Chamber is satisfied beyond reasonable doubt that the accused participated in the seizure, selection and transfer of non-Serbs to various camps and did so within the context of an armed conflict and that while doing so, he was aware that the majority of surviving prisoners would be deported from Bosnia and Herzegovina. [...]

470. [...] A Muslim, testified that she was raped at the Prijedor military barracks. After the rape she was bleeding terribly and went to the hospital where she was told by one of the doctors that she was approximately three to four months pregnant and that an abortion would have to be performed without anaesthetic because there was none. When this doctor asked another doctor for assistance, the second doctor started cursing, saying that "all balija women, they should be removed, eliminated", and that all Muslims should be annihilated, especially men. He cursed the first doctor for helping Muslims. Prior to the rape there had been no problems with her pregnancy. When she returned from the hospital she went to stay with her brother in Donja Cela, eventually returning to her apartment in Prijedor where she was subsequently raped for a second time by a former Serb colleague who had come to search her apartment. The next day she was taken to the Prijedor police station by a Serb policeman with whom she was acquainted through

work. On the way he cursed at her, using ethnically derogatory terms and told her that Muslims should all be killed because they "do not want to be controlled by Serbian authorities". When she arrived at the police station she saw two Muslim men whom she knew, covered in blood. She was taken to a prison cell which was covered in blood and where she was raped again and beaten, afterwards being taken to the Keraterm camp. She recognized several prisoners at Keraterm, all of whom had been beaten up and were bloody. She was transferred to the Omarska camp where she often saw corpses and, while cleaning rooms, she found teeth, hair, pieces of human flesh, clothes and shoes. Women were called out nightly and raped; on five separate occasions she was called out of her room and raped. As a result of the rapes she has continuing and irreparable medical injuries. After Omarska she was taken to the Trnopolje camp and then returned to Prijedor, where she was often beaten. [...]

V. EVIDENTIARY MATTERS [...]

D. Victims of the Conflict as Witnesses

540. Each party has relied heavily on the testimony of persons who were members of one party or other to the conflict and who were, in many cases, also directly made the victims of that conflict, often through violent means. The argument has been put by the Defence that, while the mere membership of an ethnic group would not make a witness less reliable in testifying against a member of another ethnic group, the "specific circumstances of a group of people who have become victims of this terrible war ... causes questions to be raised as to their reliability as witnesses in a case where a member of the victorious group, their oppressors, is on trial".

541. The reliability of witnesses, including any motive they may have to give false testimony, is an estimation that must be made in the case of each individual witness. It is neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he was the victim of a crime committed by a person of the same creed, ethnic group, armed force or any other characteristic of the accused. That is not to say that ethnic hatred, even without the exacerbating influences of violent conflict between ethnic groups, can never be a ground for doubting the reliability of any particular witness. Such a conclusion can only be made, however, in the light of the circumstances of each individual witness, his individual testimony, and such concerns as the Defence may substantiate either in cross-examination or through its own evidence-in-chief. [...]

G. Testimony of Dragan Opacic

553. During the course of this trial the truthfulness of the testimony of one witness, Dragan Opacic, first referred to as Witness L, was attacked and ultimately,

on investigation, the Prosecution disclaimed reliance upon that witness's evidence. The Defence contends that this incident is but one instance of a quite general failure by the Prosecution to test adequately the truthfulness of the evidence to be presented against the accused. [...]

554. Two points should be made in regard to this submission. First, the provenance of Dragan Opacic was quite special. Apparently, of all the witnesses, he was the only one who came to the notice of the Prosecution as proffered as a witness by the authorities of the Republic of Bosnia and Herzegovina in whose custody he then was. The circumstances surrounding his testimony were, accordingly, unique to him. [...]

VI. APPLICABLE LAW

A. General Requirements of Articles 2, 3 & 5 of the Statute [...]

1. Existence of an Armed Conflict [...]

(a) Protracted armed violence between governmental forces and organized armed groups

562. The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law. [...]

564. The territory controlled by the Bosnian Serb forces was known initially as the "Serbian Republic of Bosnia and Herzegovina" and renamed Republika Srpska on 10 January 1992. This entity did not come into being until the Assembly of the Serbian People of Bosnia and Herzegovina proclaimed the independence of that Republic on 9 January 1992. In its revolt against the de jure Government of the Republic of Bosnia and Herzegovina in Sarajevo, it possessed, at least from 19 May 1992, an organized military force, namely the VRS, comprising forces formerly part of the JNA and transferred to the Republika Srpska by the Federal Republic of Yugoslavia (Serbia and Montenegro). These forces were officially under the command of the Bosnian Serb administration located in Pale, headed by the Bosnian Serb President, Radovan Karadzic. The Bosnian Serb forces occupied and operated from a determinate, if not definite, territory, comprising a significant part of Bosnia and Herzegovina, bounded by the borders of the Republic of Bosnia and Herzegovina on the one hand, and by the front-lines of the conflict between the Bosnian Serb forces and the forces of the Government of the Republic of Bosnia and Herzegovina and the forces of the Bosnian Croats, on the other. [...]

568. Having regard then to the nature and scope of the conflict in the Republic of Bosnia and Herzegovina and the parties involved in that conflict, and irrespective of the relationship between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces, the Trial Chamber finds that, at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the laws or customs of war embodied in Article 3 common to the four Geneva Conventions of 12 August 1949, applicable as it is to armed conflicts in general, including armed conflicts not of an international character.

(b) Use of force between States

569. Applying what the Appeals Chamber has said, it is clear from the evidence before the Trial Chamber that, from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina. This was an armed conflict between the forces of the Republic of Bosnia and Herzegovina on the one hand and those of the Federal Republic of Yugoslavia (Serbia and Montenegro), being the JNA (later the VJ), working with sundry paramilitary and Bosnian Serb forces, on the other. [...]

2. Nexus between the Acts of the Accused and the Armed Conflict [...]

573. [...] [F]or an offence to be a violation of international humanitarian law, [...] this Trial Chamber needs to be satisfied that each of the alleged acts was in fact closely related to the hostilities. It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, as the Appeals Chamber has indicated, nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law. The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole.

574. In any event, acts of the accused related to the armed conflict in two distinct ways. First, there is the case of the acts of the accused in the take-over of Kozarac and the villages of Sivci and Jaskici. Given the nature of the armed conflict as an ethnic war and the strategic aims of the Republika Srpska to create a purely Serbian State, the acts of the accused during the armed

take-over and ethnic cleansing of Muslim and Croat areas of opstina Prijedor were directly connected with the armed conflict.

575. Secondly, there are the acts of the accused in the camps run by the authorities of the Republika Srpska. Those acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners in the camps in opstina Prijedor. Indeed, such treatment effected the objective of the Republika Srpska to ethnically cleanse, by means of terror, killings or otherwise, the areas of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces. Accordingly, those acts too were directly connected with the armed conflict. [...]

B. Article 2 of the Statute [...]

2. Status of the Victims as "Protected Persons" [...]

(b) Were the victims in the hands of a party to the conflict? [...]

580. Most of the victims of the accused's acts within the opstina Prijedor camps with whom the Trial Chamber is concerned in this case were, prior to the occurrence of the acts in question, living in the town of Kozarac or its surrounds or in the villages of Sivci and Jaskici. In some instances, the exact date and place when some of the victims of the acts of the accused fell into the hands of forces hostile to the Government of the Republic of Bosnia and Herzegovina is not made clear. Whether or not the victims were "protected persons" depends on when it was that they fell into the hands of the occupying forces. The exact moment when a person or area falls into the hands of a party to a conflict depends on whether that party has effective control over an area. According to Georg Schwarzenberger, in International Law as applied by International Courts and Tribunals, the law relating to belligerent occupation:

> .. applies only to invaded territory, but not to the whole of such territory. It does not extend to invaded enemy territory in which fighting still takes place or to those parts of it which the territorial sovereign may have abandoned, but in which the invader has not yet established his own authority.
>
> ... [I]n invaded territory which is not yet effectively occupied, the invader is bound merely by the limitations which the rules of warfare stricto sensu impose. The protection which the civilian population in such areas may claim under international customary law rests on the continued application in their favour of the standard of civilisation in all matters in which this does not run counter to the necessities of war. Those of the provisions of Geneva Red Cross Convention IV of 1949 which are not limited to occupied territories add further to this minimum of protection.

In the case of opstina Prijedor, only parts of the opstina, including the main population centre of Prijedor town, were occupied on or before 19 May 1992.

In relation to the citizens of Kozarac and other Muslim-controlled or dominated areas of opstina Prijedor, they fell into the hands of the VRS upon their capture by those forces on or after 27 May 1992. That is not, however, to say that, because some parts of opstina Prijedor were not controlled by the VRS until 27 May 1992, there was not an effective occupation of the remainder of opstina Prijedor. This point is made clear, for example, by the British Manual of Military Law, which states:

> The fact that there is a defended place or zone still in possession of the national forces within an occupied district does not make the occupation of the remainder invalid, provided that such place or defended zone is surrounded and effectively cut-off from the rest of the occupied district.

581. In any event, for those persons in opstina Prijedor who were in territory occupied prior to 19 May 1992 by Bosnian Serb forces and JNA units, their status as "protected persons", subject to what will be said about the relationship between the VRS and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) below, ceased on that date. As Schwarzenberger points out:

> In accordance with its territorial and temporal limitations, the law of belligerent occupation ceases to apply whenever the Occupying Power loses effective control the occupied territory. Whether, then, this body of law is replaced by the laws of war in the narrower sense or by the law of the former territorial sovereign, depends on the fortunes of war.

582. On 15 May 1992 the Security Council, in resolution 752 of 1992, demanded that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately and that those units either be withdrawn, be subject to the authority of the Government of the Republic of Bosnia and Herzegovina, or be disbanded and disarmed. Subject to what will be said below regarding the relationship between the JNA or the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), on the one hand, and the VRS and the Republika Srpska on the other, by 19 May 1992 the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) had lost or given up effective control over opstina Prijedor and most other parts of the Republic of Bosnia and Herzegovina. As each of the crimes alleged to have been committed by the accused occurred after 19 May 1992, the question to which the Trial Chamber now turns, having clearly determined that the victims were at all relevant times in the hands of a party to the conflict, is whether, after that date and at all relevant times, those victims were in the hands of a party to the conflict or occupying power of which they were not nationals.

583. In making this assessment, the Trial Chamber takes notice of two facts. The first is the conclusion inherent in the Appeals Chamber Decision and in the statements of the Security Council in relation to the conflict in the former Yugoslavia that that conflict was of a mixed character, and the Appeals Chamber's implicit deference to this Trial Chamber on the issue of whether the victims were "protected persons" in the present case. It is thus for the

Trial Chamber to characterize the exact nature of the armed conflict, of which the events in opstina Prijedor formed a part, when applying international humanitarian law to those events. [...]

(c) Were the victims in the hands of a party to the conflict of which they were not nationals?

[N.B.: The Appeals Chamber reversed this part of the Judgement (See C., Tadic, Appeals Chamber, Merits, paras. 68-171).] [...]

C. Article 3 of the Statute

1. Requirements of Article 3 of the Statute

610. According to the Appeals Chamber, the conditions that must be satisfied to fulfil the requirements of Article 3 of the Statute are: [...]

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. ..; [...]

612. While, for some laws or customs of war, requirement (iii) may be of particular relevance, each of the prohibitions in Common Article 3: against murder; the taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying-out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples, constitute, as the Court put it, "elementary considerations of humanity", the breach of which may be considered to be a "breach of a rule protecting important values" and which "must involve grave consequences for the victim". Although it may be possible that a violation of some of the prohibitions of Common Article 3 may be so minor as to not involve "grave consequences for the victim", each of the violations with which the accused has been charged clearly does involve such consequences. [...]

2. Conditions of Applicability of the Rules Contained in Common Article 3

614. The rules contained in paragraph 1 of Common Article 3 proscribe a number of acts which [...] are committed against persons taking no active part in hostilities. [...]

615. [...] This protection embraces, at the least, all of those protected persons covered by the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces in the field and wounded sick and shipwrecked members of the armed forces at sea. Whereas the concept of "protected person" under the Geneva Conventions is defined positively, the class of persons protected by the operation of Common Article 3 is

defined negatively. For that reason, the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.

616. It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time. Violations of the rules contained in Common Article 3 are alleged to have been committed against persons who, on the evidence presented to this Trial Chamber, were captured or detained by Bosnian Serb forces, whether committed during the course of the armed take-over of the Kozarac area or while those persons were being rounded-up for transport to each of the camps in opstina Prijedor. Whatever their involvement in hostilities prior to that time, each of these classes of persons cannot be said to have been taking an active part in the hostilities. Even if they were members of the armed forces of the Government of the Republic of Bosnia and Herzegovina or otherwise engaging in hostile acts prior to capture, such persons would be considered "members of armed forces" who are "placed hors de combat by detention". Consequently, these persons enjoy the protection of those rules of customary international humanitarian law applicable to armed conflicts, as contained in Article 3 of the Statute. [...]

D. Article 5 of the Statute

1. The Customary Status in International Humanitarian Law of the Prohibition Against Crimes Against Humanity

618. [...] The notion of crimes against humanity as an independent juridical concept, and the imputation of individual criminal responsibility for their commission, was first recognized in Article 6(c) of the Nürnberg Charter [...] ("Nürnberg Charter") which granted the International Military Tribunal for the Trial of the Major War Criminals ("Nürnberg Tribunal") jurisdiction over this crime. [...]

622. The customary status of the Nürnberg Charter, and thus the attribution of individual criminal responsibility for the commission of crimes against humanity, was expressly noted by the Secretary-General. Additional codifications of international law have also confirmed the customary law status of the prohibition of crimes against humanity, as well as two of its most egregious manifestations: genocide and apartheid.

623. Thus, since the Nürnberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned. It would seem that this finding is implicit in the *Appeals Chamber Decision* which

found that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict". If customary international law is determinative of what type of conflict is required in order to constitute a crime against humanity, the prohibition against crimes against humanity is necessarily part of customary international law. As such, the commission of crimes against humanity violates customary international law, of which Article 5 of the Statute is, for the most part, reflective. As stated by the Appeals Chamber: "[T]here is no question. .. that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*."

2. Conditions of Applicability

624. Article 5 of the Statute grants the International Tribunal subject-matter jurisdiction over crimes against humanity and there follows a list of the specific offences proscribed. [...]

626. Article 5 of the Statute grants the International Tribunal jurisdiction to prosecute crimes against humanity only "when committed in armed conflict" (whether international or internal) and they must be "directed against any civilian population". These conditions contain within them several elements. [...] The Trial Chamber's determination of the conditions of applicability, as elaborated below, is that, first, "when committed in armed conflict" necessitates the existence of an armed conflict and a nexus between the act and that conflict. Secondly, "directed against any civilian population" is interpreted to include a broad definition of the term "civilian". It furthermore requires that the acts be undertaken on a widespread or systematic basis and in furtherance of a policy. [...]

(a) When committed in armed conflict

627. Article 5 of the Statute, addressing crimes against humanity, grants the International Tribunal jurisdiction over the enumerated acts "when committed in armed conflict". [...] [T]he inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, [...] which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character. "In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that the acts be committed as part of an attack against a civilian population. The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, "the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law", having stated earlier that "[s]ince customary international law no longer requires any nexus between crimes against humanity and armed conflict ... Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal.

"Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict. [...]

(b) Directed against any civilian population

635. The requirement in Article 5 that the enumerated acts be "directed against any civilian population" contains several elements. The inclusion of the word "any" makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality. [...]

(i) The meaning of "civilian" [...]

638. [...] [I]t is clear that the targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population.

639. The second aspect, determining which individual of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, [...] "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely ... ." [...] However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in Protocol I. [...] They [...] do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in furtherance or as part of an attack directed against a civilian population.

640. [...] The Commission of Experts Established Pursuant to Security Council Resolution 780 ("Commission of Experts") observed: "It seems obvious that article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms." The Commission of Experts then provided an example based on the situation in the former Yugoslavia and concluded: "A Head of a family who under such circumstances tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same is the case for the sole policeman or local defence guard doing the same, even if they joined hands to try to prevent the cataclysm."

643. [...] Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively

involved in a resistance movement can qualify as victims of crimes against humanity. [...]

(ii) The meaning of "population"

644. The requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian "population" does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity. [...]

Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement imported by the Secretary-General and members of the Security Council that the actions be taken on discriminatory grounds.

a. The widespread or systematic occurrence of the acts

645. The Prosecution argues that the term "population" in Article 5 contemplates that by his actions the accused participated in a widespread or systematic attack against a relatively large victim group, as distinct from isolated or random acts against individuals. The Defence, while generally in agreement, argues that in order to constitute a crime against humanity the violations must be both widespread and systematic.

646. While this issue has been the subject of considerable debate, it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts. [...]

649. A related issue is whether a single act by a perpetrator can constitute a crime against humanity. [...] Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian population and thus "[e]ven an isolated act can constitute a crime

against humanity if it is the product of a political system based on terror or persecution".[...]

b. The necessity of discriminatory intent

[N.B.: The Appeals Chamber reversed this part of the Judgement. (*See* C., Appeals Chamber, Merits, paras. 282-304).] [...]

c. The policy element

653. As mentioned above the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. [...]

Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not. [...]

654. An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. [...] In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. [...]

(c) Intent

[N.B.: The Appeals Chamber reversed this part of the Judgement. (*See* C., Appeals Chamber, Merits, paras. 282-304).] [...]

E. Individual Criminal Responsibility Under Article 7, Paragraph 1

[N.B.: The Appeals Chamber reversed this part of the Judgement. (*See* C., Appeals Chamber, Merits, paras. 178-233).] [...]

VII. LEGAL FINDINGS [...]

723. According to [common article 3 to the Geneva Conventions] the prohibition against cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in the hostilities shall in all circumstances be treated humanely. [...]

724. No international instrument defines cruel treatment because, according to two prominent commentators, "it has been found impossible to find any satisfactory definition of this general concept, whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation".

725. However, guidance is given by the form taken by Article 4 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) which provides that what is prohibited is "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment". These instances of cruel treatment, and the inclusion of "any form of corporal punishment", demonstrate that no narrow or special meaning is there being given to the phrase "cruel treatment".

726. Treating cruel treatment then, as J. H. Burger and H. Danelius describe it, as a "general concept", the relevant findings of fact as stated earlier in this Opinion and Judgment are that the accused took part in beatings of great severity and other grievous acts of violence inflicted on [...]. The Trial Chamber finds beyond reasonable doubt that those beatings and other acts which each of those Muslim victims suffered were committed in the context of an armed conflict and in close connection to that conflict, that they constitute violence to their persons and that the perpetrators intended to inflict such suffering. The Trial Chamber further finds that the accused in some instances was himself the perpetrator and in others intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them and thereby aided and abetted in the commission of the crimes and is therefore individually responsible for each of them as provided by Article 7, paragraph 1, of the Statute. The Trial Chamber accordingly finds beyond reasonable doubt that the accused is guilty as charged in Count 10 of the Indictment in respect of each of those six victims. [...]

C. Appeals Chamber, Merits

[**Source:** ICTY, The Prosecutor v. Dusko Tadic, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999; available on http://www.un.org]

22. The Prosecution raises the following grounds of appeal against the Judgement:

Ground (1): The majority of the Trial Chamber erred when it decided that the victims of the acts ascribed to the accused in Section III of the Judgement did not enjoy the protection of the grave breaches regime of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("Statute").

Ground (2): The Trial Chamber erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had played any part in the killing of any of the five men from the village of Jaskici, as alleged in Counts 29, 30 and 31 of the Indictment. [...]

IV. THE FIRST GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT IT HAD NOT BEEN PROVED THAT THE VICTIMS WERE "PROTECTED PERSONS" UNDER ARTICLE 2 OF THE STATUTE (ON GRAVE BREACHES)

A. Submissions of the Parties

1. The Prosecution Case

68. In the first ground of the Cross-Appeal, the Prosecution challenges the Appellant's acquittal on Counts 8, 9, 12, 15, 21 and 32 of the Indictment which charged the Appellant with grave breaches under Article 2 of the Statute. The Appellant was acquitted on these counts on the ground that the victims referred to in those counts had not been proved to be "protected persons" under the applicable provisions of the Fourth Geneva Convention. [...]

B. Discussion

1. The Requirements for the Applicability of Article 2 of the Statute

80. Article 2 of the Statute embraces various disparate classes of offences with their own specific legal ingredients. The general legal ingredients, however, may be categorised as follows.

(i) The nature of the conflict. [...] [T]he international nature of the conflict is a prerequisite for the applicability of Article 2.

(ii) The status of the victim. Grave breaches must be perpetrated against persons or property defined as "protected" by any of the four Geneva Conventions of 1949. To establish whether a person is "protected", reference must clearly be made to the relevant provisions of those Conventions.

81. In the instant case it therefore falls to the Appeals Chamber to establish first of all (i) on what legal conditions armed forces fighting in a *prima facie* internal armed conflict may be regarded as acting on behalf of a foreign Power and (ii) whether in the instant case the factual conditions which are required by law were satisfied. [...]

2. The Nature of the Conflict [...]

87. In the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces - in whose hands the Bosnian victims in this case found themselves - could be considered as de iure or de facto organs of a foreign Power, namely the FRY.

3. The Legal Criteria for Establishing When, in an Armed Conflict Which is *Prima Facie* Internal, Armed Forces May Be Regarded as Acting On Behalf of a Foreign Power, Thereby Rendering the Conflict International

[...]

(b) The Notion of Control: The Need for International Humanitarian Law to Be Supplemented by General International Rules Concerning the Criteria for Considering Individuals to be Acting as De Facto *State Organs*

98. International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials. Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.

(c) The Notion of Control Set Out By the International Court of Justice in Nicaragua

99. In dealing with the question of the legal conditions required for individuals to be considered as acting on behalf of a State, i.e., as *de facto* State officials, a high degree of control has been authoritatively suggested by the International Court of Justice in *Nicaragua*.

100. [...] The Court went so far as to state that in order to establish that the United States was responsible for "acts contrary to human rights and humanitarian law" allegedly perpetrated by the Nicaraguan contras, it was necessary to prove that the United States had specifically "directed or enforced" the perpetration of those acts. [...]

(i) Two Preliminary Issues

102. Before examining whether the *Nicaragua* test is persuasive, the Appeals Chamber must deal with two preliminary matters which are material to our discussion in the instant case.

103. First, with a view to limiting the scope of the test at issue, the Prosecution has contended that the criterion for ascertaining State responsibility is different from that necessary for establishing individual criminal responsibility. [...] The Appeals Chamber, with respect, does not share this view.

104. What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a de facto organ of a State. Logically these conditions must be the same

both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the "grave breaches" regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international. [...]

114. On close scrutiny, and although the distinctions made by the [International] Court [of Justice] might at first sight seem somewhat unclear, the contention is warranted that in the event, the Court essentially set out two tests of State responsibility: (i) responsibility arising out of unlawful acts of State officials; and (ii) responsibility generated by acts performed by private individuals acting as *de facto* State organs. For State responsibility to arise under (ii), the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question. Applying this test, the Court concluded that in the circumstances of the case it was met as far as the UCLAs were concerned (who were paid and supervised by the United States and in addition acted under their specific instructions). By contrast, the test was not met as far as the *contras* were concerned: in their case no specific instructions had been issued by the United States concerning the violations of international humanitarian law which they had allegedly perpetrated.

(ii) The Grounds On Which the Nicaragua Test Does Not Seem To Be Persuasive

115. [...] The Appeals Chamber, with respect, does not hold the Nicaragua test to be persuasive. There are two grounds supporting this conclusion.

a. The Nicaragua *Test Would Not Seem to Be Consonant With the Logic of the Law of State Responsibility [...]*

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission [...]. Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State

officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. [...] The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

118. One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State [...]. In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove - if only by necessary implication - that the individual acted as a de facto State agent. Alternatively it would be necessary to show that the State has publicly given retroactive approval to the action of that individual. [...]

119. To these situations another one may be added, which arises when a State entrusts a private individual [...] with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State [...]. In this case, [...] it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.

120. One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.

121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. [...] [A] State is internationally accountable for ultra vires acts or transactions of its organs. [...] The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. [...]

122. The same logic should apply to the situation under discussion. As noted above, the situation of an organised group is different from that of a single private individual performing a specific act on behalf of a State. In the case

of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State. [...]

123. [...] [I]nternational law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act ultra vires or contra legem), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued specific instructions to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.

b. The Nicaragua *Test is at Variance With Judicial and State Practice*

124. There is a second ground - of a similarly general nature as the one just expounded - on which the Nicaragua test as such may be held to be unpersuasive. This ground is determinative of the issue. The "effective control" test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised. In short, as shall be seen, this practice has upheld the Nicaragua test with regard to individuals or unorganised groups of individuals acting on behalf of States. By contrast, it has applied a different test with regard to military or paramilitary groups.

125. In cases dealing with members of military or paramilitary groups, courts have clearly departed from the notion of "effective control" set out by the International Court of Justice (i.e., control that extends to the issuance of specific instructions concerning the various activities of the individuals in question). [...]

130. Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. This proposition is confirmed by the international practice concerning national liberation movements. Although some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States. Nicaragua also supports this proposition, since the United States, although it aided the contras financially, and otherwise, was not held responsible for their acts (whereas on account of this financial and other

assistance to the contras, the United States was held by the Court to be responsible for breaching the principle of non-intervention as well as "its obligation [...] not to use force against another State." This was clearly a case of responsibility for the acts of its own organs).

131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

132. It should be added that courts have taken a different approach with regard to individuals or groups not organised into military structures. With regard to such individuals or groups, courts have not considered an overall or general level of control to be sufficient, but have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission. [...]

137. In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a de facto organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto*

State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

138. Of course, if, as in *Nicaragua*, the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.

139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.

140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.

141. It should be added that international law does not provide only for a test of overall control applying to armed groups and that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a third test. This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State. [...]

144. Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs. In these cases it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.

145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.

4. The Factual Relationship Between the Bosnian Serb Army and the Army of the FRY [...]

150. The Trial Chamber clearly found that even after 19 May 1992, the command structure of the JNA did not change after it was renamed and redesignated as the VJ. Furthermore, and more importantly, it is apparent from the

decision of the Trial Chamber [...] that even after that date the VJ continued to control the Bosnian Serb Army in Bosnia and Herzegovina, that is the VRS. The VJ controlled the political and military objectives, as well as the military operations, of the VRS. Two "factors" emphasised in the Judgement need to be recalled: first, "the transfer to the 1st Krajina Corps, as with other units of the VRS, of former JNA Officers who were not of Bosnian Serb extraction from their equivalent postings in the relevant VRS unit's JNA predecessor" and second, with respect to the VRS, "the continuing payment of salaries, to Bosnian Serb and non-Bosnian Serb officers alike, by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)". According to the Trial Chamber, these two factors did not amount to, or were not indicative of, effective control by Belgrade over the Bosnian Serb forces. The Appeals Chamber shares instead the views set out by Judge McDonald in her Separate and Dissenting Opinion, whereby these two factors, in addition to others shown by the Prosecution, did indicate control.

151. What emerges from the facts which are [...] uncontested by the Trial Chamber (concerning the command and control structure that persisted after the redesignation of the VRS and the continuous payment of salaries to officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense. This is further evidenced by the following factors:

(i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.

(ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS. As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.

(iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter "active elements" of the FRY's armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina. Much *de facto* continuity, in terms of the ongoing hostilities, was therefore observable and there seems to have been little factual basis for the Trial Chamber's finding that by 19 May 1992, the FRY/VJ had lost control over the VRS.

(iv) JNA military operations under the command of Belgrade that had already commenced by 19 May 1992 did not cease immediately and, from a purely practical point of view, it is highly unlikely that they would have been able to cease overnight in any event.

The creation of the VRS by the FRY/VJ, therefore, did not indicate an intention by Belgrade to relinquish the control held by the FRY/VJ over the Bosnian Serb army. To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY's own political and military objectives, and the evidence demonstrates that these objectives were implemented by military and political operations that were controlled by Belgrade and the JNA/VJ. There is no evidence to suggest that these objectives changed on 19 May 1992.

152. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities. Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade. It was apparent that even after 19 May 1992 the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber and the Trial Chamber accepted that the VRS Main Staff had links and regular communications with Belgrade. In spite of this, [...] the Trial Chamber [...] concluded that "without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out 'on behalf of' the Federal Republic of Yugoslavia (Serbia and Montenegro)."

153. The Appeals Chamber holds that to have required proof of specific orders circumventing or overriding superior orders not only applies the wrong test but is also questionable in this context. A distinguishing feature of the VJ and the VRS was that they possessed shared military objectives. As a result, it is inherently unlikely that orders from Belgrade circumventing or overriding the authority of local Corps commanders would have ever been necessary as these forces were of the same mind; a point that appears to have been virtually conceded by the Trial Chamber.

154. Furthermore, the Trial Chamber, noting that the pay of all [...] officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well "be equated with control". The Trial Chamber nevertheless dismissed such continuity [...] as being "as much matters of convenience as military necessity" and noted that such evidence "establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced." In the Appeals Chamber's view, however, [...] it

is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY; a point which was amply demonstrated by the Prosecution. In the view of the Appeals Chamber, the finding of the Trial Chamber that the relationship between the FRY/VJ and VRS amounted to cooperation and coordination rather than overall control suffered from having taken largely at face value those features which had been put in place intentionally by Belgrade to make it seem as if their links with Pale were as partners acting only in cooperation with each other. Such an approach is not only flawed in the specific circumstances of this case, but also potentially harmful in the generality of cases. Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in de facto control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.

155. Finally, it must be noted that the Trial Chamber found the various forms of assistance provided to the armed forces of the Republika Srpska by the Government of the FRY to have been "crucial" to the pursuit of their activities and that "those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations." [...]

156. As the Appeals Chamber has already pointed out, [...] it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial [...] had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. [...]

157. An *ex post facto* confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the Republika Srpska in the political and military spheres. [...] Nevertheless, the Dayton-Paris Accord may be seen as the culmination of a long process. This process necessitated a dialogue with all political and military forces wielding actual power on the ground (whether *de facto* or *de iure*) [...]. The fact that from 4 August 1994 the FRY appeared to cut off its support to the Republika Srpska because the leadership of the former had misgivings about the authorities in the latter is not insignificant. Indeed, this "delinking" served to emphasise the high degree of overall control exercised over the Republika Srpska by the FRY, for, soon after this cessation of support from the FRY, the Republika Srpska realised that it had little choice but to succumb to the authority of the FRY. [...]

160. All this would seem to bear out the proposition that in actual fact, at least between 1992 and 1995, overall political and military authority over the Republika Srpska was held by the FRY (control in this context included

participation in the planning and supervision of ongoing military operations). Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments by the Republika Srpska, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the Republika Srpska, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict.

161. This would therefore constitute yet another (albeit indirect) indication of the subordinate role played vis-Á-vis the FRY by the Republika Srpska and its officials in the aforementioned period, including 1992.

162. The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict.

5. The Status of the Victims

163. Having established that in the circumstances of the case the first of the two requirements set out in Article 2 of the Statute for the grave breaches provisions to be applicable, namely, that the armed conflict be international, was fulfilled, the Appeals Chamber now turns to the second requirement, that is, whether the victims of the alleged offences were "protected persons".

(a) The Relevant Rules

164. Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines "protected persons" - hence possible victims of grave breaches - as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals". In other words, subject to the provisions of Article 4(2), the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection (consider, for instance, a situation similar to that of German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory).

165. Thus already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. In the aforementioned

case of refugees, the lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality. In the cases provided for in Article 4(2), in addition to nationality, account was taken of the existence or non-existence of diplomatic protection: nationals of a neutral State or a co-belligerent State are not treated as "protected persons" unless they are deprived of or do not enjoy diplomatic protection. In other words, those nationals are not "protected persons" as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of "protected persons".

166. This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

(b) Factual Findings

167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as de facto organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were "protected persons" as they found themselves in the hands of armed forces of a State of which they were not nationals.

168. It might be argued that before 6 October 1992, when a "Citizenship Act" was passed in Bosnia and Herzegovina, the nationals of the FRY had the same nationality as the citizens of Bosnia and Herzegovina, namely the nationality of the Socialist Federal Republic of Yugoslavia. Even assuming that this proposition is correct, the position would not alter from a legal point of view. As the Appeals Chamber has stated above, Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4

intends to look to the substance of relations, not to their legal characterisation as such.

169. Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.

C. Conclusion

170. It follows from the above that the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply.

171. The Appeals Chamber accordingly finds that the Appellant was guilty of grave breaches of the Geneva Conventions on Counts 8, 9, 12, 15, 21 and 32.

V. THE SECOND GROUNG OF CROSS-APPEAL BY THE PROSECUTION: THE FINDING OF INSUFFICIENT EVIDENCE OF PARTICIPATION IN THE KILLINGS IN JASKICI [...]

B. Discussion

1. The Armed Group to Which the Appellant Belonged Committed the Killings

178. The Trial Chamber found, amongst other facts, that on 14 June 1992, the Appellant, with other armed men, participated in the removal of men, who had been separated from women and children, from the village of Sivci to the Keraterm camp, and also participated in the calling-out of residents, the separation of men from women and children, and the beating and taking away of men in the village of Jaskici. It also found that five men were killed in the latter village. [...]

2. The Individual Criminal Responsibility of the Appellant for the Killings

(a) Article 7(1) of the Statute and the Notion of Common Purpose

185. The question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men from Jaskici even though there is no evidence that he personally killed any of them. The two central issues are:

(i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and

(ii) what degree of *mens rea* is required in such a case.

186. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). [...]

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to all those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the actus reus of the enumerated crimes but appears to extend also to other offenders (See in particular Article 2, which refers to committing or ordering to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including conspiracy, incitement, attempt and complicity).

190. [...] [A]ll those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single

individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

193. [...] [I]nternational criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (actus reus and mens rea) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result. [...]

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. [...]

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory" but failed to do so. It would seem that in these cases the required actus reus was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The mens rea element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. [...]

205. The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were

carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. [...]

220. [...] With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning mens rea are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further - individually and jointly - the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called dolus eventualis is required (also called "advertent recklessness" in some national legal systems). [...]

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany and the Netherlands. Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France and Italy.

They also embrace common law jurisdictions such as England and Wales, Canada, the United States, Australia and Zambia.

225. It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the

world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that "suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law". In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

226. The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

227. In sum, the objective elements (actus reus) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

(i) A plurality of persons. They need not be organised in a military, political or administrative structure [...].

(ii) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

(iii) Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

228. By contrast, the mens rea element differs according to the category of common design under consideration. [...] With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

(b) The Culpability of the Appellant in the Present Case

230. In the present case, the Trial Chamber found that the Appellant participated in the armed conflict taking place between May and December 1992 in the Prijedor region. An aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia. It was also found that, in furtherance of this policy, inhumane acts were committed against numerous victims and "pursuant to a recognisable plan". The attacks on Sivci and Jaskici on 14 June 1992 formed part of this armed conflict raging in the Prijedor region.

231. The Appellant actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts. The common criminal purpose was not to kill all non-Serb men; from the evidence adduced and accepted, it is clear that killings frequently occurred in the effort to rid the Prijedor region of the non-Serb population. That the Appellant had been aware of the killings accompanying the commission of inhumane acts against the non-Serb population is beyond doubt. That is the context in which the attack on Jaskici and his participation therein, as found by the Trial Chamber as well as the Appeals Chamber above, should be seen. That nobody was killed in the attack on Sivci on the same day does not represent a change of the common criminal purpose.

232. The Appellant was an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaskici on 14 June 1992. [...] The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaskici. [...] Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.

3. The Finding of the Appeals Chamber

233. The Trial Chamber erred in holding that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had any part in the killing of the five men from the village of Jaskici. The Appeals Chamber finds that the Appellant participated in the killings of the five men in Jaskici, which were committed during an armed conflict as part of a widespread or systematic attack on a civilian population. The Appeals Chamber therefore holds that under the provisions of Article 7(1) of the Statute, the Trial Chamber should have found the Appellant guilty. [...]

VI. THE THIRD GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT CRIMES AGAINST HUMANITY CANNOT BE COMMITTED FOR PURELY PERSONAL MOTIVES

238. In the Judgement, the Trial Chamber identified, from among the elements which had to be satisfied before a conviction for crimes against humanity could be recorded, the need to prove the existence of an armed conflict and a nexus between the acts in question and the armed conflict.

239. As to the nature of the nexus required, the Trial Chamber found that, subject to two caveats, it is sufficient for the purposes of crimes against humanity that the act occurred "in the course or duration of an armed conflict". The first caveat was "that the act be linked geographically as well as temporally with the armed conflict". The second caveat was that the act and the conflict must be related or, at least, that the act must "not be unrelated to the armed conflict". The Trial Chamber further held that the requirement that the act must "not be unrelated" to the armed conflict involved two aspects. First, the perpetrator must know of the broader context in which the act occurs. Secondly, the act must not have been carried out for the purely personal motives of the perpetrator. [...]

B. Discussion [...]

1. Article 5 of the Statute

248. The Appeals Chamber agrees with the Prosecution that there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. The Appeals Chamber agrees that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern. There is nothing in the Statute, however, which mandates the imposition of a further condition that the acts in question must not be committed for purely personal reasons, except to the extent that this condition is a consequence or a re-statement of the other two conditions mentioned.

249. The Appeals Chamber would also agree with the Prosecution that the words "committed in armed conflict" in Article 5 of the Statute require nothing more than the existence of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a jurisdictional element, not "a substantive element of the mens rea of crimes against humanity" (i.e., not a legal ingredient of the subjective element of the crime). [...]

3. Case-law as Evidence of Customary International Law [...]

268. One reason why the above cases do not refer to "motives" may be, as the Defence has suggested, that "the issue in these cases was not whether the Defendants committed the acts for purely personal motives". The Appeals Chamber believes, however, that a further reason why this was not in issue is precisely because motive is generally irrelevant in criminal law, as the Prosecution pointed out in the hearing of 20 April 1999. [...]

269. The Appeals Chamber approves this submission, subject to the caveat that motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence (for example, the above mentioned thief might be dealt with more leniently if he stole to give presents to his children than if he were stealing to support a heroin habit). Indeed the inscrutability of motives in criminal law is revealed by the following reductio ad absurdum. Imagine a high-ranking SS official who claims that he participated in the genocide of the Jews and Gypsies for the "purely personal" reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason. Despite this quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for "purely personal" reasons. Similarly, if the same man said that he participated in the genocide only for the "purely personal" reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the

final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of "non-personal" motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused's acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a "motive" requirement; it simply duplicated the context and mens rea requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

C. Conclusion

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of mens rea, a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof of the accused's motives. Consequently, in the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal's Statute. [...]

VII. THE FOURTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT ALL CRIMES AGAINST HUMANITY REQUIRE A DISCRIMINATORY INTENT [...]

B. Discussion [...]

1. The Interpretation of the Text of Article 5 of the Statute

282. Notwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty, in the interpretation of the Statute it is

nonetheless permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation in its Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations*: "The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur". [Note 346: ICJ Reports (1950), p. 8.]

283. The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely "persecutions" provided for in Article 5 (h).

284. In addition to such textual interpretation, a logical construction of Article 5 also leads to the conclusion that, generally speaking, this requirement is not laid down for all crimes against humanity. Indeed, if it were otherwise, why should Article 5 (h) specify that "persecutions" fall under the Tribunal's jurisdiction if carried out "on political, racial and religious grounds"? This specification would be illogical and superfluous. It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.

285. As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds as specified in paragraph (h) of Article 5. In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of "crimes against humanity", thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. A *fortiori*, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members.

[N.B.: The Secretary General's Report established in accordance with paragraph 2 resolution 808 (1993) of the Security Council, (S/25704), 3 May 1993, available on http://www.un.org states in paragraph 48 "Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."]

Such an interpretation of Article 5 would create significant *lacunae* by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of "class enemies" in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report. [...]

2. Article 5 and Customary International Law [...]

292. This warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.

3. The Report of the Secretary-General

293. The interpretation suggested so far is not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal's Statute was adopted by the Council. The Appeals Chamber is nevertheless of the view that these two interpretative sources do not suffice to establish that all crimes against humanity need be committed with a discriminatory intent.

294. We shall consider first the Report of the Secretary-General, which stated that the crimes under discussion are those "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

295. It should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was "approved" by the Security Council (See the first operative paragraph of Security Council resolution 827 (1993)), while the Statute was "adopt[ed]" (See operative paragraph 2). By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute. [...]

4. The Statements Made by Some States in the Security Council

298. Let us now turn to the statements made in the Security Council, after the adoption of the Statute, by three States, namely, France, the United States and the Russian Federation.

299. Before considering what the legal meaning of these statements may be, one important point may first be emphasised. Although they were all directed at importing, as it were, into Article 5 the qualification concerning discriminatory intent set out in paragraph 48 of the Secretary-General's Report, these statements varied as to their purport. The statement by the French representative was intended to be part of "a few brief comments" on the Statute. By contrast, the remarks of the United States representative were expressly couched as an "interpretative statement"; furthermore, that representative added a significant comment: "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute" including the "clarification" concerning Article 5. With regard to the representative of the Russian Federation, his statement concerning Article 5 was expressly conceived of as an interpretative declaration. Nevertheless, this declaration was made in such terms as to justify the proposition that for the Russian Federation, Article 5 "encompasses" crimes committed with a "discriminatory intent" without, however, being limited to these acts alone.

300. The Appeals Chamber, first of all, rejects the notion that these three statements - at least as regards the issue of discriminatory intent - may be considered as part of the "context" of the Statute, to be taken into account for the purpose of interpretation of the Statute pursuant to the general rule of construction laid down in Article 31 of the Vienna Convention on the Law of the Treaties. In particular, those statements cannot be regarded as an "agreement" relating to the Statute, made between all the parties in connection with the adoption of the Statute. True, the United States representative pointed out that it was her understanding that the other members of the Security Council shared her views regarding the "clarifications" she put forward. However, in light of the wording of the other two statements on the specific point at issue, and taking into account the lack of any comment by the other twelve members of the Security Council, it would seem difficult to conclude that there emerged an agreement in the Security Council designed to qualify the scope of Article 5 with respect to discriminatory intent. In particular, it must be stressed that the United States representative, in enumerating the discriminatory grounds required, in her view, for crimes against humanity, included one ground ("gender") that was not mentioned in the Secretary-General's Report and which was, more importantly, referred to neither by the French nor the Russian representatives in their declarations on Article 5. This, it may be contended, is further evidence that no agreement emerged within the Security Council as to the qualification concerning discriminatory intent.

301. Arguably, in fact, the main purpose of those statements was to stress that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity. This ingredient, absent in Article 5, had already been mentioned in paragraph 48 of the Secretary-General's Report. In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General's Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes.

302. The contention may also be warranted that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred. Those States therefore intended to draw the attention of the future Tribunal to the need to take this significant factor into account. One should not, however, confuse what happens most of the time (*quod plerumque accidit*) with the strict requirements of law.

303. Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the "context" of the Statute, it may be argued that they comprise a part of the *travaux préparatoires*. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the *travaux* constitute a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is *ambiguous or obscure.* As the wording of Article 5 is clear and does not give rise to uncertainty, at least as regards the issue of discriminatory intent, there is no need to rely upon those statements. Excluding from the scope of crimes against humanity widespread or systematic atrocities on the sole ground that they were not motivated by any persecutory or discriminatory intent would be justified neither by the letter nor the spirit of Article 5.

304. The above propositions do not imply that the statements made in the Security Council by the three aforementioned States, or by other States, should not be given interpretative weight. They may shed light on the meaning of a provision that is ambiguous, or which lends itself to differing interpretations. Indeed, in its *Tadic* Decision on Jurisdiction the Appeals Chamber repeatedly made reference to those statements as well as to statements made by other States. It did so, for instance, when interpreting Article 3 of the Statute [N.B.: note 363: *see Tadic* Decision on Jurisdiction, paras 75, 88 (where reference was also made to the statements of the representatives of the United Kingdom and Hungary). [See A. Jurisdiction, p. 1437.].] and when pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict. [...]

[N.B.: By the trial judgement of 7 May 1997 and the appellate decision of 15 July 1999, as well as the sentencing decisions of 14 July 1997 and 11 November 1999, and finally by the decision on appeal against sentence of 26 January 2000, Dusko Tadic was convicted of 20 of the crimes with which he was charged. He was sentenced to 20 years' imprisonment for crimes against humanity, violations of the laws and customs of war and grave breaches of the 1949 Geneva Conventions.]

DISCUSSION

1. *(Jurisdiction, paras. 11-12.)* Is it inherent in the nature of a tribunal that it has incidental jurisdiction to examine whether it was lawfully established? Must an accused, who invokes before a criminal tribunal his or her human right to be tried by a court "established by law", at least have the right that the court examines whether its own establishment was lawful?

2. *(Jurisdiction, paras. 30-39.)*
   a. Were the different armed conflicts in the Former Yugoslavia a threat to international peace (justifying measures under chapter VII of the UN Charter, available on http://www.un.org.)? Does an affirmative answer depend on the classification of the conflicts as international armed conflicts? Can a non-international armed conflict be a threat to international peace? Is the establishment of the ICTY a suitable measure to re-establish international peace? Do violations of IHL as such threaten international peace?
   b. Is it possible to say that the ICTY has contributed to re-establishing peace in the former Yugoslavia? In diminishing the number of war crimes committed? Is this final result essential to judge the legality of the establishment of the ICTY in regard to the UN Charter? Does the prosecution of the leaders not render them less likely to compromise during peace negotiations?

3. *(Jurisdiction, paras. 41-48.)* When is an international tribunal established by law? Does the Security Council have the ability to legislate or is its role restricted to the application of norms? Is there a strict differentiation between the creation of rules and their application in international law? Can a tribunal established by an institution that cannot create rules be "established by law"?

4. *(Jurisdiction, paras. 67-70.)* What are the geographical and temporal scopes of application of IHL? Do IHL rules apply to the whole territory of the State confronted with an international conflict? Non-international? Does the IHL of international armed conflicts apply "until the general conclusion of peace" (para. 70)? (*Cf.* Art. 5 of Convention III; Art. 6 of Convention IV; Art. 3 (b) of Protocol I.) Does the law of non-international armed conflicts apply "until a peaceful settlement is achieved" (para. 70)? (*Cf.* Art. 2 (2) of Protocol II.)

5. a. *(Jurisdiction, paras. 72 and 73.)* Which armed conflicts in the Former Yugoslavia can be classified as international? Non-international? Did the participation of the Yugoslav Peoples' Army internationalise the conflict in Croatia? As from what moment? Since Croatia's declaration of independence? Its recognition by other States? Its admission to the UN? Did the Yugoslav army become an occupying force in the regions of Croatia were it remained?

(*Cf.* Art. 2 common to the Conventions.) What could have internationalised the conflict in Bosnia-Herzegovina? Before 19 May 1992? After this date?

b. *(Trial Chamber, Merits, para. 569; Appeals Chamber, Merits, para. 87.)* Why was the conflict in Bosnia-Herzegovina international "from the beginning 1992 until May 19, 1992"? Was that the case even before its declaration of independence of April 1992? Did the Yugoslav Peoples' Army become an occupying power the day of the declaration of independence?

c. *(Jurisdiction, paras. 76 and 136; Trial Chamber, Merits, paras. 564-569; Appeals Chamber, Merits, paras. 87-162.)* Why was the conflict in Bosnia-Herzegovina international after 19 May 1992?

6. *(Jurisdiction, paras. 79-84.)*

a. Why is it important to know if an act can be qualified as a "grave breach"? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions; Art. 85 (1) of Protocol I.)

b. Are there grave breaches of IHL in non-international conflicts? According to the Appeals Chamber? According to the United States? Does the US' opinion apply to conflicts outside of Former Yugoslavia? What are the practical consequences for the United States of their interpretation as to their obligations in regards to certain conflicts such as in Central America? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions; Art. 85 (1) of Protocol I.)

c. In non-international conflicts are civilians not "protected persons"? Is an atrocity committed against a civilian in a non-international armed conflict not committed against a "protected person", and therefore not a "grave breach"? (*Cf.* Arts. 50/51/130/147 respectively of the four Conventions; Art. 85 of Protocol I.)

d. In international armed conflicts are all murders of civilians grave breaches? Must the civilian be "protected"? Who is a "protected civilian"? Which civilians are not "protected civilians"? (*Cf.* Arts. 4 and 147 of Convention IV.)

7. *(Appeals Chamber, Merits, paras. 68-171.)* What conditions are necessary for Tadic's acts to be qualified as 'grave breaches' under Art. 2 of the ICTY Statute? Identify the differences of opinion on the law and the facts between the Appeals Chamber and the Trial Chamber. Is it necessary to qualify the conflict as international in order to punish Tadic's acts?

8. *(Appeals Chamber, Merits Chamber, paras. 99-145.)* Does the Appeals Chamber believe that it must answer the same question as the ICJ in *Nicaragua v. United States*? Does it give the same ruling? Is it admissible for the ICTY to deliberately not follow the case law of the ICJ, even though according to Art. 92 of the UN Charter, the latter is the principal judicial organ of the United Nations? What difficulties does different case law produce?

9. a. *(Appeals Chamber, Merits, paras. 117-123.)* Is a State responsible for the acts committed by its agents in violation of their instructions? When does an individual become a *de facto* State agent? Is a State responsible for the acts committed by its *de facto* agents in violation of their instructions? In the case

of individuals? If they are organised groups? Why is there stricter responsibility for organised groups than for individuals?

b. *(Appeals Chamber, Merits, para. 131.)* What are the conditions for a third State to become responsible for acts committed by armed groups it supports?

c. If all the acts of the VRS can be attributed to the Federal Republic of Yugoslavia (FRY), do the members of these forces automatically become FRY combatants? (*Cf.* Art. 43 of Protocol I.) If they are captured by the Bosnian armed forces do they become prisoners of war? (*Cf.* Art. 4 of Convention III.) At the end of the conflict must they be repatriated to FRY? (*Cf.* Art. 118 of Convention III.) Are Serb civilians also agents of FRY?

10. *(Appeals Chamber, Merits, paras. 150-162.)* What facts brought the Appeals Chamber to conclude that the FRY had overall control over VRS? Are they all convincing? Is the fact that FRY signed the Dayton Agreement on behalf of the Bosnian Serbs a clue? Could FRY have helped VRS after Bosnia-Herzegovina's independence in the same way the United States did for the contras in Nicaragua? How could it have done this without becoming responsible for all its acts? According to the Appeals Chamber case law, would the United States have been responsible for all the acts of the contras?

11. *(Jurisdiction, para. 76; Appeals Chamber, Merits, paras. 163-169.)* Is the *reductio ad absurdum* of the ICTY in paragraph 76 of the Decision on Jurisdiction convincing? If the conflict in Bosnia-Herzegovina is international because the Bosnian Serbs are Yugoslav agents, is the murder of a Muslim by a Serb a grave breach and the murder of a Serb by a Muslim not? In the light of the law of international armed conflicts is this an absurd conclusion? How does the Appeals Chamber avoid this result in its decision on the Merits? (*Cf.* Arts. 4 and 147 of Convention IV.)

12. *(Jurisdiction, para. 76; Appeals Chamber, Merits, paras. 163-169.)*

a. According to Art. 4 of Convention IV, who is a 'protected person'? According to the Appeals Chamber? Did it change its opinion between its decision on jurisdiction and its ruling on the merits?

b. Is the protection of refugees and neutral nationals dependent on their nationality or their effective need for protection? (*Cf.* Arts. 4 (2), 44 and 70 (2) of Convention IV.) If the protection of refugees and neutral nationals depends on their effective need for protection, can we conclude that IHL gives the status of 'protected person' to all those who have an effective need for protection? To protect, does IHL always look at "the substance of relations, not to their legal characterisation as such"? (Appeals Chamber, Merits, para. 168.)

c. Does the allegiance criteria, taken as a factor defining the status of protected person, apply only in Former Yugoslavia? Only to inter-ethnic conflicts? To all international conflicts? Even to non-international conflicts?

d. For the fighting factions and the humanitarian actors who have to apply IHL, is it easier and more practical to apply the criteria of allegiance or that of

nationality? If you are a detained civilian will you claim non-allegiance to your captor, in order to gain protected person's treatment?

e. Has a government that forcibly enrols a person who broke his allegiance - or commits this person to military duties - committed a grave breach? (*Cf.* Arts. 50 and 130 of Convention III; Arts. 40, 51 and 147 of Convention IV.)

f. Does the Appeals Chamber mention precedents from practice in favour of its interpretation? Is it obliged to do so? In an international armed conflict, do States give their own citizens extended legal protection as soon as their allegiance shifts to the enemy?

g. Does the fact that the Appeals Chamber applies its new interpretation of Art. 4 of Convention IV to Tadic's past actions violate the principle *nullum crimen sine lege?* Is it necessary to qualify Tadic's victims as 'protected persons' to punish his acts? As grave breaches to the Geneva Conventions? As violations of the laws and customs of war?

13. *(Jurisdiction, paras. 86-136.)*

a. When does a violation of IHL come under Article 3 of the ICTY Statute? Is a serious violation of customary IHL sufficient? Of IHL of non-international armed conflicts? Of customary IHL of non-international armed conflicts?

b. Considering the interpretation the Court has given to Art. 3 of the ICTY Statute, why does the decision contain such a detailed analysis of customary IHL of non-international armed conflicts (Jurisdiction, paras. 96-136.)? Is this analysis necessary to establish the jurisdiction of the ICTY to judge Tadic for the rape, torture and murder of prisoners? Could the ICTY not simply have applied Art. 3 common to the Conventions and Protocol II? Why are Protocols I and II not mentioned in the ICTY Statute? Was the fear of breaching the principle of *nullum crimen sine lege* (Jurisdiction, para. 143.) justified in the light of the fact that the Former Yugoslavia and its successor States were parties to Protocols I and II?

c. *(Jurisdiction, paras. 99 and 109.)* What are the specific difficulties of ascertaining customary rules of IHL? How can the ICRC contribute to the development of the customary rules? Can its practice contribute to the formation of the material element of custom? *Opinio juris?* Both? Neither?

d. Did the Court decide which rules of IHL customarily apply to non-international armed conflicts? Which of these customary laws set out individual penal responsibility for those who violate them? May we deduce from paragraph 89 of the decision on the jurisdiction that serious violations of the Hague Regulations on international armed conflicts fall under Art. 3 of the ICTY Statute, even if they were committed during a non-international armed conflict?

e. *(Jurisdiction, para. 97.)* Does the distinction between international and non-international armed conflicts lose significance "as far as human beings are concerned"? Are there IHL rules protecting interests other than those of 'human beings'? Is it logically or morally conceivable for States to claim to be allowed to use in non-international conflicts weapons that are banned in international ones (Jurisdiction, paras. 119-126.)? In other areas of IHL, such

as the protection and status of persons, is a distinction logically or even morally conceivable?

f. Do paragraphs 128-136 of the decision on jurisdiction simply mean that the acts of Tadic fall under the competence of the ICTY, or do they also mean that third States have the obligation or the right to prosecute such acts committed during non-international armed conflicts elsewhere in the world? How would you formulate the rule established by the ICTY? Does it correspond to State practice? In 1992? In 1995? In 2005?

g. *(Jurisdiction, paras. 89, 94 and 143.)* Must a rule from the Geneva Conventions be customary for the ICTY to be able to judge if Tadic violated it?

h. *(Jurisdiction, para. 135.)* If we estimate, contrary to the ICTY, that State practise in pursuing violations of IHL of non-international conflicts does not permit a claim of a customary rule entailing individual penal responsibility, is Tadic necessarily a victim of a violation of the *nullum crimen sine lege* principle?

14. *(Trial Chamber, Merits, paras. 562-568.)* What differentiates non-international armed conflict from banditry or terrorism? Is there a minimum level beneath which Art. 3 common to the Conventions does not apply?

15. *(Trial Chamber, Merits, paras. 573-575.)* During a non-international armed conflict in a given State, do all murders of civilians in this State represent a violation of Art. 3 common to the Conventions? Must there be a link between the conflict and the murder? Must there be a link between the offender and a party to the conflict?

16. *(Trial Chamber, Merits, para. 615.)* Which persons does Art. 3 common to the Conventions protect? Is this the same category of people as 'protected persons' under the IHL of international armed conflicts?

17. *(Trial Chamber, Merits, para. 626.)* What constitutes a crime against humanity? In customary law? Under the ICTY Statute?

18. *(Appeals Chamber, Merits, paras. 248-270.)*

a. What link must there be between the crime and the armed conflict for it to be a crime against humanity? Can an act committed for personal reasons be a crime against humanity? Are the examples mentioned by the Chamber in para. 269 really acts motivated by personal reasons? Is the *reductio ad absurdum* really convincing?

b. Is it a crime against humanity when the offender, under cover of a general or systematic attack, kills his neighbour in the hope of wedding the latter's wife? When the chosen method is to denounce the neighbour as an enemy to those committing a general or systematic attack on the civilian population? What are the advantages and disadvantages of extending the concept of crime against humanity in this way?

c. In criminal law, do motives ever have a role in determining if an act comes under penal dispositions?

19. *(Appeals Chamber, Merits, paras. 282-304.)*
    a. Are the acts set out in Art. 5 (a)-(g) of the ICTY Statute crimes against humanity if there was no discriminatory intent? If a police officer takes advantage of a general attack on a civilian population to arrest an innocent person with whom he has a dispute over inheritance, is this a crime against humanity?
    b. Can discriminatory persecutions, dependent on distinctions not enumerated in Art. 5 (h) of the Statute, come under the other letters of the article? Is this a sufficient reason to renounce all discriminatory intention under these letters? Does the risk of legal gaps justify a broad interpretation of penal law?
    c. What are the importance of the Secretary-General's Report and the declarations of certain States for the interpretation of the ICTY Statute? Must a Security Council Resolution be interpreted as a treaty? Or are the declarations of State members of the Council more important in the interpretation of a Council resolution than the declarations made during a diplomatic conference in the interpretation of a treaty adopted by the latter? If no State denounced the interpretation made by three of the permanent members of the Security Council, can the ICTY nevertheless ignore it? At least if the text is clear and does not lead to a result that is obviously absurd or unreasonable?
    d. How come the report of the Secretary-General and the declarations of the member states are important in justifying the (extensive) interpretation of Art. 3 of the Statute (*Cf.* A. Jurisdiction, paras. 75, 88 and 143.) but are not when they oppose an extensive interpretation of Art. 5 of the Statute?

20. *(Trial Chamber, Merits, paras. 638-643.)* Can killing a combatant during a general or systematic attack against a civilian population be a crime against humanity? In these circumstances is torturing a prisoner of war a crime against humanity? Is the killing of "[a] head of a family who under such circumstances tries to protect his family gun-in-hand" or of a "local defence guard doing the same" (para. 640.) a violation of IHL? A crime against humanity? Are this "head of a family" or this "local defence guard" civilians or combatants? If they are civilians are they allowed to commit acts of violence against the opposing forces? Under what circumstances? (*Cf.* Art. 4 (4) of Convention III; Arts. 43 (2), 48 and 51 (2)-(3) of Protocol I.)

21. a. *(Appeals Chamber, Merits, paras. 185-195 and 229.)* When is a person aider and abettor or instigator of a crime? A co-perpetrator of a crime? When is a co-perpetrator responsible for the acts committed by the other perpetrators?
    b. *(Appeals Chamber, Merits, paras. 204-228.)* Under what circumstances is Tadic responsible for the crimes committed by his comrades which go beyond the common plan? What rule did the Trial Chamber apply? What rule is foreseen in common law? Italian law? French? German? Dutch? What rule did the Appeals Chamber apply? Is it sufficient that the result was predictable and that Tadic was indifferent to it? The fact that he consciously took the risk that the acts committed by his comrades would lead to the results we now know? Is it necessary that the results were inevitable or probably linked to the

common plan and that he accepted that they would take place? Is he responsible even if he hoped the outcome would not take place?

c. *(Appeals Chamber, Merits, para. 220.)* Must the common purpose of co-perpetrators, leading to their responsibility for individual acts going beyond this purpose, be criminal as well? Is a military operation that is legal under IHL (such as occupying a village controlled by the enemy) also sufficient as a starting point? If the operation is an act of aggression?

d. *(Appeals Chamber, Merits, paras. 225-226.)* Does the Appeals Chamber consider that the rule it is developing corresponds to a general principle of law? If national laws were in agreement on this, would this then mean that there is a rule of customary international criminal law? According to the Appeals Chamber what is missing for there to be such a rule of international criminal law? Why would the rule developed by the Appeals Chamber still be customary?

e. Is the rule developed by the Appeals Chamber compatible with the status of combatant? With the principle of individual criminal responsibility? Is a combatant free to join an armed force (which he knows pursues objectives contrary to IHL), as a criminal is to join a criminal group? Is a combatant, who joins a pillaging armed group, responsible, according to the judgement, of the murders committed by his comrades of civilians resisting the pillage? Even if he personally does not commit murder? Even if although he occupies villages that will be pillaged he does not participate in this? Even if his motive is the defence of his country?

22. *(Trial Chamber, Merits, paras. 540-553.)* What are the specific difficulties in assessing the credibility of witnesses in an interethnic conflict: in establishing the responsibility of the opposing parties? In establishing the individual responsibility of someone from a different ethnic group than the witness?

23. *(Trial Chamber, Merits, paras. 239-241.)* When a prisoner was detained in a camp where many others were killed, where he was mistreated, where he was separated from his comrades and was never seen again even by his family, can one assume that he is dead? For the purpose of delivering a death certificate to his family? For convicting those who participated in his detention and mistreatment?

24. What are the four most important statements in this case for IHL? What do they mean for IHL? For the victims of war? What are the advantages and risks of these statements for the victims of future conflicts?

Case No. 181, ICTY, The Prosecutor v. Martic, Rule 61 Decision

THE CASE

[**Source:** International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Case No. IT-95-11-I, March 8, 1996; footnotes omitted.]

THE PROSECUTOR
v.
MILAN MARTIC

DECISION

[...]

I. INTRODUCTION

[...]

3. [...] [P]roceedings under Rule 61 of the Rules ensure that the Tribunal, which does not have any direct enforcement powers, is not rendered ineffective by the non-appearance of the accused and may proceed nevertheless. To this end, if the Trial Chamber is satisfied that the charges are reasonable, after it has again confirmed the indictment, it shall issue an international warrant of arrest against the accused. Furthermore, should the Trial Chamber be satisfied that failure to execute the warrants of arrest is due in whole or in part to the refusal of a State to cooperate, the President of the Tribunal shall notify the Security Council. The review of the indictment by a panel of Judges sitting in a public hearing reinforces the confirmation decision and, when they are summoned to appear, provides the victims with the opportunity to have their voices heard and to become a part of history.

II. REVIEW OF THE INDICTMENT

A. CHARGES

4. Milan Martic is accused of having knowingly and wilfully ordered the shelling of Zagreb with Orkan rockets on May 2 and 3, 1995 (counts I and III). The attacks allegedly killed and wounded civilians in the city. Milan Martic is also accused of being responsible of the shelling because of his position of authority and his alleged failure to prevent the attack or to punish the perpetrators (counts II and IV). During the hearing, the Prosecutor stated that he was presenting the latter two counts in the alternative. [...]

B. COMPETENCE OF THE TRIBUNAL UNDER ARTICLE 3 OF THE STATUTE

5. [...] In its Decision of October 2, 1995 in the *Tadic* case (IT-94-I-AR72, hereinafter "Decision of the Appeals Chamber") [*See* **Case No. 180**, ICTY, The

Prosecutor v. Tadic. [*Cf.* A., Jurisdiction.] p. 1804.], the Appeals Chamber stipulated that Article 3 [*See* **Case No. 179**, UN, Statute of the ICTY. p. 1791.] refers to a broad category of offences, namely, all "violations of the laws or customs of war" and that the enumeration of some of these violations provided in Article 3 are merely illustrative and not exhaustive. Since the violation identified by the Prosecutor is not fully covered by paragraphs (a) to (e) of Article 3, the Trial Chamber must verify that it constitutes a violation of the laws or customs of war referred to in the Article. Since the Appeals Chamber set a certain number of conditions for establishing the jurisdiction of the Tribunal pursuant to Article 3, the Trial Chamber must therefore be satisfied that these conditions appear to have been fulfilled at this stage.

1. Identification of Rules of International Humanitarian Law

[...]

8. *Violations of the rules of conventional law* fall within the purview of Article 3 of the Statute *qua* treaty law. The Appeals Chamber has specified that this Article must be interpreted to include violations of Additional Protocols I and II. All the States which were part of the former Yugoslavia and parties to the present conflict at the time the alleged offences were committed were bound by Additional Protocols I and II, applicable to international and non-international armed conflicts respectively. Under the terms of these additional Protocols, attacks against civilians are prohibited. Articles 85 (3) (a) of Additional Protocol I provides that making the civilian population or individual civilians the object of attack constitutes a grave breach, when committed wilfully in violation of the relevant provisions of the Protocol, and causing death or serious injury to body or health. Grave breaches of Additional Protocol I constitute war crimes and are subject to prosecution under Article 3 of the Statute. Furthermore, violations of Article 51 (2), stating that "the civilian population as such, as well as individual civilians, shall not be the object of attack" and prohibiting "acts or threats of violence, the primary purpose of which is to spread terror among the civilian population", fall within the competence of the Tribunal under Article 3. Similarly, violations of paragraph 6 of that same Article, which expressly prohibits "attacks against the civilian population or civilians by way of reprisals", come within the province of the Tribunal as defined in Article 3 of the Statute. Last, in respect of Additional Protocol II, Article 13 (2) provides that the "civilian population as such, as well as individual civilians, shall not be the object of attack". Paragraph 1 of that same article stipulates that this rule must be observed "in all circumstances" so that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations". Violations of the Additional Protocol II constitute violations of the laws or customs of war and, as such, come under Article 3 of the Statute.

9. The unqualified character of the conventional rules prohibiting attacks against civilians is also underpinned by Article 60 (5) of the 1969 Vienna Convention on the Law of Treaties. This provision excludes the application of

the principle of reciprocity in conventional matters, in cases of material breaches of provisions of a treaty "relating to the protection of the human person contained in treaties of humanitarian character".

10. *As regards customary law* the rule that the civilian population as such, as well as individual civilians, shall not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts.

11. There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterisation as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed, the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited and the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law (paragraph 127, Decision of the Appeals Chamber).

12. The applicability of these rules to all armed conflicts has been corroborated by General Assembly resolutions 2444 (XXIII) and 2675 (XXV), both adopted unanimously, in 1968 and 1970 respectively. These resolutions are considered as declaratory of customary international law in this field. The customary prohibition on attacks against civilians in armed conflicts is supported by its having been incorporated into both Additional Protocols. Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, both mentioned above, prohibit attacks against the civilian population as such, as well as individual civilians. Both provisions explicitly state that this rules shall be observed in all circumstances. The Appeals Chamber reaffirmed that both articles constitute customary international law.

13. Furthermore, the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the "Martens clause". This clause has been incorporated into basic humanitarian instruments and states that "in cases not covered by (the relevant instruments), 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". Moreover, these norms also emanate from the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.

14. It is sufficient to recall at this point that the elementary considerations of humanity are reflected in Article 3 Common to the Geneva Conventions. This provision embodies those rules of customary international law which should be observed "as a minimum" by all parties" at any time and in any place whatsoever" irrespective of the characterisation of the conflict. The prohibition to attack civilians must be derived from Common Article 3 which

provides that "persons taking no active part in the hostilities ... shall, in all circumstances, be treated humanely" and which prohibits, in paragraph 1 (a), "violence to life and person, in particular, murder of all kinds, mutilation ...". Attacks against the civilian population as such or individual civilians would necessarily lead to an infringement of the mandatory minimum norms applicable to all armed conflicts. Article 4 of Protocol II, further developing and elaborating Common Article 3, reiterates these fundamental guarantees.

15. Might there be circumstances which would exclude unlawfulness, in whole or in part? More specifically, does the fact that the attack was carried out as a reprisal reverse the illegality of the attack? The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 Common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered wrongful. The International Court of Justice considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law (*Case concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. United States of America, merits, I.C.J. Reports 1986, paragraph 220).

16. The prohibition on reprisals against the civilian population or individual civilians which is applicable to all armed conflicts, is reinforced by the texts of various instruments. General Assembly resolution 2675, underscoring the need for measures to ensure the better protection of human rights in armed conflicts of all types, posits that "civilian populations, or individual members thereof, should not be the object of reprisals". Furthermore, Article 51 (6) of Protocol I, mentioned above, states an unqualified prohibition because "in all circumstances, attacks against the civilian population or civilians by way of reprisals are prohibited". Although Protocol II does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision. Prohibited behaviour must remain so "at any time and in any place whatsoever". The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of "collective punishments" in paragraph 2(b) of Article 4 of Protocol II.

17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even

when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.

18. Last, even if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law. There exists no formal provision forbidding the use of cluster bombs in armed conflicts. Article 35 (2) of Additional Protocol I prohibits the employment of "weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury". In addition, paragraph 4(b) of Article 51 of that same Protocol states that indiscriminate attacks are prohibited. These include attacks "which employ a method or means of combat which cannot be directed at a specific military objective". Last, under the terms of paragraph 5(b) of that same article, attacks must not cause damage and harm to the civilian population disproportionate in relation to the concrete and direct military advantage anticipated.

2. Other Conditions

19. [...] The Appeals Chamber considered that, in order for a violation of international humanitarian law to fall within the jurisdiction of the Tribunal pursuant to Article 3 of its Statute, it must, in fact, be serious. The Appeals Chamber identified two criteria for evaluating "seriousness": the violation must undermine important values and it must have serious consequences for the victim or victims. In this respect, the norm which has been violated stems from elementary considerations of humanity and protects the civilian population or individual civilians from attack. The violation of the norm thus jeopardises the survival and safety of the civilian population and, in so doing, infringes on an important value. Furthermore, it has grave consequences for the victims.

20. The Appeals Chamber also clearly stated that for a violation of a norm of humanitarian law, to fall within the jurisdiction of the Tribunal, it must involve the individual criminal responsibility of the perpetrator of the violation. The prohibition against attacking the civilian population as such or individual civilians during armed conflicts is clear, as is the resolve of States to attach to it the principle of individual responsibility. As the Appeals Chamber reaffirmed, citing the judgement of the International Military Tribunal at Nuremberg: "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (paragraph 128, Decision of the Appeals Chamber). The principle of criminal responsibility, restated in Article 7 (1) of the Statute of this Tribunal, covers the person who planned, instigated, ordered, committed or otherwise aided and abetted n the planning, preparation or execution of a crime. International law thus permits the prosecution of individuals who acted in an official capacity, as stated in Article 7 (2) of the Statute.

21. The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able

to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes. In a Decision of 16 May 1995, this Trial Chamber considered that such persons "more so than those just carrying our orders (...) would thus undermine international public order" (Karadzic, Mladic and Stanisic, IT-95-5-D, official request for deferral, paragraph 25). Since the criminal intent is formulated at a high level of the administrative hierarchy, the violation of the norm of international humanitarian law is part of a system of criminality specifically justifying the intervention of the Tribunal.

22. The competence of the Tribunal, subject to a contrary interpretation of the merits, in any subsequent trial, is thus established.

C. THE FACTS

[...]

24. As regard the military and political situation prevailing at the time of the attacks on Zagreb in May 1995, there can be no question that the armed forces of the Republic of Croatia and the armed forces of the self-proclaimed Republic of Serbian Krajina were engaged in an armed conflict. It was also made clear that the armed forces of the Federal Republic of Yugoslavia supported the self-proclaimed Republic of Serbian Krajina at that time. The evidence submitted shows that on 1 May 1995, the Croatian army launched a massive attack against the territory held by the Serbs in western Slavonia, a region located directly along the Zagreb-Belgrade highway which is the main east-west artery in Croatia. During the fighting in this region of eastern Slavonia, the city of Zagreb was shelled on 2 and 3 May 1995.

25. The relevant parts of the record and the testimony heard during the hearing demonstrate that the shelling of Zagreb was ordered by Milan Martic. At the time these acts occurred, Milan Martic was the president of the self-proclaimed Republic of Serbian Krajina. Pursuant to Rule 78, paragraph 5 of the constitution of that self-proclaimed entity, "the President commands the armed forces in times of peace and war, commands the national resistance in time of war, orders partial or general mobilisation, and organises military preparations in accordance with the provisions of the law". After the shelling, in television and radio interviews and in interviews with newspaper journalists, Milan Martic admitted several times that he was the person who gave the order ".

26. Furthermore, the facts submitted by the Prosecutor permit the inference that the shelling of Zagreb was an operation which had been planned or prepared. Admitting that he was under orders from Milan Martic, General Celeketic announced to the press on 24 March 1995, more than a month prior to the events on which the charges are based, that should a Croatian offensive be launched, he expected to respond by targeting the "weak

points", that is, "the parks of the Croatian cities". General Celeketic added: "we know who the people in the parks are - civilians". [...]

28. As regards the attacks themselves, the testimony of Sergeant Curtis, a member of the Office of the Prosecutor, and of the two police officers from Zagreb shows that on the morning of 2 May 1995, three rockets struck the centre of the city of Zagreb while three others hit a site near the civilian airport. On 3 May 1995, during the lunch hour, two rockets again fell on the centre of the city and three others on nearby neighbourhoods. Seven people died in the two attacks, more than 100 were seriously wounded, and an equal number were slightly wounded. All the testimony corroborates the assertion that none of these people was, or could be presumed to have been, performing a military duty.

29. As the photographs and the video tape produced during the hearing show, there was significant physical damage which could have been much more serious. It appears both from the documents produced and the testimony heard that a high school, a children's hospital, a retirement home, and the National Academy were damaged. According to the witnesses, there were no military targets in the immediate vicinity. It is noted, however, that the administration building of the Ministry of the Interior was also allegedly hit during the attack of 2 May. In addition, the witnesses emphasised that there were no military targets near the places where the civilians were killed. All asserted that the number of deaths might have been much higher. The fact that there were few civilians in the streets of Zagreb during the second attack can be attributed to the climate of terror generated by the attack of the previous day. The frightened population chose to desert the streets during the lunch hour, which certainly reduced the number of casualties this type of shelling might have caused.

30. The weapons expert clearly elaborated the features of the Orkan rockets and the bombs they release. From his testimony it appears that the People's Yugoslav Army (JNA) developed the rockets used during the attacks on Zagreb. The effects of these rockets have been known for many years. The rockets in question were equipped with 288 bomblets each of which, on explosion, propels jagged bits of metal and more than 400 small steel spheres in every direction. The rockets have a range of about 50 kilometres with a lethal radius of about 10 metres. Unlike missiles which can be guided towards the desired target, these rockets are relatively inaccurate because the lateral error factor can be as much as 600 metres on either side. The bombs released by the rockets have a dual purpose: they can be used both as an anti-personnel weapon and as a means of inflicting damage on light artillery since they can penetrate more than 60 millimetres of steel. The military expert believed that because they are inaccurate and have a low striking force, the choice of the Orkan rockets for the attack on Zagreb would not have been appropriate had the purpose been to damage military targets. In respect of this, the expert referred to a set of photographs which show minor damage to buildings in Zagreb during the attacks of May 1995.

In his opinion, it is therefore reasonable to believe that attacking and terrorising the civilian population was the main reason for using such rockets. Finally, the expert stated that the rockets were launched from a region less than 50 kilometres from Zagreb controlled by the armed forces of the self-proclaimed Republic of Serbian Krajina. The region presents the type of geophysical conditions which lend themselves to this type of operation.

31. Based on the evidence produced and the testimony heard, the Trial Chamber is satisfied that there are reasonable grounds for believing that on May 2 and 3, 1995, the civilian population of the city of Zagreb was attacked with Orkan rockets on orders from Milan Martic, the then president of the self-proclaimed Republic of Serbian Krajina. The attacks killed and wounded many civilians. In respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military targets but to terrorise the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law already discussed above and fall within the jurisdiction of the Tribunal pursuant to Article 3 of the Statute.

32. The Chamber therefore is satisfied that there is reason to reconfirm all four counts of the indictment against Milan Martic and to issue an international arrest warrant against him which will be sent to all States. [...]

[...]

DISCUSSION

1. *paras. 8, 11-14, 24*: Was the armed conflict between the Republic of Croatia and the self-proclaimed Republic of Serbian Krajina an international armed conflict or a non-international armed conflict? Under which conditions could it be qualified as international? Does the Chamber qualify the conflict?

2. a. *para. 8*: Does every attack wilfully killing and wounding civilians violate Protocols I and II? If not, in which cases are the Protocols violated? Are the conditions different under Protocol I and Protocol II? Does every attack directed at civilians violate Protocols I and II? (*Cf.* Art. 51 of Protocol I and Art. 13 of Protocol II.)

   b. *paras. 8, 11-14*: Does the Chamber see any difference between customary IHL and the Protocols as far as the prohibition of attacks wilfully killing and wounding civilians is concerned? Can the extent of that prohibition already be derived from the "Martens clause" and from Article 3 common to the Conventions? Is Article 3 common applicable to the conduct of hostilities? Are Article 51 of Protocol I and Article 13 of Protocol II in their entirety customary?

   c. *paras. 25-31*: What arguments convince the Chamber that the attacks were actually directed at the civilian population?

d. *paras. 30-31*: Does the Chamber consider Orkan rockets as a means of combat which cannot be directed at a specific military objective? What other conclusions does the Chamber draw from the testimony of the weapons expert?

3. *paras. 9, 15-18*:
   a. Is every attack affecting the civilian population prohibited by Protocol I also unlawful if committed as a proportionate reprisal aimed at stopping similar unlawful attacks by the enemy?
   b. Does Protocol II prohibit reprisals consisting of proportionate violations of Protocol II aimed at stopping similar violations by the adverse party? Is the very concept of reprisals imaginable in non-international armed conflicts? (*Cf.* Art. 13 of Protocol II.)
   c. Does Article 60 (5) of the Vienna Convention on the Law of Treaties imply that any reprisals consisting of violations of IHL treaties are unlawful? Is there a difference between reprisals and the ending or suspension of the operation of a treaty because of a substantial breach?
   d. Are attacks directed at the civilian population as a proportionate reprisal aimed at stopping similar unlawful attacks by the enemy prohibited by customary IHL?

4. *paras. 20, 21*: What reasons does the Chamber give for holding that attacks against the civilian population involve the individual criminal responsibility of the perpetrator? Is the fact that the accused was in a position of authority a valid argument?

Case No. 182, ICTY, The Prosecutor v. Rajic, Rule 61 Decision

THE CASE

[**Source:** International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, Case No. IT-95-12-R61, September 13, 1996.]

PROSECUTOR
v.
IVICA RAJIC (a/k/a VIKTOR ANDRIC)

REVIEW OF THE INDICTMENT PURSUANT TO RULE 61 OF THE RULES OF PROCEDURE AND EVIDENCE

[...]

A. The Charges

1. Ivica Rajic is accused of ordering the October 23, 1993 attack against the village of Stupni Do, which was located in the Republic of Bosnia-

Herzegovina. The attack was allegedly carried out by the Croatian Defence Council ("HVO"), which are identified as the armed forces of the self-proclaimed Croatian Community of Herceg-Bosna ("HB"), acting under Ivica Rajic's control. Ivica Rajic is charged under six counts: Count I - a grave breach of the Geneva Conventions of 1949, as recognised by Article 2 (a) (wilful killing) of the Statute of the International Tribunal ("Statute"); Count II - a grave breach of the Geneva Conventions of 1949, as recognised by Article 2 (d) (destruction of property) of the Statute; and Count III - violations of the laws and customs of war, as recognised by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute. [...]

B. Preliminary Matters

2. [...] Rule 61 proceedings [...] give the Prosecutor the opportunity to present in open court the indictment against an accused and the evidence supporting such indictment. Rule 61 proceedings therefore are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated. If the Trial Chamber determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged in the indictment, it shall issue an international arrest warrant. The issuance of such a warrant, with which all States that are Members of the United Nations are obliged to comply, enables the arrest of the accused if he crosses international borders. After a Rule 61 proceeding the President of the International Tribunal may notify the Security Council of the failure of a State to cooperate with the International Tribunal. The Prosecutor has submitted material in which it is asserted that failure to effect personal service of the indictment on Ivica Rajic is due in whole or in part to the failure of the Republic of Croatia and the Croatian Community of Herzeg-Bosna to cooperate with the International Tribunal.

3. A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding. The only determination the Trial Chamber makes is whether there are reasonable grounds for believing that the accused committed the crimes charged in the indictment. [...]

C. Subject-Matter Jurisdiction

[...]

1. Article 2 of the Statute - Grave Breaches

[...]

8. Because the crimes alleged by the Prosecutor were directed against civilian persons and property, the Geneva Convention relevant to this case is [...] Geneva Convention IV [...]. Based on the provisions of this Convention, the

Trial Chamber first considers whether the Prosecutor has shown sufficiently that the alleged attack on Stupni Do took place during an international armed conflict and then addresses the issue of whether the attack involved persons and/or property protected under Geneva Convention IV.

a. International Armed Conflict

9. The evidence submitted by the Prosecutor indicates that the attack on the village of Stupni Do was part of the clashes occurring in central and southern Bosnia between the HVO [...] on the one hand, and the forces of the Bosnian Government on the other. [...]

11. [...] The conflict between the HVO and Bosnian Government forces [...] should be treated as internal unless the direct involvement of a State is proven. Thus, the issue of whether the alleged attack on the civilian population of Stupni Do was part of an international armed conflict turns on the existence and extent of outside involvement in the clashes between the Bosnian Government forces and the HVO in central and southern Bosnia.

[...]

i. Direct Military Intervention by Croatia

13. The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one. The evidence submitted by the Prosecutor provides reasonable grounds to believe that between 5000 to 7000 members of the Croatian Army [HV], as well as some members of the Croatian Armed Forces ("HOS"), were present in the territory of Bosnia and were involved, both directly and through their relations with HB and the HVO, in clashes with Bosnian Government forces in central and southern Bosnia. [...]

17. [...] Documents suggest that HV soldiers serving in the HVO were not volunteers, but rather were mobilized by Croatia and were serving in their capacity as HV soldiers with a special status within the HVO.

18. The above conclusion is supported by witness statements reported sightings of entire brigades of Croatian Army troops in Bosnia. [...] It is unlikely that units of this size would of their own accord volunteer for service in a foreign country. Moreover, witnesses testified to seeing military equipment such as tanks, helicopters and artillery bearing Croatian Army insignia in central and southern Bosnia. [...] It does not seem probable that such equipment could have been transported to Bosnia by volunteers without the cooperation of the Croatian Government. [...]

21. [...] There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993.

ii. Croatia's Control of the Bosnian Croats

22. The Chamber's finding regarding the nature of the conflict stated above is all that is necessary to meet the international armed conflict requirement of Geneva Convention IV. Nonetheless, for purposes of the Prosecutor's arguments regarding persons protected under Geneva Convention IV, which are discussed below, the Chamber believes it appropriate to consider the Prosecutor's additional argument that the conflict between the Bosnian Government and HB may be regarded as international because of the relationship between Croatia and HB. The Prosecutor has asserted that Croatia exerted such political and military control over the Bosnian Croats that the latter may be regarded as an agent or extension of Croatia.

23. The Trial Chamber believes that an agency relationship between Croatia and the Bosnian Croats - if proven at trial - would also be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international in character.

24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 Draft Articles on State Responsibility. Draft Article 8 provides in relevant part that the conduct of a person or a group of persons shall "be considered as an act of the State under international law" if "it is established that such person or group of persons was in fact acting on behalf of that State". 1980 II (Part Two) Y.B. Int'l L. Commission at p. 31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of Nicaragua, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.

Nicaragua, 1986 I.C.J. Rep. 109. It found that the United States had financed, organised, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasise that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the "general control by the [United States] over a force with a high degree of dependency on [the United States]" was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. 115. In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over [...] acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.

26. The evidence submitted in this case establishes reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1993. It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats. [...]

29. In addition to the evidence of Croatian domination of the military institutions of the Bosnian Croats described above, the Prosecutor has also provided the Trial Chamber with material that suggests that the Bosnian Croat political institutions were influenced by Croatia. [...]

30. In its 7 April 1992 decision recognising the existence of the Republic of Bosnia and Herzegovina, Croatia explicitly stated that recognition of Bosnia implied that "the Croatian people, as one of the three constituent nations in Bosnia and Herzegovina, shall be guaranteed their sovereign rights "and granted Bosnian Croats the right to Croatian citizenship. [...]

31. [...] Perhaps most tellingly, at the time of the conclusion of the Dayton Peace Agreement, the Foreign Minister of the Republic of Croatia, Mate Granic, wrote to the foreign ministers of several States assuring them that the Republic of Croatia would take all necessary steps "to ensure that personnel or organisations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [sic] and comply with the provisions of [certain portions of the Dayton Peace Agreement]". *Letter dated*

29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. GAOR, 50th Sess., U.N. SCOR, 50th Sess., at 126-130, U.N. Doc. A/50/790 & S/1995/999 (30 Nov. 1995) ("*Dayton Peace Agreement*").

[....]

b. Protected Persons and Property

33. Having concluded that the attack on Stupni Do was part of an international armed conflict, the Trial Chamber now turns to the second requirement for the application of Article 2 of the International Tribunal's Statute: whether the alleged crimes were "against persons or property protected under the provisions of the relevant Geneva Convention". [...]

i. Protected Persons

34. Article 4 of Geneva Convention IV, which addresses the protection of civilian persons in time of war, reads in pertinent part:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Under this definition, Bosnian civilian victims qualify as "protected persons" if they are "in any manner whatsoever ... in the hands of a Party to the conflict ... of which they are not nationals". The Prosecutor asserts that the HVO forces under the command of Ivica Rajic were under the control of Croatia to such an extent that Bosnian persons who were the object of the attack by Ivica Rajic's forces may be regarded as being in the hands of Croatia.

35. The Trial Chamber has found that HB and the HVO may be regarded as agents of Croatia so that the conflict between the HVO and the Bosnian Government may be regarded as international in character for purposes of the application of the grave breaches regime. The question now is whether this level of control is also sufficient to meet the protected person requirement of Article 4 of Geneva Convention IV.

36. The International Committee of the Red Cross's Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words "at a given moment and in any manner whatsoever" were "intended to ensure that all situations and all cases were covered".

[...] *Commentary on Geneva Convention IV* [...] [a]t page 47 [...] notes that the expression "in the hands of " is used in an extremely general sense.

> [...] In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question.

37. The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do. [...] Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of this area. Thus, although the residents of Stupni Do were not directly or physically "in the hands of" Croatia, they can be treated as being constructively "in the hands of" Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were - for the purposes of the grave breaches provisions of Geneva Convention IV - protected persons *vis à vis* the Bosnian Croats because the latter were controlled by Croatia. The Trial Chamber notes this holding is solely for the purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.

ii. Protected Property

38. Geneva Convention IV also contains several provisions that set out the types of property that are protected under the Convention. The Prosecutor has suggested that Article 53 of the Convention is the appropriate definition in this case. Article 53 provides as follows:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The Prosecutor argues that when Stupni Do was overrun by HVO forces under the command of Ivica Rajic and came under their control, "the property of Stupni Do became protected property in terms of Article 53... [because] it was [Bosnian] property under the control of HVO forces, who are to be regarded as part of the opposite side, namely Croatia, in an international conflict". [...]

39. Article 53 describes the property that is protected under the Convention in terms of the prohibitions applicable in the case of an occupation. Accordingly, an occupation is necessary in order for civilian property to be protected against destruction under Geneva Convention IV. The only provisions of Geneva Convention IV which assist with any definition of occupation are Articles 2 and 6. Article 2 states: "The Convention shall also apply to all cases of partial or total occupation ... even if the said occupation meets with no armed resistance" while Article 6 provides that Geneva Convention IV "shall apply from the outset of any conflict or occupation mentioned in Article 2". [...]

42. The Trial Chamber has held that the Bosnian Croats controlled the territory surrounding the village of Stupni Do and that Croatia may be regarded as being in control of this area. Thus, when Stupni Do was overrun by HVO

forces, the property of the Bosnian village came under the control of Croatia, in an international conflict. The Trial Chamber therefore finds that the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV. The Trial Chamber notes this holding is for the sole purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused. [...]

2. Article 3 - Violations of the Laws or Customs of War

[...]

48. In the *Tadic* case the Appeals Chamber established the principle that civilians are protected during internal armed conflicts. *Tadic Appeal Decision on Jurisdiction* at 119, 127. The specific issue of whether an attack on a civilian population constitutes a violation of the laws or customs of war was addressed by Trial Chamber I of the International Tribunal in the *Martic Rule 61 Decision*. Trial Chamber I held that attacks on civilian populations were prohibited under conventional and customary law in both international and internal armed conflicts. With respect to conventional law, the Chamber relied on the provisions of Additional Protocols I and II. It also found a customary prohibition on such conduct based on the Appeals Chamber Decision, resolutions of the United Nations General Assembly, Article 3 Common to the Geneva Conventions and the provisions of Additional Protocols I and II as reflective of customary law. Trial Chamber I further found that the other conditions identified in the Appeals Chamber Decision for the International Tribunal's jurisdiction under Article 3 had been met, *i.e.*, that the violation was serious because it undermined important values and had serious consequences for the victims and involved the individual criminal responsibility of the perpetrator of the violation. *See Martic Rule 61 Decision,* 8, 10, 19, 20. This Trial Chamber agrees with the analysis conducted by Trial Chamber I in the *Martic Rule 61 Decision* and holds that the International Tribunal has jurisdiction under Article 3 of its Statute to entertain the charge of attack against a civilian population. [...]

D. Reasonable Grounds

[...]

51. The evidence submitted by the Prosecutor indicates that Stupni Do was a small village approximately four kilometres south-east of Vares in central Bosnia. In contrast to nearby Vares, Stupni Do had a mostly Muslim population of approximately two hundred and fifty people. Witnesses testified that at approximately eight o'clock on the morning of 23 October 1993, HVO soldiers under the command of Ivica Rajic attacked Stupni Do. On hearing the gunfire which signalled the beginning of the attack, villagers took to shelters, cellars, and other hiding places. Approximately forty lightly armed local villagers, constituting the local defence forces, attempted to defend and protect their families and property. The shooting continued for approximately three hours, but because the villagers were the HVO's only opposition, they

were soon overrun. The village defenders then withdrew to a main shelter to try to protect and warn the people located there. [...]

52. It appears that HVO soldiers went from house to house, searching for village residents. On finding the villagers, the evidence indicates, the HVO forced them out of the shelters and terrorised them. Witnesses statements indicate that the HVO forcibly took money and possessions from the villagers and that they stabbed, shot, raped, and threatened to kill the unarmed civilians they encountered. The HVO soldiers apparently had no regard for the defencelessness of the villagers. For example, four women who were hiding in a cellar were shot at from above. Three of the four died. The one that survived reported that she escaped from the house only to be shot at by the HVO as she ran away towards the woods. Witnesses indicated that they saw the bodies of at least sixteen unarmed residents who appeared to have been murdered in this or a similar manner. In addition, HVO soldiers attempted to burn approximately twelve civilians alive by locking them in a house and setting the house on fire. The civilians eventually managed to escape by breaking the door with an axe. Throughout the attack, HVO soldiers fired exploding phosphorus munitions into the houses, causing them to burst into flames. The HVO soldiers dragged many of the corpses into burning houses. [...]

53. According to the Registrar's Office of the Vares municipality, which was responsible for maintaining Stupni Do's death records, by the time the attack ended, thirty-seven Stupni Do residents were dead. Nearly all of the sixty homes in the village were virtually destroyed. [...]

54. Several witness statements report that Stupni Do had no military significance. The village had no militia to speak of; the "defence force" was made up almost entirely of village residents who came together to defend themselves. [...]

56. [...] There is no evidence that there was a military installation or any other legitimate target in the village. [...]

59. There is proof Ivic Rajic knew about the attack and actually ordered it. [...] Sergeant Ekenheim stated that Ivica Rajic planned the attack and noted that Ivica Rajic had explicitly stated that he took over Stupni Do "because he thought the Bosnian Army would launch an attack against Vares through Stupni Do so they had to neutralise Stupni Do. It was a Bosnian stronghold filled with soldiers and traitors". [...] At one of several meetings with UNPROFOR representatives, Ivica Rajic informed Sergeant Ekenheim and Colonel Henricsson that he would not hurt the civilians, that the troops in Stupni Do were his, and, because he was in charge, he could guarantee that the civilians would not get hurt. [...]

60. It is also evident that HVO troops in the area recognised Ivica Rajic's authority. For example, on the way to Vares, Sergeant Ekenheim and Colonel Henricsson passed a HVO checkpoint at which HVO soldiers said they

could not pass without permission from Ivica Rajic, their commanding officer. [...]

61. Finally, a witness who had been a member of the HVO and the Croatian Armed Forces stated that prior to the attack, most of the local HVO troops were deployed to the front line areas by Ivica Rajic. [...] This witness believes that Ivica Rajic was in charge of the troops because Ivica Rajic had given him a hand-written note authorising him to retain his weapons while going in and out of checkpoints around Stupni Do. When they were meeting for this purpose, Ivica Rajic indicated that he was proud of his men's actions and that the casualties were normal for this type of action. [...] This witness also claims that he saw Ivica Rajic slap an HVO soldier who supposedly released a girl during the Stupni Do attack. [...]

E. Failure to cooperate with the International Tribunal

[...]

66. The Trial Chamber believes that Ivica Rajic has been present in Croatia and in the territory of the Federation of Bosnia and Herzegovina on several occasions since his release. The prosecutor has produced reliable information indicating that Ivica Rajic resides or has been residing in Split in the Republic of Croatia and that he visits Kiseljak, in the Federation of Bosnia and Herzegovina for short periods. [...] In addition, the Trial Chamber has received a power of attorney, signed by Ivica Rajic while in Kiseljak, appointing a Croatian lawyer, Mr. Hodak, as his representative in the proceedings in this case.

67. The Republic of Croatia is bound to cooperate with the International Tribunal pursuant to Article 29 of the Statute. Despite the presence of Ivica Rajic on its territory, the Republic of Croatia has neither served the indictment nor executed the warrant of arrest addressed to it.

68. The Federation of Bosnia and Herzegovina is also bound to cooperate with the International Tribunal, following the signing of the Dayton Peace Agreement. Pursuant to Article X of annex 1-A of the Dayton Peace Agreement, the Federation of Bosnia and Herzegovina has undertaken to "cooperate fully with all entities involved in implementation of this peace agreement ... including the International Tribunal for the Former Yugoslavia". Again, despite the presence of Ivica Rajic on its territory, the Federation of Bosnia and Herzegovina has neither served the indictment nor executed the warrant of arrest addressed to it.

69. In a side letter to the Dayton Peace Agreement, on 21 November 1995, the Republic of Croatia undertook to ensure that

> personnel or organisations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [*sic*] and comply

with the provisions of the aforementioned Annexes [i.e. annexes 1-A and 2 of the Dayton Peace Agreement].

Dayton Peace Agreement at 126-30. Both the Security Council of the United Nations and the Presidency of the European Union have recently called upon the Republic of Croatia to use its influence on the Bosnian Croat leadership to ensure full compliance by the Federation of Bosnia and Herzegovina with its international obligations. The failure of the Federation of Bosnia and Herzegovina to comply also implies the failure of the Republic of Croatia.

70. In light of the above, the Trial Chamber considers that the failure to effect personal service of the indictment and to execute the warrants of arrest against Ivica Rajic may be ascribed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the International Tribunal. Accordingly, the Trial Chamber so certifies for the purpose of notifying the Security Council. [...]

III. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, PURSUANT TO RULE 61, UNANIMOUSLY

RULES that it has subject-matter jurisdiction over all counts of the indictment against Ivica Rajic;

FURTHER RULES that it is satisfied that there are reasonable grounds for believing that Ivica Rajic committed the crimes charged in all counts of the indictment against him;

HEREBY CONFIRMS all counts of the indictment;

ISSUES an international arrest warrant for Ivica Rajic; and

ORDERS that the arrest warrant shall be transmitted to all States and to the multinational military Implementation Force (IFOR).

NOTES that the failure to effect personal service of the indictment can be ascribed to the refusal to cooperate with the International Tribunal by the Republic of Croatia and by the Federation of Bosnia and Herzegovina and entrusts the responsibility of so informing the Security Council to the President of the International Tribunal, pursuant to Sub-rule 61 (E). [...]

DISCUSSION

1. *paras. 2, 66-70, Disposition*: Which are the advantages and inconveniences of the "Article 61 Procedure" compared with an *in absentia* trial or with a simple indictment by the prosecutor? What purpose does the "Article 61 Procedure" fulfil? What are the consequences of the Tribunal's ruling for Rajic, for Croatia, and for Bosnia and Herzegovina? How could the Tribunal rule against the Federation of Bosnia and Herzegovina (which is one of the two constituent

entities of Bosnia and Herzegovina)? Is not Bosnia and Herzegovina now internationally responsible for the Federation of Bosnia and Herzegovina? Could the UN Security Council now impose sanctions against Bosnia and Herzegovina? Against the Federation of Bosnia and Herzegovina? Against the latter's inhabitants of Croat nationality? Or (under the decision here discussed) also against those of Muslim nationality?

2. *paras. 8, 33 and 34*: Is every wilful killing of a civilian in an armed conflict a grave breach of IHL? At least if it is committed in an international armed conflict? (*Cf.* Arts. 1, 4 and 147 of Convention IV.)

3. a. *paras. 13-31*: Has the Court decided that an armed conflict existed between Bosnia and Herzegovina and Croatia? How did it establish its existence? Was it sufficient that Croatia financed, organised, supplied and equipped Croatian Defence Council (HVO)? Did the HVO have to be an organ of the Croat government? Does the Tribunal apply the same criteria as the ICJ applied in **Case No. 130**, ICJ, Nicaragua v. US. p. 1365?

   b. *paras. 13-31*: Was the presence of Croatian troops on the territory of Bosnia and Herzegovina sufficient to make it an international armed conflict? Did the Tribunal consider that troops from Croatia were present in Stupni Do? If not, how could it consider that the laws of international armed conflict nevertheless applied? Was it necessary to apply the law of international armed conflict to punish the behaviour of Rajic? (*Cf.* Arts. 1 and 3 of Convention IV, Arts. 4 and 13 of Protocol II, and "Agreement No. 1" in **Case No. 173**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. p. 1761.)

   c. *paras. 31 and 69*: Was the fact that Croatia undertook in the Dayton Peace Agreement "to ensure that" HVO personnel respect it sufficient to prove that HVO was acting on its behalf? (*Cf.*, by analogy, Art. 1 common to the Conventions.)

   d. *paras. 34-37*: Does the Tribunal not apply the reasoning of the Prosecutor, which the Appeals Chamber qualified as absurd and fallacious in paragraph 76 of **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction.] p. 1804? If a "defender" of Stupni Do had tortured a passing Bosnian Croat inhabitant of nearby Vares would that have been a grave breach of IHL? How could the latter have been qualified as a "protected person" in respect of that "defender"? (*Cf.* Arts. 4, 27, 31 and 147 of Convention IV.)

   e. *paras. 37 and 42*: Is the question whether the Court has subject-matter jurisdiction over acts committed by HVO under Article 2 of the Statute distinct from the question of Croatia's liability for acts of HVO?

4. *paras. 34-37*: How can someone be in the hands of Croatia who has never been under its jurisdiction (nor been under the control of its troops)?

5. *paras. 39 and 42*: Was Stupni Do after the HVO attack a territory occupied by Croatia?

6. *para. 48*: Why is an attack on a civilian population in a non-international armed conflict a violation of IHL? (*Cf.* Art. 3 of Convention IV and Art. 13 of Protocol II.)

7. *paras. 51-56*: Were there any military objectives in Stupni Do? Were members of the "defence force made up almost entirely of village residents who came together to defend themselves" civilians or combatants? Were they military objectives? If they were, did that make their wives or their houses licit objects of attack? (*Cf.* Arts. 48, 50 and 52 of Protocol I.)

8. *para. 59*: Was the plan of Rajic to "neutralize Stupni Do" "because he thought the Bosnian Army would launch an attack against Vares through Stupni Do" violating IHL? Would it have violated IHL if he did not fear an attack against Vares? (*Cf.* Arts. 48, 50 and 52 of Protocol I.)

Case No. 183, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel

[*See also* **Document No. 19**, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal. p. 645.]

THE CASE

A. ICTY, The Prosecutor v. Simic *et al.*

[**Source:** ICTY, The Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic , Stevan Todorovic, Simo Zaric, IT 95-9.PT, in the Trial Chamber, Decision of 27 July 1999; footnotes are not reproduced.]

[N.B.: This decision was made public by the Tribunal on 1st October 1999.]

IN THE TRIAL CHAMBER
Decision of: 27 July 1999
PROSECUTOR
v.
BLAGOJE SIMIC [and Others]
EX PARTE CONFIDENTIAL

DECISION ON THE PROSECUTION MOTION UNDER RULE 73 FOR A RULING CONCERNING THE TESTIMONY OF A WITNESS [...]

II. SUBMISSIONS

A. The Prosecution [...]

3. [...] In the Prosecution's view, the issue is whether a third party to the proceedings such as the ICRC is entitled to intervene to prevent a willing witness from testifying. The Prosecution asserts that the issues in contention between the ICRC and the Prosecution are: (1) whether the ICRC has a right to determine unilaterally that ICRC employees or former employees may not

give evidence before the International Tribunal despite their willingness to do so, the Prosecution position being that it does not; (2) alternatively, whether it is for the Trial Chamber to determine whether protective measures could adequately protect a relevant confidentiality interest of the ICRC; and (3) if so, then it is for the Trial Chamber to determine whether, in this particular case the circumstances are so extreme that the ICRC has a relevant confidentiality interest which can only be protected by not allowing the witness to be called at all. Again the Prosecution argues that they are not. The Prosecution presents arguments on various issues which it anticipates the ICRC will raise, in particular as to immunity and privilege.

4. With respect to the ICRC's general position, the Prosecution states that it understands the ICRC's concern to be that national authorities might deny ICRC personnel access to places where persons protected by the Geneva Conventions are located if they think that these ICRC personnel might subsequently testify in criminal proceedings about what they have seen and heard in those places. Although sympathetic to the ICRC concerns, the Prosecution reiterates its view that the ICRC does not enjoy, as a matter of law, any immunity or privilege that would enable it, unilaterally, to prevent any of its former employees from testifying.

5. The Prosecution contends that the Trial Chamber should make a determination on a case by case basis and should decide that a witness be precluded from testifying only in exceptional circumstances. It is the Prosecution's contention that protective measures could afford appropriate protection to the ICRC interests. [...]

B. The ICRC [...]

12. The ICRC relies, *inter alia*, on the following arguments in support of its opposition: the ICRC's international mandate, its operational principles and their application, its status of immunity, the privileged nature of its communications and the impact of such testimony on its operations, and the privilege or confidentiality doctrine in national law.

13. It is the ICRC's general position that the testimony of a former ICRC employee would involve a violation of principles of international humanitarian law concerning the role of the ICRC and its mandate under the Geneva Conventions, the Additional Protocols and the Statute of the ICRC. The ICRC submits that the testimony would jeopardise its ability to discharge its mandate in the future, as concerned parties (national authorities or warring parties) are likely to deny or restrict access to prison and detention facilities if they believe that ICRC officials or employees might subsequently give evidence in relation to persons they met or events they witnessed. [...]

14. The ICRC relies on the mandate entrusted to it under the Geneva Conventions, the Additional Protocols and its Statute, together with its special status and role, to support its arguments. It places particular

emphasis on the importance of respecting the principles of, *inter alia*, impartiality and neutrality, as well as the need for confidentiality in the performance of its functions. The ICRC notes that, by adhering to these principles, it has been able to win the trust of warring parties to armed conflicts and bodies engaged in hostilities, in the absence of which it would not be able to perform the tasks assigned to it under international humanitarian law. Further, the ICRC asserts that in carrying out its mandate it undertakes a duty of confidentiality towards the warring parties. An essential feature of that duty is that ICRC officials and employees do not testify about matters which come to their attention in the course of performing their functions. [...]

19. [...] The ICRC contends that the International Tribunal should exclude evidence to be given without the consent of the ICRC unless the Prosecution can demonstrate that there is an overwhelming need to admit such evidence and that this need is strong enough to outweigh the need for confidentiality and the likely adverse effect on the ICRC's ability to function. The ICRC argues that the following conditions must be met in order for the above-mentioned test to be satisfied:

(1) the crimes charged must be of the utmost gravity;
(2) the evidence must be indispensable, in the sense that the case could not be mounted without it; and
(3) admitting the evidence would not prejudice the work of the ICRC.

In the ICRC's opinion, on the basis of the information currently available, in particular as to the substance of the evidence, these criteria are not met in the present case. [...]

III. DISCUSSION [...]

A. Issues not in dispute between the Prosecution and the ICRC [...]

36. [...] It is the Trial Chamber's view that the ICRC has an interest in this matter sufficient to entitle it to present arguments on the Motion if the Information is based on knowledge gathered by a former employee while carrying out official duties, as ICRC's interests could then be potentially affected. It is acknowledged that a distinction should be drawn between information gathered in an official capacity and information gathered in a private capacity. If the information was obtained in the course of performing official functions, it can be considered as belonging to the entity on whose behalf the individual was working. It follows from this that the relevant entity can be considered to have a legal interest in such information and accordingly may raise objections to the disclosure of the Information. By contrast, in cases where information is acquired by an individual in his private capacity, the entity has no legal interest. Further, if the Information had been obtained in the course of carrying out tasks which do not fall within the competence of the ICRC, it follows that the ICRC could not claim an interest in relation to the non-disclosure of the Information. [...]

B. Issues in dispute and relevant issues

38. The issue is not whether the International Tribunal has jurisdiction over the ICRC and, in particular, it is not whether the International Tribunal has the power to compel the ICRC to produce the Information. In the Trial Chamber's view, the issue to be considered is whether the ICRC has a relevant and genuine confidentiality interest such that the testimony of a former employee, who obtained the Information while performing official duties, should not be admitted. [...]

42. [...] It is trite that the International Tribunal is bound by customary international law, not least because under Article 1 of its Statute it applies international humanitarian law, which consists of both customary and conventional rules [...].

44. The Trial Chamber thus finds that the following considerations are relevant to the determination of the issue at hand: [...]

1. Whether under conventional or customary international law there is a recognition that the ICRC has a confidentiality interest such that it is entitled to non-disclosure of the former employee's testimony

(a) The ICRC's mandate under conventional and customary international law [...]

46. It is widely acknowledged that the ICRC, an independent humanitarian organization, enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols. Another task of the ICRC, under its Statute, is to promote the development, implementation, dissemination and application of international humanitarian law. [...]

50. The specific status and role of the ICRC was also recognised by the General Assembly of the United Nations. "Considering the special role carried on accordingly by the ICRC in international humanitarian relations", the General Assembly granted the ICRC the status of observer to the General Assembly. The Trial Chamber notes that this resolution was sponsored by 131 States and adopted unanimously by the General Assembly. When introducing the resolution on behalf of the co-sponsors, the Permanent Representative of Italy to the United Nations referred to the ICRC in the following terms: "The special role conferred upon the ICRC by the international community and the mandate given to it by the Geneva Conventions make of it an institution unique of its kind and exclusively alone in its status." On the same occasion, the United States representative stated that the "unique mandate of the ICRC sets the Committee apart from the other international humanitarian relief organizations or agencies".

51. The widely acknowledged prestige of the ICRC and its "*autorité morale*" are based on the fact that the ICRC has generally consistently adhered to the

basic principles on which it operates to carry out its mandate. The fundamental principles on which the ICRC relies in the performance of its mandate are the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality. Of particular relevance to the issue at hand are the principles of neutrality, impartiality and independence.

52. [...] The three principles of impartiality, neutrality and independence have been described as "derivative principles, whose purpose is to assure the Red Cross of the confidence of all parties, which is indispensable to it". They are derivative in the sense that they do not relate to objectives but to means. Neutrality and impartiality are means enabling the ICRC to carry out its functions. According to these principles, the ICRC may not be involved in any controversy between parties to a conflict.

53. The principle of impartiality calls on the ICRC to perform its functions without taking sides. According to the ICRC, impartiality "does in fact correspond to the very ideal of the Red Cross, which bars it from excluding anyone from its humanitarian concern". According to the neutrality principle, the ICRC may not take sides in armed conflicts of any kind and ICRC personnel should abstain from any interference, direct or indirect in war operations. The ICRC submits that, to comply with this principle, it must avoid behaving in a way that could be perceived by one of the warring parties, past or present, as adopting a position opposed to it. The principle of neutrality also requires that the ICRC not engage in controversies, in particular of a political, racial or religious nature. Neutrality means that the ICRC treats all on the basis of equality, and as to governments or warring parties, does not judge their policies and legitimacy. The principle of independence calls on the ICRC to conduct its activities freely, and solely on the basis of decisions made by its own organs and according to its own procedures. Accordingly, it cannot depend on any national authority. This guarantees its neutrality. [...]

55. The submissions of both the Prosecution and the ICRC also address the issue of confidentiality. The principle of confidentiality, on which the ICRC relies, refers to its practice not to disclose to third parties information that comes to the knowledge of its personnel in the performance of their functions. The ICRC argues that this principle is a key element on which it needs to rely in order to be able to carry out its mandate. It has been described as a "working tool" or, more generally, as a practice. Confidentiality is directly derived from the principles of neutrality and impartiality. The Trial Chamber notes that it is always referred to in relation to its humanitarian activities. Further, all staff employed by the ICRC undertake to respect the principle of confidentiality. A pledge of discretion is incorporated in every employment contract. [...]

59. A consequence of the fundamental principles of neutrality and impartiality, and of the working principle of confidentiality, is the ICRC's policy not to permit its staff to testify before courts and, in particular, not to testify against an accused. The ICRC is of the view that any testimony by one of its employees,

past or present, concerning information acquired while performing ICRC functions cannot be disclosed without the ICRC's prior approval.

60. The Trial Chamber accepts the ICRC's submission that it has had a consistent practice as to the non-testimony of its delegates and employees before courts since the Second World War. [...] Headquarters agreements also contain a provision to this effect. [...]

63. The Prosecution submits that the ICRC has not been consistent in its practice because it has issued public statements in relation to violations of international humanitarian law in specific conflicts. The ICRC rebuts the Prosecution submission, arguing that it only releases public statements when certain conditions are met and, in any case, only when it is convinced that its ability to carry out its mandate would not be prejudiced. The ICRC also submits that its public statements are very general and never mention individuals. The Trial Chamber does not find convincing the argument of the Prosecution that the release of public statements by the ICRC constitutes a departure from its confidentiality policy. On the contrary, it is convinced that the ICRC's practice not to make public statements about specific acts committed in violation of humanitarian law and attributed to specific persons reflects its fundamental commitment to the principle of neutrality. [...]

(b) The impact of disclosure on the ICRC's ability to carry out its mandate

65. As noted before, in order to carry out its mandate, the ICRC needs to have access to camps, prisons and places of detention, and in order to perform these functions it must have a relationship of trust and confidence with governments or the warring parties. [...] These activities within the protective powers system depend on invitation or acceptance by the detaining power. These authorisations in turn are based on a relationship of trust and confidence established by the ICRC with governments and warring parties. The ICRC also needs to gain the confidence of prisoners visited. [...] The ICRC also submits that admission of the Information would have a prejudicial effect on the safety of its delegates and staff in the field as well as the safety of the victims. [...]

(c) Findings [...]

73. The analysis in the previous section has clearly indicated that the right to non-disclosure of information relating to the ICRC's activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate. The Trial Chamber therefore finds that the parties to the Geneva Conventions and their Protocols have assumed a conventional obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of an ICRC employee, and that, conversely, the ICRC has a right to insist on such non-disclosure by parties to the Geneva Conventions and the Protocols. In that regard, the parties must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality,

and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions.

74. The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC as described above, leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the Information. [...]

2. Whether the ICRC's confidentiality interest should be balanced against the interests of justice

76. It follows from the Trial Chamber's finding that the ICRC has, under international law, a confidentiality interest and a claim to non-disclosure of the Information, that no question of the balancing of interests arises. The Trial Chamber is bound by this rule of customary international law which, in its content, does not admit of, or call for, any balancing of interest. The rule, properly understood, is, in its content, unambiguous and unequivocal, and does not call for any qualifications. Its effect is quite simple: as a matter of law it serves to bar the Trial Chamber from admitting the Information. [...]

3. Whether protective measures could adequately meet the ICRC's confidentiality interest

80. The Trial Chamber's finding that there is a rule of customary international law barring it from admitting the Information necessarily means that the question of the adoption of protective measures does not arise. [...]

IV. DISPOSITION

For the foregoing reasons

Pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DECIDES that the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given.

A Separate Opinion of Judge David Hunt is appended to this Decision. [...]

EX PARTE AND CONFIDENTIAL
SEPARATE OPINION OF JUDGE DAVID HUNT
ON PROSECUTOR'S MOTION
FOR A RULING
CONCERNING THE TESTIMONY OF A WITNESS [...]

IV. THE INTERESTS INVOLVED [...]

15. I accept that this obligation of confidentiality that the ICRC has to the warring parties - an obligation which has permitted it to carry out that mandate [...].

17. However, the interest of the ICRC in protecting itself against the disclosure that such information had been revealed in evidence is not the only public interest which exists in this matter. There is also a powerful public interest that all relevant evidence must be available to the courts who are to try persons charged with serious violations of international humanitarian law, so that a just result might be obtained in such trials in accordance with law. [...]

V. IS THE ICRC'S PROTECTION AGAINST DISCLOSURE ABSOLUTE?

19. [...] The joint decision of Judge Robinson and Judge Bennouna (to which I shall refer as the "joint decision") has, however, accepted that the ICRC is afforded an absolute protection against the disclosure of such evidence by customary international law. [...]

22. It has not been suggested by the ICRC that the absolute nature of its protection against disclosure has been *expressly* accepted as having become part of customary international law. At most, it is said only that it has been *tacitly* recognised. But has it? Has the acceptance by the States to which the ICRC refers been that its protection should be treated as absolute by everyone, including the international criminal courts, or merely that the States themselves will support the absolute nature of the ICRC's protection so far as they are able to give effect to it - for example, by entering into agreements to provide an immunity in their own national courts? It is only if the former is the case that there would be a customary international law which binds this Tribunal.

23. [...] The joint decision has referred to Headquarters Agreements between the States and the ICRC to the effect that its employees enjoy immunity from giving evidence in national courts. Whilst such clauses may constitute *opinio juris* and State practice for the purposes of finding a customary rule that the ICRC's protection before national courts is an absolute one, I am not persuaded that such a rule includes *international* criminal courts whose task it is to try serious violations of international humanitarian law, including grave breaches of those same Geneva Conventions. [...] To my mind, it is an enormous step to assume that the States had contemplated at the time of the Geneva Conventions the existence of a similar immunity in international criminal courts (created for the first time almost a half of a century later), or that they have contemplated the existence of such an immunity since in such courts. For these reasons, I am not persuaded that the answer is supplied by customary international law. [...]

28. I have considered the submissions of the ICRC with care, and (I confess) with sympathy, but I am not presently persuaded by its arguments, or by the joint decision, that its protection against disclosure is the absolute one which it asserts. Two situations will suffice to demonstrate why, in my view, it may well be necessary in the rare case that the courts (or at least the international criminal courts) should have the final say.

29. The first situation is where the evidence of an official or employee of the ICRC is vital to establish the innocence of the accused person. Is the accused to be found guilty and sentenced to a substantial term of imprisonment in order to ensure the ICRC's protection against the risk of disclosure? [...]

31. The second situation where, in my view, it may be necessary that the courts should have the final say is where the evidence of an official or employee of the ICRC is vital to establish the guilt of the particular accused in a trial of transcendental importance. The policy of the ICRC would inevitably exclude its consent to such evidence being given.

32. I do not suggest that the international criminal courts would necessarily permit the evidence of an ICRC official or employee to be given in either of those two situations. The peculiar circumstances of individual cases are so various that no such forecast could properly be made. Nor would I restrict the situations in which a balancing exercise should be carried out by the courts to those two which I have mentioned. It is impossible to foresee every situation which may arise. That is why guidelines such as those that have been laid down by the ICRC are an inadequate substitute for the balancing exercise which would be carried out by such a court. In every case, the court would weigh the competing interests - the importance of the evidence in the particular trial and the risk that the fact that the evidence has been given by an official or employee of the ICRC would be disclosed - to determine on which side the balance lies. But I emphasise that it would necessarily be rare that the evidence would be of such importance as to outweigh the ICRC's protection against disclosure. [...]

VI. THE BALANCING EXERCISE [...]

41. In my opinion, the balance is this case lies clearly in favour of the ICRC. I would therefore not permit the evidence to be given whether or not the ICRC's protection against disclosure is absolute.

VII. DISPOSITION

42. The joint decision gives a ruling that "the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given". I am assured that such a ruling is intended to be limited to the evidence which the prosecution seeks to call from this particular witness - a limitation which is confirmed elsewhere in the joint decision - and that it is not intended to reflect the reasoning of the joint decision itself, that no evidence could ever be given by former officials of the ICRC where the facts came to their knowledge by virtue of their employment.

43. Upon that basis, I agree with that ruling.

B. ICC, Rules of Procedure and Evidence, Rule 73

[**Source:** ICC-ASP/1/3 (part II-A), adopted on 09/09/2002; available on http://www.icc-cpi.int]

Rule 73

Privileged communications and information [...]

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:
   (a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or
   (b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

DISCUSSION

1. a. Why are confidentiality and the refusal to testify so important in the eyes of the ICRC? Is it not generally more effective to condemn publicly all violations of IHL committed in an armed conflict? Other organizations use the method of condemnation: what are the differences between the ICRC and those organizations? In terms of mandate, legal status, effectiveness? Can it be said that they compete with each other, or are their roles complementary?

   b. Is confidentiality a principle like neutrality, impartiality or independence? Does it necessarily follow from those principles? Would an organization necessarily violate its neutrality or impartiality by allowing its staff to testify before international criminal tribunals?

2. a. What value does the case law of international criminal tribunals have in international law? What is a customary rule of international law? On what grounds does the Chamber conclude that the ICRC's right to non-disclosure is based on customary law? Does the fact that immunity was granted in headquarters agreements help to make this immunity a customary rule? How can the ICRC contribute towards the formation of customary rules? With respect to IHL? With respect to its immunity? Can its practice constitute the objective element of the custom? The *opinio iuris*? Or can the ICRC's practice only contribute towards the emergence of these elements in States?

   b. Does the ICTY Trial Chamber infer the ICRC's absolute immunity from the customary law resulting from real practice and the *opinio juris* of States? Or from an interpretation of treaty-based rules? Does it find that the immunity results from practice or that it is implicit in the mandate given by the States to the ICRC?

3. Don't the interests of justice take precedence over this principle of non-disclosure? Although it did not happen in this case, how would it be if the testimony of an ICRC delegate enabled judges to amend or reverse their decision? What would be the direct or indirect consequences, for ICRC's field operations and its access to war victims, of an ICRC delegate's testimony involving the disclosure of confidential information?

4. Does the fact that the ICC's Rules of procedure and evidence incorporate this privilege granted to the ICRC confirm its customary nature?

5. Compare the immunity granted to the ICRC as set out by the ICTY and by the ICC's Rules of procedure and evidence. Do the exceptions provided for in Rule 73 of the latter contradict the theory of absolute immunity put forward by the ICTY?

Case No. 184, ICTY, The Prosecutor v. Kupreskic *et al*

THE CASE

[**Source:** ICTY, The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, IT 95-16, Trial Chamber, Judgement of: 14 January 2000; available on http://www.un.org/icty; footnotes are only partially reproduced.]

IN THE TRIAL CHAMBER [...]
Judgement of: 14 January 2000
PROSECUTOR
v.
Zoran KUPRESKIC,
Mirjan KUPRESKIC,
Vlatko KUPRESKIC,
Drago JOSIPOVIC,
Dragan PAPIC,
Vladimir SANTIC, also known as "VLADO"

JUDGEMENT [...]

II. THE CHARGES AGAINST THE ACCUSED

31. The Prosecutor alleged the following facts and charged the following counts:

32. The accused helped prepare the April 1993 attack on the Ahmici-Santici civilians [...].

33. Under COUNT 1 all six accused are charged with a CRIME AGAINST HUMANITY, [...] on the grounds that from October 1992 until April 1993 they persecuted the Bosnian Muslim inhabitants of Ahmici-Šantici and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove all Bosnian Muslims from the village and surrounding areas. As part of this persecution, the accused participated in or aided and abetted the deliberate and systematic killing of Bosnian Muslim civilians, the comprehensive destruction of their homes and property, and their organised detention and expulsion from Ahmici-antici and its environs.

34. Under COUNTS 2-9 the accused Mirjan and Zoran Kupreskic are charged with murder as a CRIME AGAINST HUMANITY, [...] and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, [...] (murder) [...]. When the attack on Ahmici-Šantici commenced in the early morning of 16 April 1993, Witness KL was living with his son, Naser, Naser's wife, Zehrudina, and their two children, Elvis (aged 4) and Sejad (aged 3 months). Armed with an automatic weapon, Zoran and Mirjan Kupreskic entered Witness KL's house. Zoran Kupreskic shot and killed Naser. He then shot and wounded Zehrudina. Mirjan Kupre skic poured flammable liquid onto the furniture to set the house on fire. The accused then shot the two children, Elvis and

Sejad. When Witness KL fled the burning house, Zehrudina, who was wounded, was still alive, but ultimately perished in the fire. Naser, Zehrudina, Elvis and Sejad all died and Witness KL received burns to his head, face and hands.

35. Under COUNTS 10 and 11 Zoran and Mirjan Kupreskic are charged with a CRIME AGAINST HUMANITY, [...] (inhumane acts) [...] and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, [...] (cruel treatment) [...], on the grounds of killing Witness KL's family before his eyes and causing him severe burns by burning down his home while he was still in it.

36. Under COUNTS 12-15 the accused Vlatko Kupreskic is charged with murder and inhumane and cruel treatment as CRIMES AGAINST HUMANITY, [...], as well as VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, [...] Before the 16 April 1993 attack, HVO soldiers armed with automatic rifles congregated at the residence of the accused in Ahmic. [...] HVO [Croat Defence Council] soldiers shot at Bosnian Muslim civilians from the accused's house throughout the attack. Members of the Pezer family, who were Bosnian Muslims, decided to escape through the forest. As they ran by the accused's house toward the forest, the accused and other HVO soldiers in front of his house, aiding and abetting each other, shot at the group, wounding Dzenana Pezer, [...] and another woman. Dzenana Pezer fell to the ground and Fata Pezer returned to assist her daughter. The accused and the HVO soldiers shot Fata Pezer and killed her.

37. Under COUNTS 16-19, Drago Josipovic and Vladimir Santic are charged with CRIMES AGAINST HUMANITY, [...] (murder) and [...] (inhumane acts) [...] as well as with VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, [...] (murder and cruel treatment)(). On 16 April 1993, numerous HVO soldiers, including the accused, attacked the home of Musafer and Suhreta Pucul, while the family, which included two young daughters, was sleeping. During the attack, the accused and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafer Pucul whilst holding members of his family nearby. As part of the attack, the HVO soldiers, including the accused, vandalised the home and then burned it to the ground. [...]

V. THE APPLICABLE LAW [...]

A. Preliminary Issues

1. General

510. Two particular arguments which have either been put forward by the Defence in their submissions or which are implicit in the testimony of witnesses called by the Defence need to be rebutted in the strongest possible terms.

511. The first is the suggestion that the attacks committed against the Muslim population of the Lasva Valley were somehow justifiable because, in the

Defence's allegation, similar attacks were allegedly being perpetrated by the Muslims against the Croat population. The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants. [...]

2. The *Tu Quoque* Principle is Fallacious and Inapplicable: The Absolute Character of Obligations Imposed by Fundamental Rules of International Humanitarian Law [...]

517. [T]he *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that "The High Contracting Parties undertake to respect ... the present Convention *in all circumstances*" (emphasis added). Furthermore, attention must be drawn to a common provision (respectively Articles 51, 52, 131 and 148) which provides that "No High Contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article (i.e. grave breaches)". Admittedly, this provision only refers to State responsibility for grave breaches committed by State agents or *de facto* State agents, or at any rate for grave breaches generating State responsibility (e.g. for an omission by the State to prevent or punish such breaches). Nevertheless, the general notion underpinning those provisions is that liability for grave breaches is absolute and may in no case be set aside by resort to any legal means such as derogating treaties or agreements. *A fortiori* such liability and, more generally individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity. [...]

519. As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather - as was stated by the International Court of Justice in the *Barcelona Traction* case (which specifically referred to obligations concerning fundamental human rights) - they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations. [footnote 770: *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, p. 32, para. 33 and 34 [...].]

520. Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character. One illustration of the consequences which follow from this classification is that if the norms in question are contained in treaties, contrary to the general rule set out in Article 60 of the Vienna Convention on the Law of Treaties [*see* **Quotation**, *supra*, Chapter 13, IX. 2.c) dd) but no reciprocity, p. 301.], a material breach of that treaty obligation by one of the parties would not entitle the other to invoke that breach in order to terminate or suspend the operation of the treaty. Article 60(5) provides that such reciprocity or in other words the principle *inadimplenti non est adimplendum* does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any form of reprisals against persons protected by such treaties.

3. The Prohibition of Attacks on Civilian Populations [...]

525. More specifically, recourse might be had to the celebrated Martens Clause which, in the authoritative view of the International Court of Justice, has by now become part of customary international law. [*see* **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. [*Cf.* para. 84.] p. 896.] True, this Clause may not be taken to mean that the "principles of humanity" and the "dictates of public conscience" have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 [of Protocol I] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.

526. As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of

military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.

527. As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than usus, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.

528. [...] It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers. [...]

530. It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing compliance with international law is at present more widely available and, more importantly, is beginning

to prove fairly efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts.[...]

531. Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion. With regard to the formation of a customary rule, two points must be made to demonstrate that *opinio iuris* or *opinio necessitatis* can be said to exist.

532. First, even before the adoption of the First Additional Protocol of 1977, a number of States had declared or laid down in their military manuals that reprisals in modern warfare are only allowed to the extent that they consist of the use, against enemy armed forces, of otherwise prohibited weapons - thus *a contrario* admitting that reprisals against civilians are not allowed. [...] The fact remains, however, that elements of a widespread opinio necessitatis are discernible in international dealings. This is confirmed, first of all, by the adoption, by a vast majority, of a Resolution of the U.N. General Assembly in 1970 which stated that "civilian populations, or individual members thereof, should not be the object of reprisals". [footnote 78: U.N. General Assembly Resolution 2675 (XXV) of 9 Dec. 1970.] A further confirmation may be found in the fact that a high number of States have ratified the First Protocol, thereby showing that they take the view that reprisals against civilians must always be prohibited. It is also notable that this view was substantially upheld by the ICRC in its Memorandum of 7 May 1983 to the States parties to the 1949 Geneva Conventions on the Iran-Iraq war [*See* **Case No. 142**, p. 1529.] and by Trial Chamber I of the ICTY in *Martic*. [*See* **Case No. 181**, p. 1880.]

533. Secondly, the States that have participated in the numerous international or internal armed conflicts which have taken place in the last fifty years have normally refrained from claiming that they had a right to visit reprisals upon enemy civilians in the combat area. It would seem that such claim has been only advanced by Iraq in the Iran-Iraq war of 1980-1988 as well as - but only *in abstracto* and hypothetically, by a few States, such as France in 1974 and the United Kingdom in 1998. The aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.

534. The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on sub-paragraph d of Article 14 (now Article 50) of the Draft Articles on State Responsibility [*see* **Case No. 38**, p. 805.], which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that Article 3 common to the four 1949 Geneva Conventions "prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute

requirement of humane treatment" It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, Common Article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held in *Nicaragua* [*see* **Case No. 130**, [*Cf.* para. 219.] p. 1365.], it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.

535. It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by; (a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued) and; (d) 'elementary considerations of humanity' (as mentioned above).

536. Finally, it must be noted, with specific regard to the case at issue, that whatever the content of the customary rules on reprisals, the treaty provisions prohibiting them were in any event applicable in the case in dispute. In 1993, both Croatia and Bosnia and Herzegovina had ratified Additional Protocol I and II, in addition to the four Geneva Conventions of 1949. Hence, whether or not the armed conflict of which the attack on Ahmici formed part is regarded as internal, indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals.

4. The Importance the International Tribunal can Attach to Case Law in its Findings of Law

537. This issue, albeit of general relevance and of a methodological nature, acquires special significance in the present judgement, as it is largely based on international and national judicial decisions. The Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes. Again, this is a fully

understandable development: it was difficult for international law-makers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence. What judicial value should be assigned to this *corpus*?

538. The value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. on whether or not the Tribunal is an international court proper. The Trial Chamber shall therefore first of all consider, if only briefly, this matter - a matter that so far the Tribunal has not had the opportunity to delve into.

539. Indisputably, the ICTY is an international court, (i) because this was the intent of the Security Council, as expressed in the resolution establishing the Tribunal, (ii) because of the structure and functioning of this Tribunal, as well as the status, privileges and immunities it enjoys under Article 30 of the Statute, and (iii) because it is called upon to apply international law to establish whether serious violations of international humanitarian law have been committed in the territory of the former Yugoslavia. Thus, the normative *corpus* to be applied by the Tribunal *principaliter*, i.e. to decide upon the principal issues submitted to it, is international law. True, the Tribunal may be well advised to draw upon national law to fill possible *lacunae* in the Statute or in customary international law. For instance, it may have to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world. [...]

540. Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a "subsidiary means for the determination of rules of law" (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law). Hence, generally speaking, and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts

adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of opinio iuris sive necessitatis and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts.

541. As noted above, judicial decisions may prove to be of invaluable importance for the determination of existing law. Here again attention should however be drawn to the need to distinguish between various categories of decisions and consequently to the weight they may be given for the purpose of finding an international rule or principle. It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10 [...]. In many instances no less value may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Genocide Convention, or the 1949 Geneva Conventions or the 1977 Protocols or similar international treaties. [...]

C. Persecution as a Crime Against Humanity

567. Persecution under Article 5(h) has never been comprehensively defined in international treaties. Furthermore, neither national nor international case law provides an authoritative single definition of what constitutes 'persecution'. Accordingly, considerable emphasis will be given in this judgement to elucidating this important category of offences.

568. It is clear that persecution may take diverse forms, and does not necessarily require a physical element. Additionally, under customary international law (from which Article 5 of the Statute derogates), in the case of persecution, the victims of crimes against humanity need not necessarily be civilians; they may also include military personnel. An explicit finding to this effect was made by the French courts in the *Barbie* and *Touvier* cases. Under Article 5 of the Statute, a key constituent of persecution appears to be the carrying out of any prohibited conduct, directed against a civilian population, and

motivated by a discriminatory animus (political, racial or religious grounds). Beyond these brief observations, however, much uncertainty exists [...].

570. Turning to the text of Article 5, the general elements of crimes against humanity, such as the requirements of a widespread or systematic nature of the attack directed against a civilian population, are applicable to Article 5(h) [...]. The text of Article 5, however, provides no further definition of persecution or how it relates to the other sub-headings of Article 5, except to state that persecution must be on political, racial, or religious grounds. From the text of Article 5 as interpreted by the Appeals Chamber in *Tadic*, it is clear that this discriminatory purpose applies to persecution alone. [footnote 835: Tadic, Appeals Chamber Judgement, 15 July 1999, [...] [*Cf.* **Case No. 180**, ICTY, The Prosecutor v. Tadic [*Cf.* C. Appeals Chamber, Merits, paras. 282-304.] p. 1804.].]

571. With regard to a *logical construction* of Article 5, it could be assumed that the crime of persecution covers acts other than those listed in the other subheadings: each subheading appears to cover a separate crime. However, on closer examination, it appears that some of the crimes listed do by necessity overlap: for example, extermination necessarily involves murder, torture may involve rape, and enslavement may include imprisonment. Hence, the wording of Article 5, logically interpreted, does not rule out a construction of persecution so as to include crimes covered under the other subheadings. However, Article 5 does not provide any guidance on this point. [...]

572. From the submissions of the parties, it appears that there is agreement between the parties that (a) persecution consists of the occurrence of a persecutory act or omission, and (b) a discriminatory basis is required for that act or omission on one of the listed grounds. Two questions remain in dispute: (a) must the crime of persecution be linked to another crime in the Statute, or can it stand alone? (b) what is the *actus reus* of persecution and how can it be defined? Each of these issues will be addressed in turn.

1. The Alleged Need for a Link Between Persecution and Other International Crimes

573. The Defence alleges that the *Tadic* definition of persecution contravenes a long-standing requirement that persecution be "in execution of or in connection with any crime within the jurisdiction of the Tribunal". This wording is found in the Charter of the International Military Tribunal (IMT) which defines crimes against humanity as follows:

> "[...] murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated (emphasis added)."

574. [...] Although Control Council Law No. 10 eliminated this requirement, the ICC Statute upholds it in Article 7(1)(h) [*see* **Case No. 15**, The International Criminal Court. [*Cf.* A., The Statute.] p. 608.]. The Defence therefore asserts that there is a consensus that persecution is a "relatively narrow concept", and argues that "persecution should thus be construed as including only acts enumerated elsewhere in the Statute, or, at most, those connected with a crime specifically within the jurisdiction of the ICTY". [...]

575. It is evident that the phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal" contained in Article 6(c) refers not just to persecution but to the entire category of crimes against humanity. It should be noted that when this category of crimes was first laid down in Article 6(c), all crimes against humanity were subject to the jurisdictional requirement of a link to an *armed conflict*. Thus crimes against humanity could only be punished if committed in execution of or in connection with a war crime or a crime against the peace. Crimes against humanity constituted a new category of crimes and the framers of Article 6(c) limited its application to cases where there already existed jurisdiction under more "well-established" crimes such as war crimes.

576. Moreover, in its application of Article 6(c), the IMT exercised jurisdiction over individual defendants who had allegedly committed only crimes against humanity, even when there was only a *tenuous* link to war crimes or crimes against the peace. [...]

577. What is most important, and indeed dispositive of the matter, is that an examination of customary international law indicates that as customary rules on crimes against humanity gradually crystallised after 1945, the link between crimes against humanity and war crimes disappeared. This is evidenced by; (a) the relevant provision of Control Council Law No. 10, which omitted this qualification; (b) national legislation (such as the Canadian and the French laws); (c) case -law; (d) such international treaties as the Convention on Genocide of 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, and the Convention on Apartheid of 1973 [available on http://www.unhchr.ch]; and (e) the prior jurisprudence of the International Tribunal. This evolution thus evidences the gradual abandonment of the nexus between crimes against humanity and war crimes.

578. The Defence relies on Article 7(1)(h) and 2(g) of the ICC Statute to argue that persecution must be charged in connection with another crime under that Statute. Article 7(1)(h) states: [*see* **Case No. 15**, The International Criminal Court. [*Cf.* A., The Statute.] p. 608.]

579. Article 7(2)(g) provides: [*ibid*]

580. Article 7(2) thus provides a broad definition of persecution and, at the same time, restricts it to acts perpetrated "in connection" with any of the acts enumerated in the same provision as constituting crimes against

humanity (murder, extermination, enslavement, etc.) or with crimes found in other provisions such as war crimes, genocide, or aggression. To the extent that it is required that persecution be connected with war crimes or the crime of aggression, this requirement is especially striking in the light of the fact that the ICC Statute reflects customary international law in abolishing the nexus between crimes against humanity and armed conflict. Furthermore this restriction might easily be circumvented by charging persecution in connection with "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k). In short, the Trial Chamber finds that although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law. In addition, it draws attention to an important provision of the ICC Statute dealing with this matter. The application of the provisions contained in Part II of the Statute (on jurisdiction, admissibility and applicable law), including Article 7 on crimes against humanity, is restricted by Article 10 of the same Statute which provides that "Nothing in the Statute shall be interpreted as *limiting* or *prejudicing* in any way *existing* or *developing* rules of international law for purposes other than this Statute " (emphasis added). This provision clearly conveys the idea that the framers of the Statute did not intend to affect, amongst other things, *lex lata* as regards such matters as the definition of war crimes, crimes against humanity and genocide.

581. Accordingly, the Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. It notes that in any case no such requirement is imposed on it by the Statute of the International Tribunal.

2. The Actus Reus of Persecution

(a) Arguments of the Parties

582. The Prosecution argues that "persecutory act" should be defined broadly and that it should include both acts not covered by the Statute and acts enumerated elsewhere in the Statute, particularly other subheadings of Article 5, when they are committed with discriminatory intent. According to the Prosecution:

> "(a) [T]he crime of persecution has prominence [under customary international law], providing a basis for additional criminal liability in relation to all inhumane acts. [Were it not the case that crimes against humanity could comprise other crimes enumerated in the Statute], this would allow an accused to escape additional culpability for persecution merely by showing that the relevant act falls under another provision of the Statute or elsewhere in the indictment. Persecution is one of the most serious crimes against humanity and an interpretation of the Statute which does not recognise it as such is not tenable."

583. The Prosecution submits that persecution also includes acts not covered elsewhere in the Statute. Thus the persecution charge in the Indictment pertains to "an ethnic cleansing campaign" composed of the killing of Muslim civilians, destruction of their homes and property, and their organised detention and expulsion from Ahmici -antici and its environs.

584. According to the Defence a broad interpretation of persecution would be a violation of the principle of legality (*nullum crimen sine lege*). Persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution. The Defence submits that on a statutory construction of Article 5, murder is not included in persecution.

585. The Defence does not agree with the conclusion of the Trial Chamber in Tadic that persecutory acts could include, "*inter alia*, those of a physical, economic, or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights". [footnote 849: Tadic, Trial Chamber Judgement, 7 May 1997, at para. 710. [available on http://www.icty.org].]. The Defence submits that persecution should not include acts which are legal under national laws, nor should it include acts not mentioned in the Statute "which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken". [footnote 850: *Ibid*, para. 715] Such a definition, in the submission of the Defence, would be too broad and strains the principle of legality. They contend that the *Tadic* definition, which basically follows that of the International Law Commission (ILC) Draft Code, should be rejected in favour of the definition found in the ICC Statute, which "embodies the existing consensus within the international community", and which has taken a much narrower approach to the definition of persecutory acts in its Article 7(2)(g).

(b) Discussion

586. The Trial Chamber will now discuss previous instances in which a definition of persecution has been suggested: firstly, in the *corpus* of refugee law and secondly, in the deliberations of the International Law Commission. The purpose of this discussion is to determine whether the definition propounded there may be held to reflect customary international law.

587. It has been argued that further elaboration of what is meant by the notion of persecution is provided by international refugee law. In its comments on the Draft Code presented in 1991, the government of the Netherlands stated: "It would be desirable to interpret the term 'persecution' in the same way as the term embodied in the Convention on refugees is interpreted". The concept of persecution is central to the determination of who may claim refugee status under the Convention Relating to the Status of Refugees of 1951, as supplemented by the 1967 Protocol. [available on http://www.unhcr.ch]

588. However, the corpus of refugee law does not, as such, offer a definition of persecution. [footnote 854: *The UNHCR Handbook on Procedures and Criteria for Determining Refugee*

Status, (hereafter *UNHCR Handbook*) states at para. 51: "There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Art. 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution".] Nor does human rights law provide such a definition. The European Commission and the Court have on several occasions held that exposing a person to a risk of persecution in his or her country of origin may constitute a violation of Article 3 of the European Convention on Human Rights. [footnote 855: Art. 3 of the European Convention on Human Rights provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". [available on http://conventions.coe.int].] However, their decisions give no further guidance as to the definition of persecution. In an attempt to define who may be eligible for refugee status, some national courts have delivered decisions on what acts may constitute persecution. [...]

589. The Trial Chamber finds, however, that these cases cannot provide a basis for individual criminal responsibility. It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant. The result is that the net of "persecution" is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here.

590. Little guidance in the interpretation of "persecution" is provided by the ILC Draft Code of Crimes Against the Peace and Security of Mankind. The International Law Commission, which originally based its definition of crimes against humanity on the Nuremberg Charter, has included persecution since its earliest draft. The ILC proposed a definition of persecution in its commentary on the Draft Code dated 1996 which stated as follows:

> "The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognised in the Charter of the United Nations (Articles 1 and 55) and the ICCPR (Art. 2). The present provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide."

591. As neither refugee law nor the ILC draft is dispositive of the issue, in resolving matters in dispute on the scope of persecution, the Trial Chamber must of necessity turn to customary international law. Indeed, any time the

Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible lacunae must be filled by having recourse to that body of law.

592. In its discussion, the Trial Chamber will focus upon two distinct issues: (a) can the acts covered by the other subheadings of Article 5 fall within the notion of persecution? and (b) can persecution cover acts not envisaged in one of the other subheadings of Article 5?

(c) Can the Acts Covered by the Other Subheadings of Article 5 Fall Within the Notion of Persecution?

593. As noted above, the Prosecution argues that whereas the meaning of "persecutory act" should be given a broad definition, including a wide variety of acts not enumerated in the Statute, it should also include those enumerated in the Statute and particularly other subheadings of Article 5 when they are committed with discriminatory intent. By contrast, the Defence argues that it would be a violation of the principle of legality (*nullum crimen sine lege*) for this Tribunal to apply Article 5(h) to any conduct of the accused. On this view, persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution.

594. With regard to the question of whether persecution can include acts laid out in the other subheadings of Article 5, and particularly the crimes of murder and deportation, the Trial Chamber notes that there are numerous examples of convictions for the crime of persecution arising from the Second World War. The IMT in its findings on persecution included several of the crimes that now would fall under other subheadings of Article 5. These acts included mass murder of the Jews by the *Einsatzgruppen* and the SD, and the extermination, beatings, torture and killings which were widespread in the concentration camps. Similarly, the judgements delivered pursuant to Control Council Law No. 10 included crimes such as murder, extermination, enslavement, deportation, imprisonment and torture in their findings on the persecution of Jews and other groups during the Nazi era. Thus the Military Tribunals sitting at Nuremberg found that persecution could include those crimes that now would be covered by the other subheadings of Article 5 of the Statute.

595. The International Military Tribunal in its Judgement referred to persecution, stating that: "the persecution of the Jews at the hands of the Nazi

Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale". The IMT commenced with a description of the early policy of the Nazi government towards the Jewish people: discriminatory laws were passed which limited offices and professions permitted to Jews; restrictions were placed on their family life and rights of citizenship; Jews were completely excluded from German life; pogroms were organized which included the burning and demolishing of synagogues; Jewish businesses were looted; prominent Jewish businessmen were arrested; a collective fine of 1 billion marks was imposed on Jews; Jewish assets were seized; the movement of Jews was restricted; ghettos were created; and Jews were compelled to wear a yellow star. According to the IMT, "these atrocities were all part and parcel of the policy inaugurated in 1941 [...] But the methods employed never conformed to a single pattern".

596. At Nuremberg, organisations as well as individual defendants were convicted of persecution for acts such as deportation, slave labour, and extermination of the Jewish people pursuant to the "Final Solution". Moreover, several individual defendants were convicted of persecution in the form of discriminatory economic acts. [...]

597. It is clear from its description of persecution that the IMT accorded this crime a position of great prominence and understood it to include a wide spectrum of acts perpetrated against the Jewish people, ranging from discriminatory acts targeting their general political, social and economic rights, to attacks on their person. [...]

600. It is clear that the courts understood persecution to include severe attacks on the person such as murder, extermination and torture; acts which potentially constitute crimes against humanity under the other subheadings of Article 5. This conclusion is supported by the findings of national courts in cases arising out of the Second World War. [...]

604. [...] On the contrary, these Tribunals and courts specifically included crimes such as murder, extermination and deportation in their findings on persecution.

605. The Trial Chamber finds that the case-law referred to above reflects, and is indicative of, the notion of persecution as laid down in customary international criminal law. The Trial Chamber therefore concludes that acts enumerated in other sub-clauses of Article 5 can thus constitute persecution. Persecution has been used to describe some of the most serious crimes perpetrated during Nazi rule. A narrow interpretation of persecution, excluding other sub-headings of Article 5, is therefore not an accurate reflection of the notion of persecution which has emerged from customary international law.

606. It should be added that if persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5,

a lacuna would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent "to destroy, in whole or in part, a national, ethnical, racial, or religious group". An example of such a crime against humanity would be the so-called "ethnic cleansing", a notion which, although it is not a term of art, is particularly germane to the work of this Tribunal.

607. Although the *actus reus* of persecution may be identical to other crimes against humanity, what distinguishes the crime of persecution is that it is committed on discriminatory grounds. The Trial Chamber therefore accepts the submission of the Prosecution that "[p]ersecution, which can be used to charge the conduct of ethnic cleansing on discriminatory grounds is a serious crime in and of itself and describes conduct worthy of censure above and apart from non-discriminatory killings envisioned by Article 5".

(d) Can Persecution Cover Acts not Envisaged in One of the Other Subheadings of Article 5?

608. The Prosecution argues that persecution can also involve acts other than those listed under Article 5. It is their submission that the meaning of "persecutory act" should be given a broad definition and includes a wide variety of acts not enumerated elsewhere in the Statute. By contrast, the Defence submits that the two basic elements of persecution are (a) the occurrence of a persecutory act or omission, and (b) a discriminatory basis for that act or omission on one of the listed grounds. As mentioned above, the Defence argues that persecution should be narrowly construed.

609. The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity. First, the Trial Chamber will examine what types of acts, aside from the other categories of crimes against humanity have been deemed to constitute persecution. Secondly, it will examine whether there are elements underlying these acts which assist in defining persecution.

610. The Judgement of the IMT included in the notion of persecution a variety of acts which, at present, may not fall under the Statute of the International Tribunal, such as the passing of discriminatory laws, the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life, the imposition of a collective fine on them, the restriction of their movement and their seclusion in ghettos, and the requirement that they mark themselves out by wearing a yellow star. [...]

611. It is also clear that other courts have used the term persecution to describe acts other than those enumerated in Article 5. [...]

614. The Trial Chamber is thus bolstered in its conclusion that persecution can consist of the deprivation of a wide variety of rights. A persecutory act need not be prohibited explicitly either in Article 5 or elsewhere in the Statute. Similarly, whether or not such acts are legal under national laws is irrelevant. It is well-known that the Nazis passed many discriminatory laws through the available constitutional and legislative channels which were subsequently enforced by their judiciary. This does not detract from the fact that these laws were contrary to international legal standards. The Trial Chamber therefore rejects the Defence submission that persecution should not include acts which are legal under national laws.

615. In short, the Trial Chamber is able to conclude the following on the *actus reus* of persecution from the case-law above:

(a) A narrow definition of persecution is not supported in customary international law. Persecution has been described by courts as a wide and particularly serious genus of crimes committed against the Jewish people and other groups by the Nazi regime.

(b) In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.

(c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. The scope of these acts will be defined more precisely by the Trial Chamber below.

(d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice [...].

(e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.

3. The Definition of Persecution

616. In the Judgement of *Prosecutor v. Tadic*, Trial Chamber II held that persecution is a form of discrimination on grounds of race, religion or political opinion that is intended to be, and results in, an infringement of an individual's fundamental rights. [...] [footnote 896: Tadic, Trial Chamber Judgement, 7 May 1997, at paras. 697, 710. [available on http://www.un.org/icty/judgements].]

617. As mentioned above, this is a broad definition which could include acts prohibited under other subheadings of Article 5, acts prohibited under other Articles of the Statute, and acts not covered by the Statute. The same approach has been taken in Article 7(2)(g) of the ICC Statute, which states that "[p]ersecution means the intentional and severe deprivation of *fundamental rights* contrary to international law by reason of the identity of the group or collectivity" (emphasis added).

618. However, this Trial Chamber holds the view that in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be *clearly defined limits* on the types of acts which qualify as persecution. Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.

619. Accordingly, it can be said that at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5. [...]

620. It ought to be emphasised, however, that if the analysis based on this criterion relates only to the *level of seriousness* of the act, it does not provide guidance on *what types of acts* can constitute persecution. The *ejusdem generis* criterion can be used as a supplementary tool, to establish whether certain acts which generally speaking fall under the proscriptions of Article 5(h), reach the *level of gravity* required by this provision. The only conclusion to be drawn from its application is that only *gross or blatant denials* of fundamental human rights can constitute crimes against humanity.

621. The Trial Chamber, drawing upon its earlier discussion of "other inhumane acts", holds that in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law [available on http://www.unhchr.ch]. Drawing upon the various provisions of these texts it proves possible to *identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity*. Persecution consists of a severe attack on those rights, and aims to exclude a person from society on discriminatory grounds. The Trial Chamber therefore defines persecution *as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.*

622. In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane". This

delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute.

623. The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius est exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, where the category of "other inhumane acts" also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.

624. In its earlier conclusions the Trial Chamber noted that persecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent. For example, in the former Yugoslavia an individual may have participated in the single murder of a Muslim person. If his intent clearly was to kill him because he was a Muslim, and this occurred as part of a wide or systematic persecutory attack against a civilian population, this single murder may constitute persecution. But the discriminatory intent of the perpetrator must be proved for this crime to qualify as persecution. [...]

627. In sum, a charge of persecution must contain the following elements:
(a) those elements required for all crimes against humanity under the Statute;
(b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5;
(c) discriminatory grounds.

4. The Application of the Definition set out above to the Instant Case

628. The Trial Chamber will now examine the specific allegations in this case, which are the "deliberate and systematic killing of Bosnian Muslim civilians", the "organised detention and expulsion of the Bosnian Muslims from Ahmici-antici and its environs", and the "comprehensive destruction of Bosnian homes and property". Can these acts constitute persecution? [*cf.* **Case No. 185**, ICTY, The Prosecutor v. Blaskic. p. 1936.]

629. In light of the conclusions above, the Trial Chamber finds that the "deliberate and systematic killing of Bosnian Muslim civilians" as well as their "organised detention and expulsion from Ahmici" can constitute persecution. This is because these acts qualify as murder, imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5.

630. The Trial Chamber next turns its attention to the alleged comprehensive destruction of Bosnian Muslim homes and property. The question here is

whether certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution. [...]

631. The Trial Chamber finds that attacks on property can constitute persecution. [...] Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.

5. The *Mens Rea* of Persecution

632. The Trial Chamber will now discuss the *mens rea* requirement of persecution as reflected in international case-law.

633. Both parties agree that the mental element of persecution consists of *discriminatory intent on the grounds provided in the Statute*. Nevertheless, the Trial Chamber will elaborate further on the discriminatory intent required.

634. When examining some of the examples of persecution mentioned above, one can discern a common element: those acts were all aimed at singling out and attacking certain individuals on discriminatory grounds, by depriving them of the political, social, or economic rights enjoyed by members of the wider society. The deprivation of these rights can be said to have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself. [...]

636. As set forth above, the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide. [...]

VIII. DISPOSITION

A. Sentences

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the Trial Chamber finds, and imposes sentence, as follows.

1. Dragan Papic

With respect to the accused, Dragan Papic:

Count 1: NOT GUILTY of a Crime against Humanity (persecution). [...]

5. Drago Josipovic

With respect to the accused, Drago Josipovic:

Count 1: GUILTY of a Crime against Humanity (persecution). [...]

Count 16 [and 18]: GUILTY. [...]

6. Vladimir Santic

With respect to the accused, Vladimir Santic:

Count 1: GUILTY of a Crime against Humanity (persecution). [...]

Count 16 [and 18]: GUILTY. [...]

[N.B.: On appeal, 23 October 2001, the convictions of Zoran, Mirjan and Vlatko Kupreskic for crimes against humanity (persecution) were reversed on the grounds that the indictment was impermissibly vague and the identification evidence was weak. They were released. The convictions of Drago Josipovic and Vladimir Santic on counts 1, 16 and 18 were upheld; moreover, since cumulative charging and conviction is now accepted, they were convicted on counts 17 and 19. However, their overall sentences were reduced to 12 and 18 years imprisonment (respectively). Judgement available on http://www.un.org/icty]

DISCUSSION

[*See* **Case No. 15,** The International Criminal Court. [*Cf.* A., The Statute] p. 608 and **Case No. 179,** UN, Statute of the ICTY. p. 1791.]

1. a. What composes the *tu quoque* argument? How does it compare with the argument of reciprocity in the application of treaties? Why does the defence of *tu quoque* seem inadmissible in International Humanitarian Law (IHL)?

   b. According to the international law of treaties and the related Vienna Convention, can a State not suspend the execution of its conventional duties towards another State that has violated some of its undertakings? According to this same convention, do IHL treaties benefit from a spécial rule? Why? In what way are they different, so that the *tu quoque* defence seems inadmissible in IHL? (*See*, **Quotation**, *supra*. Chapter 13, IX. 2. c) dd) but no reciprocity, p. 301.)

c. Is the rejection of the defence of *tu quoque* related to the fact that the principle of reciprocity is not applicable to IHL? In ratifying an IHL treaty, towards whom did the States party contract an obligation?

2. Explain the notions of "norms of *ius cogens*" and of "obligations *erga omnes*". What is the link between these two notions? Are these notions recognised by the whole international community? Is IHL part of the *ius cogens*? Only in part? What is the position of your State in regard to *ius cogens* and IHL's affiliation to it?

3. *(Paras. 522-527.)*

   a. What is the significance of the Martens Clause? For the interpretation of IHL?

   b. Can a cumulation of attacks, directed against military objectives, each causing non-excessive civilian losses, be banned because of the cumulation of civilian losses? Because these seem excessive when compared with the cumulated military advantages? Because of the Martens Clause? (*Cf.* Arts. 51 (5) (b) and 57 (2) (a) (iii) of Protocol I.)

4. a. Is the ban on reprisals linked in one way or another to the fact that the principle of reciprocity is not applicable to IHL? Does Art. 60 (5) of the Vienna Convention on the law of treaties mean that all reprisals that are violations of IHL treaties are illegal? (*See* **Quotation,** *supra*, Chapter 13, IX. 2. c) dd) but no reciprocity, p. 301.) Is there a difference between reprisals and the termination or suspension of a treaty obligation because of a material breach of the treaty?

   b. Is the ban on reprisals an element of customary IHL? What is State practice in this matter? Does the fact that some States have recourse to reprisals mean that the ban cannot be customary?

   c. *(Para. 527)* Is *opinio iuris* more important in the field of IHL than practice? Why? Because of the Martens Clause? Do the precedents enumerated in para. 532 show a uniform *opinio iuris*? Does the fact that some States have mentioned *in abstacto* their right to undertake reprisals (para. 533) show their practice? Their *opinio iuris*? Both? Or neither? Can the ban still be customary?

   d. Are all forms of reprisals banned? Which ones do the Geneva Conventions ban? Protocol I? Customary international law? According to the ICTY? Is any attack affecting civilians that is banned by Protocol I also illegal if committed as a proportionate reprisal with the intent of putting an end to similar unlawful acts committed by the enemy? According to Protocol I? According to customary international law? (*Cf.* Art. 46 of Convention I, Art. 47 of Convention II, Art. 13 of Convention III, Art. 33 of Convention IV, Arts. 20, 51 (6), 52 (1), 53 (c), 54 (4), 55 (2) and 56 (4) of Protocol I).

   e. Does the customary ban on reprisals affirmed by the ICTY bind States such as the United Kingdom, which made reservations to Articles 51 and 55 of Protocol I? (*See* **Case No. 65**, UK, Reservations to Additional Protocol I. p. 985.)

   f. *(Para. 534)* Are reprisals that are not forbidden by IHL but which consist of the non-execution of obligations in regard to IHL (for example the use of

certain weapons against combatants), banned by Art. 50 (1) (d) of the Draft Articles on State Responsibility? (*See* **Case No. 38**, p. 805.)

g. Are reprisals sanctions for violations of international law? Can they be replaced by criminal prosecutions? What are the advantages and inconveniences of such a replacement? What is necessary for it to work?

h. Are reprisals only banned in the case of international armed conflicts? Also in the case of non-international armed conflicts? According to the IHL of non-international armed conflicts does this also constitute a customary ban? Does Protocol II ban reprisals that would constitute proportionate violations of Protocol II, which have the aim of ending similar violations committed by the enemy? Is the concept of reprisals conceivable in the context of non-international armed conflicts? (*Cf.* Art. 13 of Protocol II.)

i. *(Para. 535.)* For reprisals to remain admissible under IHL what limits must be respected?

j. Does the ICTY's reasoning in paras. 525-536 reveal a certain theory on the sources of international law? In adopting a voluntarist theory (according to which international law is based on the will of States), could the ICTY have held the same reasoning? Would it have come to the same conclusion?

5. What are the sources of international law? Of IHL? Is 'precedent' a source of IHL? A secondary source? Are international rulings in any way binding on judges? Only judges from the same tribunal? Must national case law be taken into account by international courts? At least the case law of the accused's country of origin? (*Cf.* Art. 38 of the Statute of the International Court of Justice, available on http://www.icj-cij.org and Art. 21 of the Statute of the International Criminal Court, *cf.* **Case No. 15**, p. 608.)

6. a. Can the Chamber develop a definition of persecution based on the Statute of the International Criminal Court (ICC) and then use this definition to pronounce its judgement? Would this not be an unlawful application of a rule that came into force after the events and after the creation of the ICTY?

b. Does the Statute of the ICC only codify customary IHL? Or does Art. 7 represent a step backwards in regard to persecution compared with the Statute of the ICTY and its case law?

c. Should the Chamber apply the criteria of the definition of persecution contained in the Statute of the ICC as *lex posterior* and therefore establish a "correlation" between persecution and another act that is a crime against humanity or "all other crimes" that come under its jurisdiction? Why did the Chamber choose to not establish this correlation?

7. Do you agree with the reasoning of the court in para. 623? Is it compatible with the principle of *nullum crimen sine lege*? Is it not the role of criminal law and at least that of case law to define exactly what is forbidden?

8. Do you agree with the Chamber when it refuses to take into account the concept of persecution in Refugee and Human Rights Law, in the case of establishing the criminal responsibility of an individual accused of crimes against humanity? Why? Is it not the same persecution?

9. a. How would you explain the difference between persecution as a crime against humanity and genocide? What are the differences between genocide, "ethnic cleansing" and persecution? Does the fact that the persecution must be perpetrated with discriminatory intent (*mens rea*), not render the distinction with genocide difficult? What is the element in the definition of genocide that makes it possible to differentiate it from a crime of persecution? What is the difference between the *mens rea* of genocide, that of persecution and that of other crimes against humanity?

   b. In its search for a definition of persecution, why does the Chamber mention the "final solution" committed by the Nazi regime against the Jews as a crime against humanity since it was genocide? Can one crime be defined as both persecution (crime against humanity) and genocide? Under what conditions? Since the extermination of Jews by the Nazi regime was genocide, is it still possible to qualify certain acts committed within the scope of the genocide as war crimes or crimes against humanity? On the other hand, must each act contributing to the genocide be perceived as genocide? Did the notion of "genocide" exist during the Second World War? Was this notion created because the concept of "crime against humanity" was not strong enough to describe the extreme degree of the atrocity of genocide?

Case No. 185, ICTY, The Prosecutor v. Blaskic

THE CASE

A. Trial Chamber

[**Source:** ICTY, The Prosecutor v. Tihomir Blaskic, IT-95-14, Trial Chamber, Decision of 3 March 2000; available on http://www.un.org/icty; footnotes are partially reproduced.]

IN THE TRIAL CHAMBER
[...] Decision of: 3 March 2000
THE PROSECUTOR
v.
TIHOMIR BLASKIC

JUDGEMENT [...]

Abbreviations:
ABiH
Muslim Army of Bosnia-Herzegovina

BH
Republic of Bosnia-Herzegovina [...]

ECMM
European Commission Monitoring Mission

UNPROFOR
United Nations Protection Force [...]

HVO
Croatian Defence Council [...]

CBOZ
Central Bosnia Operative Zone [...]

II. APPLICABLE LAW [...]

A. The requirement that there be an armed conflict [...]

2. Role [...]

b) A condition for jurisdiction under Article 5 of the Statute

66. An armed conflict is not a condition for a crime against humanity but is for its punishment by the Tribunal. Based on an analysis of the international instruments in force the Appeals Chamber affirmed the autonomy of that charge in relation to the conflict since it considered that the condition of belligerence had "no logical or legal basis" and ran contrary to customary international law.

67. Neither Articles 3 or 7 of the Statutes of the ICTR and the International Criminal Court nor *a fortiori* the case law of the Tribunal for Rwanda require the existence of an armed conflict as an element of the definition of a crime against humanity. In his Report to the Security Council on the adoption of the Statute of the future Court, the Secretary-General also explicitly refused to make this condition an ingredient of the crime:

> [C]rimes against humanity are aimed at any civilian population and are *prohibited regardless of whether they are committed in an armed conflict*, international or internal in character.

68. Nonetheless, the Appeals Chamber stated that whether internal or international, the existence of an armed conflict was a condition which gave the Tribunal jurisdiction over the offence. In its analysis of Article 5 of the Statute in the *Tadic* Appeal Decision, the Appeals Chamber concluded that:

> [...] Article 5 may be invoked as a *basis of jurisdiction* over crimes committed in either internal or international armed conflicts

This position was reasserted in the *Tadic* Appeal Judgement:

> [T]he Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, not "a substantive element of the *mens rea* of crimes against humanity" (i.e. not a legal ingredient of the subjective element of the crime).

3. Nexus between the crimes imputed to the accused and the armed conflict

69. In addition to the existence of an armed conflict, it is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, it is sufficient that:

> the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.

70. The foregoing observations demonstrate that a given municipality need not be prey to armed confrontation for the standards of international humanitarian law to apply there. It is also appropriate to note, as did the *Tadic* and *Celebici* Judgements, that a crime need not:

> be part of a policy or practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of the war or in the actual interest of a party to the conflict.

71. With particular regard to Article 5 of the Statute, the terms of that Article, the *Tadic* Appeal Judgement, the Decision of the Trial Chamber hearing the *Tadic* case and the statements of the representatives of the United States, France, Great Britain and the Russian Federation to the United Nations Security Council all point out that crimes against humanity must be perpetrated during an armed conflict. Thus, provided that the perpetrator's

act fits into the geographical and temporal context of the conflict, he need not have the intent to participate actively in the armed conflict.

72. In addition, the Defence does not challenge that crimes were committed during the armed conflict in question but rather that the conflict was international and that the crimes are ascribable to the accused. [...]

B. Article 2 of the Statute: Grave breaches of the Geneva Conventions

[...]

b) Protected persons and property [...]

i) The "nationality" of the victims [...]

127. [...] In an inter-ethnic armed conflict, a person's ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons. The Trial Chamber considers that this is so in this instance.

128. [...] The disintegration of Yugoslavia occurred along "ethnic" lines. Ethnicity became more important than nationality in determining loyalties or commitments. [...]

ii) Co-belligerent States

134. The Prosecution considered that the Bosnian Muslim civilians were persons protected within the meaning of the Fourth Geneva Convention because Croatia and BH were not co-belligerent States and did not have normal diplomatic relations when the grave breaches were committed.

135. The Defence contended that even if the conflict had been international, the Bosnian Muslim victims of acts imputed to the HVO still would not have had the status of "protected" persons since Croatia and Bosnia-Herzegovina were co-belligerent States united against the aggression of the Bosnian Serbs. It draws its argument from Article 4(2) of the Fourth Geneva Convention, which provides *inter alia* that:

> nationals of a co-belligerent State shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

136. The Defence argument may be tested from three perspectives: co-belligerence, normal diplomatic relations and the reasoning underlying Article 4 of the Fourth Geneva Convention.

a. Co-belligerence

137. Firstly, the reasoning of the Defence may be upheld only if Croatia and Bosnia-Herzegovina were co-belligerent States or allies within the meaning of Article 4. [...]

138. Granted, Croatia and Bosnia-Herzegovina did enter into agreements over the course of the conflict. One of these, dated 14 April 1992, stipulated that the diplomatic and consular missions of Croatia and Bosnia-Herzegovina abroad would be responsible for defending the interests of the nationals of the other State when there was only a mission of one of the two party-States in the territory of a given country. On 21 July 1992, an agreement on friendship and co-operation was signed and on 25 July the two States entered into an agreement establishing diplomatic relations.

139. However, the true situation was very different from that which these agreements might suggest. Bosnia-Herzegovina perceived Croatia as a co-belligerent to the extent that they were fighting alongside each other against the Serbs. Nonetheless, it is evident that Bosnia did not see Croatia as a co-belligerent insofar as Croatia was lending assistance to the HVO in its fight against the ABiH over the period at issue. [...]

142. In any case, it seems obvious if only from the number of casualties they inflicted on each other that the ABiH and the HVO did not act towards each other within the CBOZ in the manner that co-belligerent States should.

143. In summary, the Trial Chamber deems it established that, in the conflict in central Bosnia, Croatia and Bosnia-Herzegovina were not co-belligerent States within the meaning of the Fourth Geneva Convention.

b. Reasoning of Article 4 of the Fourth Geneva Convention

144. The Trial Chamber adjudges a final observation appropriate. The Commentary of the Fourth Geneva Convention reaffirms that the nationals of co-belligerent States are not regarded as protected persons so long as the State of which they are nationals has normal diplomatic representation in the other co-belligerent State. The reasoning which underlies this exception is revealing: "It is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, do not need protection under the Convention". [footnote 291: Commentary [published by the ICRC, available on http://www.icrc.org/ihl], p. 49.]

145. In those cases where this reasoning does not apply, one might reflect on whether the exception must nevertheless be strictly heeded. In this respect, it may be useful to refer to the analysis of the status of "protected person" which appears in the Tadic Appeal Judgement. The Appeals Chamber noted that in the instances contemplated by Article 4(2) of the Convention:

> those nationals are not "protected persons" as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of "protected persons". [footnote 292: [...] [*see* **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* C., Appeals Chamber, Merits, para. 165.] p. 1804.].]

Consequently, in those situations where civilians do not enjoy the normal diplomatic protection of their State, they should be accorded the status of protected person.

146. The legal approach taken in the *Tadic* Appeal Judgement to the matter of nationality hinges more on actual relations than formal ties. If one bears in mind the purpose and goal of the Convention, the Bosnian Muslims must be regarded as protected persons within the meaning of Article 4 of the Convention since, in practice, they did not enjoy any diplomatic protection. [...]

c) The elements of the grave breaches

151. Once it has been established that Article 2 of the Statute is applicable in general, it becomes necessary to prove the ingredients of the various crimes alleged. The indictment contains six counts of grave breaches of the Geneva Conventions which refer to five sub-headings of Article 2 of the Statute.

152. The Defence claimed that it is not sufficient to prove that an offence was the result of reckless acts. However, according to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence. The elements of the offences are set out below.

i) Article 2(a) - wilful killing (count 5)

153. The Trial Chamber hearing the *Celebici* case defined the offence of wilful killing in its Judgement. For the material element of the offence, it must be proved that the death of the victim was the result of the actions of the accused as a commander. The intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.

ii) Article 2(b) - inhuman treatment (counts 15 and 19)

154. Article 27 of the Fourth Geneva Convention states that protected persons "shall at all times be humanely treated". The *Celebici* Judgement analysed in great detail the offence of "inhuman treatment" [footnote 300: *Celebici* Judgement, [available on http://www.un.org/icty/judgements.htm], paras. 512 to 544.]. The Trial Chamber hearing the case summarised its conclusions in the following manner:

> inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity [...]. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which

the remainder of the listed "grave breaches" in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment. [footnote 301: *Celebici* Judgement, para. 543.]

155. The Trial Chamber further concluded that the category "inhuman treatment" included not only acts such as torture and intentionally causing great suffering or inflicting serious injury to body, mind or health but also extended to other acts contravening the fundamental principle of humane treatment, in particular those which constitute an attack on human dignity. In the final analysis, deciding whether an act constitutes inhuman treatment is a question of fact to be ruled on with all the circumstances of the case in mind. [footnote 302: *Celebici* Judgement, para. 544.]

iii) Article 2(c) - wilfully causing great suffering or serious injury to body or health (count 8)

156. This offence is an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health. This category of offences includes those acts which do not fulfil the conditions set for the characterisation of torture, even though acts of torture may also fit the definition given. [footnote 303: *Celebici* Judgement, para. 511.] An analysis of the expression "wilfully causing great suffering or serious injury to body or health" indicates that it is a single offence whose elements are set out as alternative options. [footnote 304: *Celebici* Judgement, para. 506.]

iv) Article 2(d) - extensive destruction of property (count 11)

157. An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of "extensive" is evaluated according to the facts of the case - a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count. [footnote 305: [ICRC] Commentary, p. 601.]

v) Article 2(h) - taking civilians as hostages (count 17)

158. Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. [footnote 306: Commentary, pp. 600-601.] However, as asserted by the Defence, detention may be lawful in some circumstances, *inter alia* to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage. The elements of the offence are

similar to those of Article 3 (b) of the Geneva Conventions covered under Article 3 of the Statute. [...]

C. Article 3 of the Statute - Violations of the Laws or Customs of War

[...]

b) The elements of the offences

179. [...] The indictment alleges nine offences under Article 3 in ten counts. The Prosecutor maintained that the *mens rea* which characterises all the violations of Article 3 of the Statute, as well as the violations of Article 2, is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likeable to serious criminal negligence. The elements of the offences which must be proved are set forth below.

i) Unlawful attack against civilians (count 3); attack upon civilian property (count 4)

180. As proposed by the Prosecution, the Trial Chamber deems that the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property. The parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity. Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective. Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.

ii) Murder (count 6)

181. The content of the offence of murder under Article 3 is the same as for wilful killing under Article 2.

iii) Violence to life and person (count 9)

182. This offence appears in Article 3(1) (a) common to the Geneva Conventions. It is a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing), Article 2(b) (inhuman treatment) and Article 2(c) (causing serious injury to body) of the Statute. The Defence contended that the specific intent to commit violence to life and person must be demonstrated. The Trial Chamber considers that the *mens rea* is characterised once it has been established that the accused intended to commit violence to the life or person of the victims deliberately or through recklessness.

iv) Devastation of property (count 12)

183. Similar to the grave breach constituting part of Article 2(d) of the Statute, the devastation of property is prohibited except where it may be justified by military necessity. So as to be punishable, the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.

v) Plunder of public or private property (count 13)

184. The prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to the "organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory". Plunder "should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'". [footnote 343: *Celebici* Judgement, paras. 590-591.]

vi) Destruction or wilful damage to institutions dedicated to religion or education (count 14)

185. The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.

vii) Cruel treatment (count 16 and 20)

186. The Defence asserted *inter alia* that using human shields and trench digging constituted cruel treatment only if the victims were foreigners in enemy territory, inhabitants of an occupied territory or detainees. The Trial Chamber is of the view that treatment may be cruel whatever the status of the person concerned. The Trial Chamber entirely concurs with the *Celebici* Trial Chamber which arrived at the conclusion that cruel treatment constitutes an intentional act or omission "which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of Common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Convention". [footnote 345: *Celebici* Judgement, para. 552.]

viii) Taking of hostages (count 18)

187. The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the Statute. The commentary defines hostages as follows:

> hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces. [footnote 346: [ICRC] Commentary, p. 229.]

Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term "hostage" must be understood in the broadest sense. [footnote 347: Commentary, p. 230.] The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is - persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking. In this respect, the Trial Chamber will examine the evidence as to whether the victims were detained or otherwise deprived of their freedom by the Croatian forces (HVO or others). [...]

III. FACTS AND DISCUSSION [...]

B. The municipality of Vitez

1. Ahmici, Santici, Pirici, Nadioci

384. The villages of Ahmici, Santici, Pirici, Nadioci, situated about 4 to 5 kilometres from the town of Vitez, belong to the municipality of Vitez. According to the last official census taken in 1991, the municipality had 27 859 inhabitants, made up of 45.5% Croats, 5.4% Serbs, 41.3% Muslims and 2.8% other nationalities. These villages are about 1000 meters away from each other and their total population was about 2 000 inhabitants. Santici, the biggest of the villages, had a population of about 1 000 inhabitants, the majority of whom were Croats, whereas Pirici, the smallest of the villages, was a mere hamlet with a mixed population. Nadioci was also a village with a substantial majority of Croats. Ahmici had about 500 inhabitants, of whom about 90% were Muslims, which meant 200 Muslim houses and fifteen or so Croat ones.

385. On Friday 16 April 1993 at 05:30 hours, Croatian forces simultaneously attacked Vitez, Stari Vitez, Ahmici, Nadioci, Šantici, Pirici, Novaci, Putis and Donja Veceriska. General Blaskic spoke of 20 to 22 sites of simultaneous combat all along the road linking Travnik, Vitez and Busovaca. The Trial Chamber found that this was a planned attack against the Muslim civilian population.

a) A planned attack with substantial assets

i) An organised attack

386. Several factors proved, beyond a doubt, that the 16 April attack was planned and organised.

387. The Trial Chamber notes, first of all, that the attack was preceded by several political declarations announcing that a conflict between Croatian forces and Muslim forces was imminent. [...]

388. The declarations were made together with orders issued by the political authorities to the Croatian population in Herceg-Bosna. In particular, on 14 April, Anto Valenta ordered the Croatian officials in the of municipalities in central Bosnia to impose a curfew from 21:00 hours to 06:00 hours and to close the schools until 19 April.

389. The evidence showed moreover that the Croatian inhabitants of those villages were warned of the attack and that some of them were involved in preparing it. Several witnesses, who lived in Ahmici at the material time, testified that Croatian women and children had been evacuated on the eve of the fighting. The witness Fatima Ahmic furthermore stated that a Croatian neighbour had informed her that the Croatian men were holding regular meetings and preparing to "cleanse Muslim people from Ahmici". Witness S testified that the same thing happened in Nadioci: several Croatian families were said to have left the village several days before the attack and a Croatian neighbour is alleged to have advised the witness to hide. [...]

390. The method of attack also displayed a high level of preparation. Colonel Stewart stated that he had received many reports indicating an increased presence of HVO troops shortly before the events. The witness Sefik Pezer also said that on the evening of 15 April he had noticed unusual HVO troop movements. On the morning of 16 April, the main roads were blocked by HVO troops. According to several international observers, the attack occurred from three sides and was designed to force the fleeing population towards the south where elite marksmen, with particularly sophisticated weapons, shot those escaping. Other troops, organised in small groups of about five to ten soldiers, went from house to house setting fire and killing. It would seem that a hundred or so soldiers took part in the operation. [...] The attack was carried out in a morning.

391. All the international observers, military experts for the most part, who went to the site after the attack had occurred, stated without hesitation that such an operation could only be planned at a high level of the military hierarchy.

392. The accused himself also consistently expressed that view. Both in the statements he made shortly after the attack in April 1993 and before the Trial Chamber, General Blaskic expressed his conviction that this was "an organised, systematic and planned crime".

393. Like Trial Chamber II in the *Kupreskic* case, the Trial Chamber therefore finds, and this finding is not open to challenge and was indeed unchallenged, that the attack carried out on Ahmici, Nadioci, Santici and Pirici was planned at a high level of the military hierarchy. [...]

b) An attack against the Muslim civilian population

i) The absence of military objectives

402. The Defence put forward different arguments in order to explain the fighting. First of all, it pointed to the strategic nature of the road linking Busovaca and Travnik. That road was controlled by the HVO at the material time, but the HVO intelligence services are said to have noted a movement of Muslim troops on 15 April from Travnik towards Ahmici and the neighbouring villages, which led them to believe that the Muslims were seeking to regain control of the road. That submission could not however be deemed to have been sufficient justification for the attack on the villages which with the exception of antici, were not directly on the main road. [...]

406. The Defence also explained that "authorised CBOZ military activity at times included a legitimate military tactic known as fighting in built-up areas (FIBUA)" defined by the witness Thomas as "clearing of a built-up area on a house-by-house area", usually with automatic weapons and grenades. The Defence recognised that such a tactic often results in many victims, the number of which may even exceed that of the hostile soldiers. The Defence submitted however that those civilian victims should be considered "collateral casualties" and that such an attack could be legal in certain circumstances. That is an incorrect interpretation of Witness Baggesen's statements to the Trial Chamber. He said that on the contrary there could be no justification for the death of so many civilians. Furthermore, General Blaskic himself acknowledged in his oral evidence that the tactic normally used by professionals avoided all combat operations inside villages. The witness Landry, who was an ECMM monitor from February to August 1993, also explained that in "this kind of cleansing operation, especially for an area of tactical significance [...], you would destroy certain buildings or houses, [...] those areas which contained some sort of military munitions but it was quite usual [...] to actually go ahead and burn a village". He went to Ahmici on 16 April and noted however that there was no longer any military presence there in the evening of 16 April whereas that morning he had noticed a high concentration of HVO troops on the main roads linking Vitez and Zenica. According to that witness: "if this village did have some tactical importance, perhaps it would have been for the HVO to be able to consolidate their position and to maintain some sort of observation post or stop post for the military operations". And he added: "it is very difficult for me to say from a military perspective, to say what was the military reason to carry out such a carnage". [...]

409. Lieutenant-Colonel Thomas, UNPROFOR commander at the material time, went to Ahmici on 17 April 1993 and stated that he saw no evidence suggesting that there had been a conflict between two separate military entities, nor any evidence of resistance such as trenches, sandbags or barbed wire indicating the presence in the village of an armed force ready for combat. Furthermore, the bodies he saw were not in uniform and not a single weapon was found in the destroyed buildings. On the contrary, there were

women and children amongst the bodies strewn on the ground. [...] In its second periodical report on the human rights situation on the territory of the former Yugoslavia, the Commission on Human Rights even found that "by all accounts, *including those of the local Croat HVO commander and international observers*, this village contained no legitimate military targets and there was no organised resistance to the attack". The accused himself admitted before the Trial Chamber that the "villagers of Ahmici, that is Bosniak Muslims," had been the victims of the attack without there having been any attempt to distinguish between the civilian population and combatants.

410. The Trial Chamber is therefore convinced beyond any reasonable doubt that no military objective justified these attacks.

ii) The discriminatory nature of the attack

411. Although the village of Ahmici had no strategic importance which justified the fighting, it was however of particular significance for the Muslim community in Bosnia. Many imams and mullahs came from there. For that reason, Muslims in Bosnia considered Ahmici to be a holy place. In that way, the village of Ahmici symbolised Muslim culture in Bosnia. The witness Watters was certain that Ahmici had been chosen as a target for that reason.

412. The eyewitnesses who saw the attack all describe the same method of attack. [...] Some time after the artillery shots, soldiers organised in groups of between five and ten went into each Muslim house shouting insults against the Muslims, referring to them as "balijas". The groups of soldiers sometimes forced the inhabitants out of their houses, without however allowing them the time to dress. Most of them were still in their night-clothes, some not even having had time to put anything on their feet before fleeing. The soldiers killed the men of fighting age at point blank range and set fire to the Muslims' houses and stables with incendiary bullets, grenades and petrol. Some houses were torched before their inhabitants even had a chance to get out. [...]

iv) Murders of civilians

414. Most of the men were shot at point blank range. Several witnesses described how the men of their families had been rounded up and then killed by Croatian soldiers. [...] The international observers also saw bodies lying in the road, many of whom had been killed by a bullet to the head fired at short range.

415. Twenty or so civilians were also killed in Donji Ahmici as they tried to flee the village. The fleeing inhabitants had to cross an open field before getting to the main road. About twenty bodies of people killed by very precise shots were found in the field. Military experts concluded that they had been shot by marksmen.

416. Other bodies were found in the houses so badly charred they could not be identified and in positions suggesting that they had been burned alive. The

victims included many women and children. The British UNPROFOR battalion reported that: "[o]f the 89 bodies which have been recovered from the village, most are those of elderly people, women, children and infants". An ECMM observer said he had seen the bodies of children who, from their position, seemed to have died in agony in the flames: "some of the houses were absolute scenes of horror, because not only were the people dead, but there were those who were burned and obviously some had been - according to what the monitors said, they had been burned with flame launchers, which had charred the bodies and this was the case of several of the bodies".

417. According to the ECMM report, at least 103 people were killed during the attack on Ahmici.

v) Destruction of dwellings

418. According to the Centre for Human Rights in Zenica, 180 of the existing 200 Muslim houses in Ahmici were burned during the attack. The Commission on Human Rights made the same finding in its report dated 19 May 1993. Prosecution exhibit P117 also showed that nearly all the Muslim houses had been torched, whereas all the Croat houses had been spared. [...]

vi) Destruction of institutions dedicated to religion

419. Several religious edifices were destroyed. The Defence did not deny the destruction of the mosque at Donji Ahmici or of the matif mesjid at Gornji Ahmici. However, it did maintain that the reason for this destruction was that "the school and church in Ahmici became locations of fighting following the attack by the Fourth Military Police Battalion".

420. Conversely, the Prosecutor contended that "both mosques were deliberately mined and given the careful placement of the explosives inside the buildings, they must have been mined after HVO soldiers had control of the buildings".

421. The Trial Chamber notes at the outset that according to the witness Stewart, it was barely plausible that soldiers would have taken refuge in the mosque since it was impossible to defend. Furthermore, the mosque in Donji Ahmici was destroyed by explosives laid around the base of its minaret. [...] The destruction of the minaret was therefore premeditated and could not be justified by any military purpose whatsoever. The only reasons to explain such an act were reasons of discrimination. [...]

vii) Plunder

424. The soldiers also set fire to the stables and slaughtered the livestock as the accused noted himself when he visited the site on 27 April. [...] The victims of these thefts were always Muslim. [...]

c) Conclusion

425. The methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolising their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population. [...]

426. Witness Baggesen said of the attack on Ahmici: "We think that this operation, military operation against the civilian population was to scare them and to show what would happen to other villages and the Muslim inhabitants in other villages if they did not move out. So I think this was an example to show", especially given what Ahmici symbolised for the Muslim community.

427. The Commission on Human Rights noted that all the Muslims had fled from Ahmici. Only a few Croats had remained. According to the witness Kajmovic, the Ahmici Muslim population had completely disappeared in 1995. According to the Centre for Human Rights in Zenica, the four Muslim families living in Nadioci had been exterminated. [...]

428. All that evidence enables the Trial Chamber to conclude without any doubt that the villages of Ahmici, Pirici, Šantici and Nadioci had been the object of a planned attack on the Muslim population on 16 April 1993. [...]

IV. FINAL CONCLUSIONS

744. The Trial Chamber concludes that the acts ascribed to Tihomir Blaskic occurred as part of an international armed conflict because the Republic of Croatia exercised total control over the Croatian Community of Herceg-Bosna and the HVO and exercised general control over the Croatian political and military authorities in central Bosnia.

745. The accused was appointed by the Croatian military authorities. Following his arrival in Kiseljak in April 1992, he was designated chief of the Central Bosnia Operative Zone on 27 June 1992 and remained there until the end of the period covered by the indictment. From the outset, he shared the policy of the local Croatian authorities. For example, he outlawed the Muslim Territorial Defence forces in the municipality of Kiseljak.

746. From May 1992 to January 1993, tensions between Croats and Muslims continued to rise. At the same time, General Blaskic reinforced the structure of the HVO armed forces with the agreement of the Croatian political authorities.

747. In January 1993, the Croatian political authorities sent an ultimatum to the Muslims, *inter alia*, so as to force them to surrender their weapons. They sought to gain control of all the territories considered historically Croatian, in particular the Lasva Valley. Serious incidents then broke out

in Busovaca and Muslim houses were destroyed. After being detained, many Muslim civilians were forced to leave the territory of the municipality.

748. Despite the efforts of international organisations, especially the ECMM and UNPROFOR, the atmosphere between the communities remained extremely tense.

749. On 15 April 1993, the Croatian military and political authorities, including the accused, issued a fresh ultimatum. General Blaskic met with the HVO, military police and Vitezovi commanders and gave them orders which the Trial Chamber considers to be genuine attack orders. On 16 April 1993, the Croatian forces, commanded by General Blaskic, attacked in the municipalities of Vitez and Busovaca.

750. The Croatian forces, both the HVO and independent units, plundered and burned to the ground the houses and stables, killed the civilians regardless of age or gender, slaughtered the livestock and destroyed or damaged the mosques. Furthermore, they arrested some civilians and transferred them to detention centres where the living conditions were appalling and forced them to dig trenches, sometimes also using them as hostages or human shields. The accused himself stated that twenty or so villages were attacked according to a pattern which never changed. The village was firstly "sealed off". Artillery fire opened the attack and assault and search forces organised into groups of five to ten soldiers then "cleansed" the village. The same scenario was repeated in the municipality of Kiseljak several days later. The Croatian forces acted in perfect co-ordination. The scale and uniformity of the crimes committed against the Muslim population over such a short period of time has enabled the conclusion that the operation was, beyond all reasonable doubt, planned and that its objective was to make the Muslim population take flight.

751. The attacks were thus widespread, systematic and violent and formed part of a policy to persecute the Muslim populations.

752. To achieve the political objectives to which he subscribed, General Blaskic used all the military forces on which he could rely, whatever the legal nexus subordinating them to him.

753. He issued the orders sometimes employing national discourse and with no concern for their possible consequences. In addition, despite knowing that some of the forces had committed crimes, he redeployed them for other attacks.

754. [...] The end result of such an attitude was not only the scale of the crimes, which the Trial Chamber has explained, but also the realisation of the Croatian nationalists' goals - the forced departure of the majority of the Muslim population in the Las va Valley after the death and wounding of its

members, the destruction of its dwellings, the plunder of its property and the cruel and inhuman treatment meted out to many. [...]

VI. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, in a unanimous ruling of its members,

FINDS Tihomir Blaskic GUILTY:

of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia, in the municipalities of Vitez, Busovaca and Kiseljak [...] between 1 May 1992 and 31 January 1994 (count 1) for the following acts:

- attacks on towns and villages;
- murder and serious bodily injury;
- the destruction and plunder of property and, in particular, of institutions dedicated to religion or education;
- inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields;
- the forcible transfer of civilians;

and by these same acts, in particular, as regards an international armed conflict, General Blaskic committed:

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of Additional Protocol I: unlawful attacks on civilians (count 3);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of Additional Protocol I: unlawful attacks on civilian objects (count 4);
- a grave breach, under Article 2(a) of the Statute: wilful killing (count 5);
- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: murder (count 6);
- a crime against humanity, under Article 5(a) of the Statute: murder (count 7);
- a grave breach under Article 2(c) of the Statute: wilfully causing great suffering or serious injury to body or health (count 8);
- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: violence to life and person (count 9);
- a crime against humanity under Article 5(i) of the Statute: inhumane acts (count 10);
- a grave breach under Article 2(d) of the Statute: extensive destruction of property (count 11);
- a violation of the laws or customs of war under Article 3(b) of the Statute: devastation not justified by military necessity (count 12);
- a violation of the laws or customs of war under Article 3(e) of the Statute: plunder of public or private property (count 13);

- a violation of the laws or customs of war under Article 3(d) of the Statute: destruction or wilful damage done to institutions dedicated to religion or education (count 14);
- a grave breach under Article 2(b) of the Statute: inhuman treatment (count 15);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 16);
- a grave breach under Article 2(h) of the Statute: taking civilians as hostages (count 17);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(b) of the Geneva Conventions: taking of hostages (count 18);
- a grave breach, under Article 2(b) of the Statute: inhuman treatment (count 19);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 20),

In any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished. [...]

and therefore,

SENTENCES Tihomir Blaskic to forty-five years in prison; [...].

B. Appeals Chamber

[**Source:** ICTY, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-A; Appeals Chamber, Decision of 29 July 2004; available on http://www.un.org/icty; footnotes are not reproduced.]

IN THE APPEALS CHAMBER
PROSECUTOR
v.
TIHOMIR BLASKIC

JUDGEMENT

[...]

III. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 7 OF THE STATUTE

[...]

A. Individual Criminal Responsibility under Article 7(1) of the Statute

[...]

41. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's [...] articulations of the *mens rea* for ordering under

Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

42. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. [...]

B. Command Responsibility under Article 7(3) of the Statute

53. In this section, the Appeals Chamber will only address alleged legal errors concerning Article 7(3) of the Statute, and will leave contentions raised by the Appellant in his second ground of appeal, concerning whether the facts of the case support a finding that the Appellant had effective control in the Central Bosnia Operative Zone (CBOZ), to the parts of the Judgement where the factual grounds of appeal are considered. [...]

2. The standard of "had reason to know" [...]

61. The Appeals Chamber notes that the Trial Chamber concluded that:

> if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.

At another place in the Trial Judgement, the Trial Chamber "holds, again in the words of the Commentary, that '[t]heir role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose.'" One of the duties of a commander is therefore to be informed of the behaviour of his subordinates.

62. The Appeals Chamber considers that the *Celebici* Appeal Judgement has settled the issue of the interpretation of the standard of "had reason to know." In that judgement, the Appeals Chamber stated that "a superior will be criminally responsible through the principles of superior responsibility only *if*

information was available to him which would have put him on notice of offences committed by subordinates." Further, the Appeals Chamber stated that "[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision (Article 7(3) (as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish." There is no reason for the Appeals Chamber to depart from that position. The Trial Judgement's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.

63. As to the argument of the Appellant that the Trial Chamber based command responsibility on a theory of negligence, the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law." It expressed that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought...." The Appeals Chamber expressly endorses this view.

64. The appeal in this respect is allowed, and the authoritative interpretation of the standard of "had reason to know" shall remain the one given in the *Celebici* Appeal Judgement, as referred to above. [...]

IV. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 5 OF THE STATUTE

A. Common Statutory Elements of Crimes against Humanity

94. The Appellant submits that the Trial Chamber "erred in several significant respects in construing and applying the substantive legal standards of Article 5." Generally, he claims that:

> [the] Trial Chamber deviated from established principles of Tribunal and/or customary law by: (1) failing to require that [the] Appellant possessed the requisite knowledge of the broader criminal attack necessary to establish a crime against humanity; (2) failing to define the *actus reus* of the crime of persecution in a sufficiently narrow fashion in accordance with the principles of legality and specificity; and (3) failing to require that [the] Appellant possessed the requisite specific discriminatory intent necessary to establish the crime of persecution. ()

1. Requirement that the acts of the accused must take place in the context of a widespread or systematic attack [...]

98. It is well established in the jurisprudence of the International Tribunal that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population. This was recognized by the Trial Chamber, which stated: "there can be no doubt that inhumane acts constituting a crime

against humanity must be part of a systematic or widespread attack against civilians."

99. The Trial Chamber then stated that the "systematic" character:

refers to four elements which for the purposes of this case may be expressed as follows:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

The Trial Chamber went on to state that the plan "need not necessarily be declared expressly or even stated clearly and precisely" and that it could be surmised from a series of various events, examples of which it listed.

100. The Appeals Chamber considers that it is unclear whether the Trial Chamber deemed the existence of a plan to be a legal element of a crime against humanity. In the view of the Appeals Chamber, the existence of a plan or policy may be evidentially relevant, but is not a legal element of the crime. [...]

2. Requirement that the attack be directed against a civilian population [...]

105. [...] The legal requirement under Article 5 of the Statute that the attack in question be directed against a civilian population was elaborated upon in the *Kunarac* Appeal Judgement, wherein the Appeals Chamber stated that:

> the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.

106. The Appeals Chamber in *Kunarac* further stated:

> the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the

> laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.

107. In this case, the Trial Chamber correctly recognized that a crime against humanity applies to acts directed against any civilian population. However, it stated that "the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed." The Appeals Chamber considers that both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity.

108. The Trial Chamber concluded:

> Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore wear (*sic*) uniform or not - but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.

109. Before determining the scope of the term "civilian population", the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which "[t]argeting civilians or civilian property is an offence when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.

110. In determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. In this regard, it notes that the Report of the Secretary General states that the Geneva Conventions "constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts." Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.

111. Article 50, paragraph 1, of Additional Protocol I states that 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 case of doubt whether a person is a civilian, that person shall be considered to be a civilian." The Appeals Chamber notes that the

imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution. [...]

113. Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. However, the Appeals Chamber considers that the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic. The Trial Chamber was correct in this regard.

114. However, the Trial Chamber's view that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian may be misleading. The ICRC Commentary is instructive on this point and states:

> All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi -civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).

As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.

115. The Trial Chamber also stated that the "presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population." The ICRC Commentary on this point states:

> ... in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.

Thus, in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.

116. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in part in its characterization of the civilian population and of civilians under Article 5 of the Statute. [...]

4. Requirement that the accused has knowledge that his acts formed part of the broader criminal attack

121. The Appellant submits that the Prosecution must establish that the accused knew of the existence of a widespread or systematic attack against a civilian population and that his acts form part of the attack. According to the Appellant, the Trial Chamber failed to determine whether and to what extent he may have known of the attack and the fact that his acts were a part thereof. Instead, he claims, the Trial Chamber applied a standard of recklessness which is not supported in law, and limited its consideration to the extent to which the Appellant may have been aware of the political context in which his acts fit, a standard below that required by the definition of crimes against humanity. [...]

124. The Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack. Moreover, the Appeals Chamber further considers that:

> [f]or criminal liability pursuant to Article 5 of the Statute [to attach], "the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons." Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.

125. In this case, the Trial Chamber referred to the *Tadic* Appeal Judgement, according to which "the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern." It then stated the following:

> The accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context.
>
> Moreover, the nexus with the institutional or *de facto* regime, on the basis of which the perpetrator acted, and the knowledge of this link, as required by the case-law of the Tribunal and the ICTR and restated above, in no manner

require proof that the agent had the intent to support the regime or the full and absolute intent to act as its intermediary so long as proof of the existence of direct or indirect malicious intent or recklessness is provided. Indeed, the Trial Chambers of this Tribunal and the ICTR as well as the Appeals Chamber required only that the accused "knew" of the criminal policy or plan, which in itself does not necessarily require intent on his part or direct malicious intent ("... the agent *seeks* to commit the sanctioned act which is either his *objective* or at least the method of achieving his objective"). There may also be indirect malicious intent (the agent did not deliberately seek the outcome but knew that it would be the result) or recklessness, ("the outcome is foreseen by the perpetrator as only a probable or possible consequence"). In other words, knowledge also includes the conduct "of a person taking a deliberate risk in the hope that the risk does not cause injury".

It follows that the *mens rea* specific to a crime against humanity does not require that the agent be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan. This specifically means that it must, for example, be proved that:

- the accused willingly agreed to carry out the functions he was performing;
- that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes;
- that he received orders relating to the ideology, policy or plan; and lastly
- that he contributed to its commission through intentional acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration.

126. In relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required. The Trial Chamber, in stating that it "suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan," did not correctly articulate the *mens rea* applicable to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber's statement is misleading in this regard. Furthermore, the Appeals Chamber considers that evidence of knowledge on the part of the accused depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case. Therefore, the Appeals Chamber declines to set out a list of evidentiary elements which, if proved, would establish the requisite knowledge on the part of the accused. [...]

128. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in part in its articulation of the mens rea applicable to crimes against humanity. [...]

VII. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR CRIMES COMMITTED IN THE AHMICI AREA

304. The Trial Chamber found the Appellant responsible for having ordered a military attack on Ahmici and the neighbouring villages of Santici, Pirici, and Nadioci, which resulted in the following crimes being committed against the Muslim civilian population: (i) persecution (count 1); (ii) unlawful attacks upon civilians and civilian objects (counts 3 to 4); (iii) wilful killing (counts 5 to 10); (iv) destruction and plunder of property of Bosnian Muslim dwellings, buildings, businesses, private property and livestock (counts 11 to 13); and (v) destruction of institutions dedicated to religion or education (count 14). [...]

A. The Appellant's responsibility under Article 7(1) of the Statute [...]

2. The Appeals Chamber's findings

324. The Trial Chamber convicted the Appellant pursuant to Article 7(1) of the Statute for crimes that targeted the Muslim civilian population and were perpetrated as a result of his *ordering* the Viteska Brigade, the Nikola Subic Zrinski Brigade, the 4th MP Battalion, the Dzokeri (Jokers), the Vitezovi, and the Domobrani to offensively attack Ahmici and the neighbouring villages. The Appeals Chamber considers that the Appellant's conviction under Article 7(1) of the Statute is based upon the following findings reached by the Trial Chamber: (i) that the attack was organised, planned at the highest level of the military hierarchy and targeted the Muslim civilian population in Ahmici and the neighbouring villages; (ii) that the Military Police, the Jokers, the Domobrani, and regular HVO (including the Viteska Brigade) took part in the fighting, and no military objective justified the attacks; and (iii) that the Appellant had "command authority" over the Viteska Brigade, the Domobrani, the 4th MP Battalion, and the Jokers during the period in question.

(a) The orders issued by the Appellant

325. The Prosecution's case was that the Appellant ordered the Viteska Brigade, the Nikola Subic Zrinski Brigade, the 4th MP Battalion, the Jokers, the Vitezovi, and the Domobrani to offensively attack the area of Ahmici, destroy and burn the Muslims' houses, kill Muslim civilians, and destroy their religious institutions. As part of his defence at trial, the Appellant put forward three orders issued by him following a military intelligence report dated 14 March 1993, which indicated the possibility of an attack by the ABiH on Ahmici in order to cut off Busovaca and Vitez.

326. With respect to D267, addressed to the 4th MP Battalion, the Vitezovi, and the HVO Operative Zone Brigades, the Trial Chamber concluded that "[t]he reasons relied upon in this order were: combat operations to prevent terrorism aimed at the HVO, and ethnic cleansing of the region's Croats by extremist Muslim forces." [...]

329. The Trial Chamber found that D269 was "very clearly" an order to attack, and that it was addressed to the Viteska Brigade, the 4th MP Battalion, the forces of the Nikola Subic Zrinski Brigade and the forces of the civilian police which "were recognised on the ground as being those which had carried out the attack." The Trial Chamber also found that the time set out in the order to commence hostilities corresponded to the start of fighting on the ground.

330. The Appeals Chamber considers that the Trial Chamber interpreted the instructions contained in D269 in a manner contrary to the meaning of the order. Even though the order was presented as a combat command to prevent an attack, the Trial Chamber concluded that it was part of an offensive strategy because "no military objective justified the attack" and in any event it was an "order to attack." The order defines the type of military activity as a blockade in the territory of Kruscica, Vranjska, and D. Vecerska (Ahmici and the neighbouring villages are not specifically mentioned), and it addresses the Viteska Brigade and the Tvrtko special unit, but not the Jokers or the Military Police which are only mentioned in item 3 of the order in the following terms:

> [i]n front of you are the forces of the IV Battalion VP, behind you are your forces, to the right of you are the forces of the unit N.S. Zrinski, and to the left of you are the forces of the civilian police.

331. As noted above, the Trial Chamber had concluded that since the Ahmici area had no strategic importance, no military objective justified the attack, and determined that it was unnecessary to analyze the reasons given by the Appellant for issuing D269. The Trial Chamber concluded that nothing had been adduced to support the claim that an imminent attack justified the issuing of D269. The Appeals Chamber notes that the Trial Chamber gave no weight to the argument that the road linking Busovaca and Travnik had a strategic significance, and with respect to the fact that ABiH soldiers were reported travelling towards Vitez, it concluded that "the fact that these soldiers were drinking highlighted the fact that the soldiers were on leave and were not preparing to fight in the municipality of Vitez".

332. The Appeals Chamber considers that the Trial Chamber's assessment of D269, as reflected in the Trial Judgement, diverges significantly from that of the Appeals Chamber following its review. The Appeals Chamber considers that the Trial Chamber's assessment was "wholly erroneous".

333. The Appeals Chamber considers that the trial evidence does not support the Trial Chamber's conclusion that the ABiH forces were not preparing for combat in the Ahmici area. In addition, the Appeals Chamber notes that additional evidence admitted on appeal shows that there was a Muslim military presence in Ahmici and the neighbouring villages, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmici-Santici-Dubravica axis. Consequently, the Appeals Chamber considers that there was a military justification for the Appellant to issue D269.

334. The Appeals Chamber further notes that in light of the planned nature, scale, and manner in which crimes were committed in the Vitez municipality on 16 April 1993, the Trial Chamber concluded that D269 corresponded to the start of fighting in the Ahmici area, and that it instructed all the troops mentioned therein to coordinate an offensive attack and commit the crimes in question. The Appeals Chamber has failed to find evidence in the record which shows that the Appellant issued D269 with the "clear intention that the massacre would be committed" during its implementation, or evidence that the crimes against the Muslim civilian population in the Ahmici area were committed in response to D269.

335. In light of the analysis of the Trial Chamber's interpretation of D269 and on the basis of the relevant evidence before the Trial Chamber, the Appeals Chamber concludes that no reasonable trier of fact could have reached the conclusion beyond reasonable doubt that D269 was issued "with the clear intention that the massacre would be committed," or that it gave rise to the crimes committed in the Ahmici area on 16 April 1993. The Appeals Chamber stresses that the additional evidence heard on appeal confirms that there was a military justification for issuing D269. The additional evidence shows that D269 was a lawful order, a command to prevent an attack, and did not instruct the troops mentioned therein to launch an offensive attack or commit crimes. [...]

(c) New evidence suggests that individuals other than the Appellant planned and ordered the commission of crimes in the Ahmici area [...]

(d) Whether the Appellant was aware of the substantial likelihood that civilians would be harmed [...]

344. The Trial Chamber concluded that since the Appellant knew that some of the troops engaged in the attack on Ahmici and the neighbouring villages had previously participated in criminal acts against the Muslim population of Bosnia or had criminals within their ranks, when ordering those troops to launch an attack on 16 April 1993 pursuant to D269, the Appellant deliberately took the risk that crimes would be committed against the Muslim civilian population in the Ahmici area and their property. The Trial Chamber held that:

> [e]ven if doubt were still cast in spite of everything on whether the accused ordered the attack with the clear intention that the massacre would be committed, he would still be liable under Article 7(1) of the Statute for ordering the crimes... [A]ny person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) [*le dol éventuel* in the original French text] so as to incur responsibility for having ordered, planned or incited the commitment of the crimes. In this case, the accused knew that the troops which he had used to carry out the order of attack of 16 April had previously been guilty of many crimes against the Muslim population of Bosnia.

345. The Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent. It has stated that a person who orders an act or omission with the awareness of the

substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to the finding outlined above. Therefore, the Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes which occurred in the Ahmici area on 16 April 1993.

346. The evidence underlying the finding in paragraph 474 of the Trial Judgement consists of orders issued by the Appellant with the aim of deterring criminal conduct, i.e., orders prohibiting looting, the burning of Muslim houses, and instructing the identification of soldiers prone to criminal conduct. The analysis of the evidence relied upon by the Trial Chamber supports the conclusion that concrete measures had been taken to deter the occurrence of criminal activities, and for the removal of criminal elements once they had been identified. For instance, approximately a month before the attack of 16 April 1993 took place, the Appellant had ordered the commanders of HVO brigades and independent units to identify the causes of disruptive conduct, and to remove, arrest and disarm conscripts prone to criminal conduct.

347. The Appeals Chamber considers that the orders and reports outlined above, may be regarded at most, as sufficient to demonstrate the Appellant's knowledge of the mere possibility that crimes could be committed by some elements. However, they do not constitute sufficient evidence to prove, under the legal standard articulated by the Appeals Chamber, awareness on the part of the Appellant of a substantial likelihood that crimes would be committed in the execution of D269.

348. Therefore, the Appeals Chamber is not satisfied that the relevant trial evidence and the additional evidence admitted on appeal prove beyond reasonable doubt that the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes committed in the Ahmici area on 16 April 1993.

B. The Appellant's responsibility under Article 7(3) of the Statute [...]

2. The Appeals Chamber's findings

372. The Appeals Chamber notes that besides finding the Appellant guilty under Article 7(1) of the Statute, the Trial Chamber also entered a conviction against the Appellant for his superior criminal responsibility under Article 7(3) of the Statute. The Trial Chamber stated:

> [i]n the final analysis, the Trial Chamber is convinced that General Blaskic ordered the attacks that gave rise to these crimes. *In any event, it is clear that he never took any reasonable measure to prevent the crimes being committed or to punish those responsible for them.* [...]

375. It is settled in the jurisprudence of the International Tribunal that the ability to exercise effective control is necessary for the establishment of superior responsibility. The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute is the effective control over a subordinate in the sense of material ability to prevent or punish criminal conduct. The Appeals Chamber will discuss whether the Appellant wielded effective control over the troops that perpetrated the crimes in the Ahmici area.

376. The Trial Chamber found that the Appellant had "command authority" over the 4th MP Battalion and the Jokers during the period in question. [...]

419. The Appeals Chamber has admitted as additional evidence on appeal documents that contain information on those allegedly responsible for the crimes committed in the Ahmici area; this evidence supports the conclusion that the Appellant was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him. [...]

420. The Appeals Chamber considers that the trial evidence assessed together with the additional evidence admitted on appeal shows that the Appellant took the measures that were reasonable within his material ability to denounce the crimes committed, and supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmici be carried out, that the investigation was taken over by the SIS Mostar, that he was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him.

421. For the foregoing reasons, and having examined the legal requirements for responsibility under Article 7(3) of the Statute, the Appeals Chamber concludes that the Appellant lacked effective control over the military units responsible for the commission of crimes in the Ahmici area on 16 April 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility have not been satisfied.

422. In light of the foregoing, the Appeals Chamber is not satisfied that the trial evidence, assessed together with the additional evidence admitted on appeal, proves beyond reasonable doubt that the Appellant is responsible under Article 7(3) of the Statute for having failed to prevent the commission of crimes in Ahmici, Santi ci, Pirici, and Nadioci on 16 April 1993 or to punish the perpetrators. [...]

XI. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR DETENTION-RELATED CRIMES

574. The Trial Judgement addressed Counts 15 to 20 of the Second Amended Indictment in a section entitled "detention related crimes", as they all entail a deprivation of freedom. During the course of the conflict in Central Bosnia, HVO forces detained Bosnian Muslims - both civilians and prisoners of war -

in various facilities. The Trial Chamber found that non-combatant Bosnian Muslims, both civilians and prisoners of war, were detained during the conflict in the Lasva Valley region of Central Bosnia, and in Vitez in particular. The Trial Chamber concluded that the Appellant knew of the circumstances and conditions under which the Bosnian Muslims were being detained and the treatment they received, and was "persuaded beyond all reasonable doubt that (the Appellant (had reason to know that violations of international humanitarian law were being perpetrated." The Trial Chamber found the Appellant guilty on all counts relating to detention -related crimes pursuant to Articles 2 and 3 of the Statute, either pursuant to Article 7(1) or to Article 7(3) of the Statute, or pursuant to both. [...]

B. Counts 17 and 18: Hostage-taking

635. The Trial Chamber convicted the Appellant of taking hostages, first for use in prisoner exchanges, and second in order to deter ABiH military operations against the HVO. It is unclear whether the Trial Chamber made this conviction pursuant to Article 7(1) or Article 7(3) of the Statute.

636. The Appellant does not deny that hostages were taken and does not appeal against this finding as a separate ground of appeal *per se*. Rather, the Appellant argues in respect of the hostage-taking convictions that the Trial Judgement is "extremely vague," that there was no finding that he ordered the taking of hostages, and that he presumes that he was convicted of the charges on the basis of Article 7(3) of the Statute. The position of the Prosecution is that the Appellant was in fact convicted of hostage-taking under Article 7(1) of the Statute, even though the Trial Chamber found that the Appellant did not expressly order that hostages be taken.

637. The Appeals Chamber however emphasises that the Trial Chamber itself found that the Appellant did not order that hostages be taken or used. Instead, the Trial Judgement stated that the Appellant ordered the defence of Vitez and thereby "deliberately ran the risk that many detainees might be taken hostage for this purpose." The Appeals Chamber considers that the Appellant was convicted for hostage-taking pursuant to Article 7(1) of the Statute, and that no finding was made under Article 7(3) of the Statute in relation to these counts. As a result, the Appeals Chamber declines to consider Article 7(3) responsibility any further.

638. Hostage-taking as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war was considered by the Trial Chamber in this case, and in the *Kordic and Cerkez* Trial Judgement. In the latter case, the following was stated:

> It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement ...
>
> The additional element ... is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a "threat either to

> prolong the hostage's detention or to put him to death". In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition.

639. The Appeals Chamber agrees that the essential element in the crime of hostage -taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person. The crime of hostage-taking is prohibited by Common Article 3 of the Geneva Conventions, Articles 34 and 147 of Geneva Convention IV, and Article 75(2)(c) of Additional Protocol I. [...]

2. Hostage-taking in the defence of Vitez

641. In convicting the Appellant of hostage-taking, the Trial Chamber relied on the testimony of Witness Mujezinovic. Witness Mujezinovic testified at trial that, on 19 April 1993, he was taken to a meeting with Cerkez, the Commander of the Vitez Brigade. At that meeting, Witness Mujezinovic was instructed by Cerkez to contact ABiH commanders and Bosnian leaders, and to tell them that the ABiH was to halt its offensive combat operations on the town of Vitez, failing which the 2,223 Muslims detainees in Vitez (expressly including women and children) would all be killed. Witness Mujezinovic was further instructed to appear in a television broadcast to repeat that threat, and to tell the Muslims of Stari Vitez to surrender their weapons. The threats were repeated the following morning.

642. The Trial Chamber concluded that the detainees were "threatened with death" in order to prevent the ABiH advance on Vitez. The Appeallant has not contended that these events did not occur. However, the Trial Chamber further concluded the following, since Cerkez was the commander of the Vitez Brigade, and since he was under the direct command of the Appellant:

> The Trial Chamber concludes that although General Blaskic did not order that hostages be taken, it is inconceivable that as commander he did not order the defence of the town where his headquarters were located. In so doing, Blaskic deliberately ran the risk that many detainees might be taken hostage for this purpose. [...]

644. The Trial Chamber itself found that the Appellant did not order that hostages be used to repel the attack on Vitez, only that he ordered the defence of Vitez. However, the Trial Chamber's further finding that the Appellant can accordingly be held accountable for the crime of hostage-taking is problematic for two reasons. First, the Appeals Chamber disagrees that the Appellant's order to defend Vitez necessarily resulted in his subordinate's illegal threat. It does not follow, by virtue of his legitimate order to defend an installation of military value, that the Appellant incurred criminal responsibility for his subordinate's unlawful choice of how to execute the

order. There is no necessary causal nexus between an order to defend a position and the taking of hostages.

645. Second, the Trial Chamber based its conclusion that the Appellant was responsible for the hostage-taking on its finding that he "deliberately ran the risk that many detainees might be taken hostage for this purpose." As stated above, the Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent: a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order has the requisite *mens rea* for establishing liability for ordering the crime under Article 7(1) of the Statute. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to its findings concerning the taking of hostages.

646. The Appeals Chamber finds that there was insufficient evidence for the Trial Chamber to conclude that the Appellant ordered the defence of Vitez with the awareness of the substantial likelihood that hostages would be taken. The Trial Chamber's finding that the Appellant was on notice that HVO troops were likely to take hostages in order to defend Vitez, or that the Appellant was aware of the threats made by others in that regard, is not supported by the trial evidence. The Appeals Chamber finds that this evidence does not prove beyond reasonable doubt that he was aware of a substantial likelihood that crimes would be committed in the execution of his orders. The findings of the Trial Chamber with respect to hostage-taking are overturned. In light of these conclusions, the Appeals Chamber declines to consider the argument as to the credibility of the single witness, and grants this ground of appeal. The Appellant's convictions for Counts 17 and 18 are reversed.

C. Counts 19 and 20: Human Shields

647. The Trial Chamber found that the Appellant ordered the use of detainees as human shields to protect the headquarters of the Appellant at the Hotel Vitez on 20 April 1993. The Appeals Chamber notes that no finding was made under Article 7(3) of the Statute in relation to this count, and it will not consider this mode of responsibility in that respect.

648. The Trial Chamber also found that detainees were used as human shields in January or February 1993 to prevent the ABiH from firing on HVO positions. As regards the use of detainees as human shields in January or February 1993, however, the Trial Chamber did not make a finding establishing the Appellant's criminal responsibility, and the Appeals Chamber therefore does not consider it any further. As regards the use of human shields on 19 and 20 April 1993, on the other hand, the Trial Chamber found that the Prosecution did not prove beyond reasonable doubt that the detainees at Dubravica school and the Vitez Cultural Centre (excluding the Hotel Vitez) were used as protection against attack. The Trial Judgement entered no

conviction for crimes committed against detainees in those particular locations, and the Appeals Chamber is barred from considering these allegations any further in the absence of an appeal from the Prosecution.

649. The Trial Chamber did, however, find that on 20 April 1993, the villagers of Gacice were used as human shields to protect the HVO headquarters in the Hotel Vitez, which "inflicted considerable mental suffering upon the persons involved." In convicting the Appellant on Counts 19 and 20, the Trial Chamber's reasoning was the following: first, the detainees (numbering 247) were detained in front of the Appellant's headquarters for two and a half to three hours. Second, the Appellant was present in the building for a large part of the afternoon. Third, the ABiH on 20 April 1993 began an offensive of which the Appellant was aware. The Trial Chamber was "therefore convinced beyond all reasonable doubt that on 20 April 1993 General Blaskic ordered civilians from Gacice village to be used as human shields in order to protect his headquarters." [...]

652. The Appeals Chamber notes that Article 23 of Geneva Convention III provides as follows:

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

It also considers that Article 28 of Geneva Convention IV provides that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." Article 83 of the same Convention provides that the 'Detaining Power' "shall not set up places of internment in areas particularly exposed to the dangers of war." Furthermore, Article 51 of Additional Protocol I, relating to the protection of the civilian population in international armed conflicts, provides as follows:

> [T]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

653. The use of prisoners of war or civilian detainees as human shields is therefore prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the Statute respectively where the other elements of these crimes are met.

654. The Trial Chamber convicted the Appellant for ordering the use of detainees as human shields. This finding is partly premised upon the alleged shelling of the Hotel Vitez and the need to protect the HVO headquarters from that shelling. There is also evidence of ABiH shelling of that location in the days before as well as on 20 April 1993. While there is evidence to suggest that the shelling on 20 April was not as heavy as it had been over the preceding days, a factual finding that the Hotel Vitez was actually being shelled at all

on 20 April is not required in order to establish that detainees were unlawfully being used as human shields in anticipation of such shelling, contrary to the submission of the Appellant. Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself. To the extent that the Trial Chamber considered the intensity of the shelling of Vitez on 20 April 1993, that consideration was superfluous to an analysis of a breach of the provisions of the Geneva Conventions, but may be relevant to whether the use of the protected detainees as human shields amounts to inhuman treatment for the purposes of Article 2 of the Statute. [...]

656. [...] Witness Hrustic testified [...] in response to the question as to whether her conclusion that she was used as a human shield was based on the statement made by the soldier, that she believed that she and the other detainees were gathered around the Hotel Vitez to be used as human shields:

> Let me tell you, the moment that we were brought there with the children and with the men, knowing that there were people dead in the village, knowing a little of what had happened to the other villages, and seeing the fires, the shelling and everything, and what the soldier said, 'you sit there for a time and let your people shell you now, because they have been shelling us so far', and knowing that the hotel was a military base for a long time before that day, we could have expected shelling. At this point in time, I believe that we were brought there as a human shield because there were not many Croatian soldiers in the hotel, and then we were taken back. At that moment, at that time, I did not care whether I would die there or somewhere else. [...]

658. In determining whether the Appellant ordered the use of human shields, the Appeals Chamber has accepted the detainees were detained in front of the Hotel Vitez (which had been shelled in the preceding days) for up to three hours. However, the presence of the Appellant in the Hotel Vitez for a large part of the afternoon is of limited value as circumstantial evidence. It remains for the Appeals Chamber to consider whether or not the findings of the Trial Chamber were such that they could have been made by a reasonable trier of fact.

659. The Appeals Chamber holds that the reasoning of the Trial Chamber in finding the Appellant responsible for ordering the use of civilian detainees as human shields is flawed, although it does not undermine the conviction. The Trial Chamber had no evidence before it suggesting that the Appellant ordered that detainees be used as human shields. Instead, the Trial Chamber inferred that the Appellant had actually ordered that civilians from Gacice village be used as human shields because the installations allegedly being protected by the detainees' presence contained his headquarters, and because of his proximity to that location. A factual conclusion that detainees were used as human shields on a particular occasion (which is one that a reasonable trier of fact could have made) does not lead to the inference that the Appellant positively ordered that to be done.

660. A conviction under Article 7(1) is not, however, limited to the positive act of ordering. The Appeals Chamber notes that the Appellant was indicted by the Second Amended Indictment for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful and inhumane treatment of Bosnian Muslims. The Second Amended Indictment therefore fairly charges the Appellant with other forms of participation under Article 7(1) of the Statute in addition to the positive act of ordering. In particular, criminal responsibility for an omission pursuant to Article 7(1) of the Statute is expressly envisaged by the Second Amended Indictment. [...]

662. In the absence of evidence that the Appellant positively ordered the use of detainees as human shields to protect the Hotel Vitez, and in light of the foregoing analysis of the Second Amended Indictment, the Appeals Chamber will now consider whether the Appellant's criminal responsibility for endorsing the use of human shields is better expressed as an omission.

663. Although criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (i.e. under the doctrine of command responsibility). There is a further exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one's subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.

664. The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute. [...]

666. In order to be responsible for the omission under Article 2, the Appellant must have been aware of the use of the detainees as human shields. The Trial Chamber concluded that the Appellant knew that the detainees were outside his headquarters, and were being used as human shields. In arriving at this conclusion, the Trial Chamber relied on evidence that Vitez and the Hotel Vitez were shelled around 20 April 1993; that on 20 April 1993, 247 Muslim men, women and children from the village of Ga cice were directed to a place in front of the Hotel Vitez following an HVO attack on their village, that the men were led off elsewhere, that one of the soldiers said to some of them that they were to sit and be shelled by ABiH forces, that the detainees were surveilled by soldiers inside the Hotel Vitez and that whoever moved would be shot, and that the detainees (excluding the men) were returned to the village after about two and a half to three hours. The Trial Chamber also accepted evidence that that there were many HVO soldiers in

and around the Hotel Vitez, which had a glass faÓade, and that one of the HVO soldiers told one of the detainees in front of the Hotel Vitez that he would go and tell the 'commander'; and that the officer responsible for operations under the Appellant implicitly admitted that the detainees were put in danger. Despite his presence in his headquarters in the Hotel Vitez for a large part of the afternoon, the Appellant claimed that he knew nothing of it. The Appeals Chamber concludes that the Trial Chamber's finding that the Appellant knew of the use of the detainees as human shields is one that a reasonable trier of fact could have made. [...]

670. The Appeals Chamber concludes that the Appellant's conviction for the use of human shields under Counts 19 and 20 was correct in substance. However, in the absence of proof that he positively ordered the use of human shields, the Appellant's criminal responsibility is properly expressed as an omission pursuant to Article 7(1) as charged in the Second Amended Indictment. The Appeals Chamber accordingly finds that the elements constituting the crime of inhuman treatment have been met: there was an omission to care for protected persons which was deliberate and not accidental, caused serious mental harm, and constituted a serious attack on human dignity. The Appellant is accordingly guilty under Article 7(1) for the inhuman treatment of detainees occasioned by their use as human shields.

671. The Appeals Chamber has above considered the sole distinguishing element between Article 2 (inhuman treatment) and Article 3 (cruel treatment): that the former contains the protected person status of the victim as an element not present in the latter. Also considered above is the definition of "protected person" provided by Article 4 of Geneva Convention IV and how it has been extended to the apply to bonds of ethnicity. The Appeals Chamber considers that the Bosnian Muslim detainees used as human shields were protected persons for the purposes of this distinction. A conviction for cruel treatment under Article 3 does not require proof of a fact not required by Article 2; hence the Article 3 conviction under Count 20 must be dismissed. [...]

XIII. DISPOSITION

For the foregoing reasons, THE APPEALS CHAMBER [...]

SENTENCES the Appellant to 9 (nine) years imprisonment to run as of this day [...].

DISCUSSION

1. a. Who is a "protected person" under Convention IV? Which civilians are not "protected civilians" (*Cf.* Arts. 4 and 147 of Convention IV.)

   b. Does the Chamber respect the terms of Art. 4 of Convention IV when it replaces the nationality criteria with ethnicity for "determining loyalties or

commitments" (Trial Chamber, para. 128) and thereby determining the status of protected persons?

c. *(Trial Chamber, paras. 134-146)* In the specific context of the Former Yugoslavia, is it preferable to look for the "purpose and goal of the Convention" instead of applying it literally, and is this in the interest of the victims? Would it have been in line with the purpose and goal of Art. 4 to consider Bosnian Muslims as not having the status of protected persons during attacks led by the HVO since Bosnia-Herzegovina and Croatia were fighting against a common enemy? Is the ICTY's interpretation compatible with the principle of *nullum crimen sine lege*?

d. Does the allegiance criteria, taken as the determining factor, apply only to the Former Yugoslavia? Only to interethnic conflicts? To all international conflicts?

e. For the belligerents and humanitarian actors who need to apply International Humanitarian Law (IHL), is it easier and more practical to apply the criteria of allegiance or that of nationality? If you were a detained civilian, would you state to the detaining power your lack of allegiance to it in order to obtain the treatment prescribed for protected persons?

2. What are the laws and customs of war? What is the difference between violations of these (Art. 3 of the Statute) and grave breaches (Art. 2 of the Statute)?

3. a. *(Trial Chamber, para. 152)* Must an act be intentional for it to be a grave breach or is negligence sufficient? According to the Conventions and Protocol I? (*Cf.* Arts. 50/51/130/147 respectively of the Conventions; Art. 85 (1) of Protocol I.) According to the Statute of the ICTY (*See* **Case No. 179**, UN, Statute of the ICTY. [*Cf.* C., Statute.] p. 1791)? According to the Statute of the ICC? (Art. 30 of the Statute of the ICC (*See* **Case No. 15**, The International Criminal Court. p. 608.))

b. Is recklessness or serious criminal negligence sufficient for all the breaches set out in paragraphs 151 to 158 of the Trial Chamber judgment? Even for wilful killing?

4. a. *(Trial Chamber, para. 179)* Must an act be intentional to constitute a violation of the laws or customs of war within the meaning of Art. 3 of the ICTY Statute? A war crime under Art. 8 (2) (b) of the ICC Statute? (Art. 30 of the ICC Statute; *Cf.* **Case No. 15**. p. 608.)

b. Is recklessness or serious criminal negligence sufficient for all the breaches set out in paras. 180 to 187 of the Trial Chamber judgment? Even for murder?

5. *(Trial Chamber, paras. 152 and 179)* Is "recklessness" a form of intent or negligence in the meaning of Roman-Germanic legal systems?

6. a. *(Trial Chamber, paras. 66-72)* What elements constitute a crime against humanity? In customary international law? According to the terms of the ICTY Statute?

b. Is the existence of an armed conflict an element of the definition of a crime against humanity? Only in the case of the ICTY prosecuting the authors of this

crime? If a crime against humanity can be committed outside of the context of an armed conflict, is it a violation of IHL? Of International Human Rights Law?

c. *(Appeals Chamber, paras. 105-116)* Is the concept of 'civilian population' the same as an element of crimes against humanity and under IHL? Under IHL is a member of armed forces or resistance movements a legitimate target while he or she does not directly participate in hostilities? If yes, when does the presence of such persons make a population lose its civilian character? Is the presumption of civilian status applicable in criminal trials?

d. *(Appeals Chamber, paras. 121-128)* What are the divergences of views between the Trial Chamber and the Appeals Chamber regarding the *mens rea* necessary for a crime against humanity?

7. Classify the facts described in paragraphs 384 to 428 of the Trial Chamber judgment and paragraphs 574 to 671 of the Appeals Chamber judgment between those that would be a grave breach (Art. 2 of the Statute), a violation of the laws and customs of war (Art. 3 of the Statute) or a crime against humanity (Art. 5 of the Statute). Are all the facts described criminalised by the Statute? Could certain facts constitute, for example, at the same time a grave breach and a crime against humanity?

8. In the case where an attack causes civilian victims "the number of which may even exceed that of the hostile soldiers" (Trial Chamber, para. 406), would these victims be admissible "collateral casualties" or would the principles of proportionality and distinction be violated?

9. *(Trial Chamber, paras. 402-410)* According to IHL, if no military objective justified the attack of the village of Ahmici, was it lawful to attack it? To occupy it? (*Cf.* Art. 52 (2) of Protocol I.)

10. *(Trial Chamber, para. 416)* Are attacks by flame launcher lawful under IHL? Are they incendiary weapons in the sense of Protocol III of the 1980 Convention on Conventional Weapons? Were the States Parties to this conflict bound by this protocol? If yes, would the use of flame launchers have been authorised against combatants? If, hypothetically, the use of this weapon was prohibited by IHL, would the ICTY have been able to Punish the accused for its use? (*See* **Document No. 4**, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Geneva, October 10, 1980. p. 540 and **Document No. 6**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention. p. 545.) Does it matter, in this case, whether flame launchers are as such prohibited, restricted or lawful?

11. If only the Muslims were massacred and pillaged in the municipality of Vitez, and only the Muslim houses and Mosques were destroyed, could it be a case of genocide? Even if it is 'only' "twenty or so villages" (Trial Chamber, para. 750.)? Is it possible to consider the "Muslim population" (Trial Chamber, para. 425.) of Ahmici as a "national ethnic, racial or religious group" (Art. 4 of the Statute.)? May the Chamber's discussion on the "ethnic background" (Trial Chamber, para 127.) of the victims, in the context of the definitions of protected persons, lead us to the

conclusion that the victims all belong to the same "ethnic group"? What element is missing for there to be a crime of persecution?

12. a. *(Appeals Chamber, paras. 42-64)* What is necessary for a commander to be held responsible for acts committed by others? According to the Appeals Chamber, how should the mental element "had reason to know" be interpreted? May a standard of *mens rea* that is lower than direct intent apply in relation to ordering under Article 7 (1) of the Statute? To command responsibility under Article 7 (3) of the Statute?

b. *(Appeals Chamber, paras. 324-670)* When is a commander who orders forces to carry out a lawful operation, and who knows those forces may possibly be committing war crimes during that operation, responsible for those crimes: under Article 7 (1) of the Statute? Under Article 7 (3) of the Statute?

c. *(Appeals Chamber, paras. 647-670)* When may a commander, under Article 7 (1) of the Statute, be responsible by omission for a crime committed by subordinates? Where is the difference between that responsibility and that under Article 7 (3) of the Statute?

Case No. 186, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic

THE CASE

[**Source:** ICTY, The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23 and IT-96-23/1, Appeals Chamber, Judgement rendered 12 June 2002; available on http://www.un.org/icty/kunarac/appeal/judgement/index.htm; footnotes are partially reproduced.]

[N.B.: The Judgement rendered on 22 February 2001 by Trial Chamber II is available on http://www.un.org/icty/kunarac/trialc2/judgement/index.htm.]

[*See also* **Case No. 179**, UN, Statute of the ICTY. p. 1791.]

IN THE APPEALS CHAMBER [...]
Judgement of:
12 June 2002
PROSECUTOR
V
DRAGOLJUB KUNARAC
RADOMIR KOVAC

AND
ZORAN VUKOVIC

JUDGEMENT

[...]

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against

the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic.*

Having considered the written and oral submissions of the parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT. [...]

INTRODUCTION [...]

C. Findings of the Appeals Chamber

1. Convictions

32. The Appeals Chamber finds that it is unable to discern any error in the Trial Chamber's assessment of the evidence or its findings in relation to any of the grounds of appeal set out [...]. Therefore, the Appeals Chamber dismisses the appeals of each of the Appellants on their convictions, as well as all common grounds of appeal.

2. Sentencing

33. [...] The Appeals Chamber rejects the other grounds of appeal against sentence of the Appellants Kunarac and Vukovic and all those of the Appellant Kovac, on the basis that the Trial Chamber came to reasonable conclusions and that no discernible errors have been identified. [...]

V. GROUNDS OF APPEAL RELATING TO THE TRIAL CHAMBER'S DEFINITION OF THE OFFENCES

A. Definition of the Crime of Enslavement (Dragoljub Kunarac and Radomir Kovac) [...]

2. Discussion

116. After a survey of various sources, the Trial Chamber concluded "that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person". [footnote 143 - Trial Judgement, para 539.] It found that "the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person", and the " *mens rea* of the violation consists in the intentional exercise of such powers". [footnote 144 - *Ibid.*, para 540.]

117. The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention [available on http://www.unhchr.ch] and often referred to as "chattel slavery", has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms

of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of "chattel slavery" but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.

118. The Appeals Chamber will however observe that the law does not know of a "right of ownership over a person". [footnote 147: Trial Judgement, para 539. *See* also Article 7(2)(c) of the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998 [*Cf.* **Case No. 15**, The International Criminal Court. [A. The Statute.] p. 608.]] Article 1(1) of the 1926 Slavery Convention speaks more guardedly "of a person over whom any or all of the powers attaching to the right of ownership are exercised." That language is to be preferred.

119. The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour". [footnote 148: Trial Judgement, para 543. *See* also Trial Judgement, para 542.] Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand. In this respect, the Appeals Chamber would also like to refer to the finding of the Trial Chamber in paragraph 543 of the Trial Judgement stating:

> The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

However, this particular aspect of the Trial Chamber's Judgement not having been the subject of argument, the Appeals Chamber does not consider it necessary to determine the point involved.

120. In these respects, the Appeals Chamber rejects the Appellants' contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent. Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the

element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent. In the view of the Appeals Chamber, the circumstances in this case were of this kind.

121. The Appellants contend that another element of the crime of enslavement requires the victims to be enslaved for an indefinite or at least for a prolonged period of time. The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement. [footnote 149: [Judgement] para 542.] The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case.

122. Lastly, as far as the *mens rea* of the crime of enslavement is concerned, the Appeals Chamber concurs with the Trial Chamber that the required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership. [footnote 150: *Ibid.*, para 540.] It is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.

123. Aside from the foregoing, the Appeals Chamber considers it appropriate in the circumstances of this case to emphasise the citation by the Trial Chamber of the following excerpt from the *Pohl* case: [footnote 151: *US v Oswald Pohl and Others*, Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council No. 10*, Vol 5, (1997), p. 958 at p. 970.]

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.

The passage speaks of slavery; it applies equally to enslavement.

124. For the foregoing reasons, the Appeals Chamber is of the opinion that the Trial Chamber's definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed. The Appellants' contentions are therefore rejected; the appeal relating to the definition of the crime of enslavement fails.

B. Definition of the Crime of Rape [...]

2. Discussion

127. After an extensive review of the Tribunal's jurisprudence and domestic laws from multiple jurisdictions, [footnote156: Trial Judgement, paras 447-456.] the Trial Chamber concluded:

> the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. [footnote 157: *Ibid.*, para 460.]

128. The Appeals Chamber concurs with the Trial Chamber's definition of rape. Nonetheless, the Appeals Chamber believes that it is worth emphasising two points. First, it rejects the Appellants' "resistance" requirement, an addition for which they have offered no basis in customary international law. The Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.

129. Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape. [footnote 158: See, e.g., *Furundzija* Trial Judgement, para 185. [available on http://www.un.org/icty] Prior attention has focused on force as the defining characteristic of rape. Under this line of reasoning, force or threat of force either nullifies the possibility of resistance through physical violence or renders the context so coercive that consent is impossible.] However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. [footnote 159: Trial Judgement, para 458.] In particular, the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim". [footnote 160: *Ibid.*, para 438.] A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

130. The Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of force so long as "there is a reasonable possibility that the perpetrator will execute the

threat". [footnote 161: California Penal Code 1999, Title 9, Section 261(a)(6). [...].] While it is true that a focus on one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.

131. Under the chapter entitled "Crimes Against Sexual Self-Determination," German substantive law contains a section penalising sexual acts with prisoners and persons in custody of public authority. The absence of consent is not an element of the crime. Increasingly, the state and national laws of the United States - designed for circumstances far removed from war contexts - support this line of reasoning. [...]

132. For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.

133. In conclusion, the Appeals Chamber agrees with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible. The Appellants' grounds of appeal relating to the definition of the crime of rape therefore fail. [...]

VII. CUMULATIVE CONVICTIONS [...]

B. The Instant Convictions [...]

2. Intra-Article Convictions under Article 5 of the Statute

(a) Rape and Torture

179. The Appeals Chamber will now consider the Appellants' arguments regarding intra - Article convictions. The Appellants contend that the Trial Chamber erred by entering convictions for both torture under Article 5(f) and rape under Article 5(g) of the Statute on the theory that neither the law nor the facts can reasonably be interpreted to establish distinct crimes. The Trial Chamber found that the crimes of rape and torture each contain one materially distinct element not contained in the other, making convictions under both crimes permissible. [footnote 242: See Trial Judgement, para 557.] As its earlier discussion of the offences of rape and torture make clear, the Appeals Chamber agrees. The issue of cumulative convictions hinges on the definitions of distinct offences under the Statute which are amplified in

the jurisprudence of the Tribunal. That torture and rape each contain a materially distinct element not contained by the other disposes of this ground of appeal. That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime. [...]

181. In the *Celebici* Trial Judgement, the Trial Chamber considered the issue of torture through rape. [footnote 245: *Celebici* Trial Judgement, paras 475-496 [available on http://www.un.org/icty].] The Appeals Chamber overturned the Appellant's convictions under Article 3 of the Statute as improperly cumulative in relation to Article 2 of the Statute, but the Trial Chamber's extensive analysis of torture and rape remains persuasive. Grounding its analysis in a thorough survey of the jurisprudence of international bodies, the Trial Chamber concluded that rape may constitute torture. Both the Inter-American Commission on Human Rights and the European Court of Human Rights have found that torture may be committed through rape. And the United Nations Special Rapporteur on Torture listed forms of sexual assault as methods of torture. [footnote 246: *Ibid.*, para 491, [...].]

182. For rape to be categorised as torture, both the elements of rape and the elements of torture must be present. Summarising the international case-law, the Trial Chamber in the *Celebici* case concluded that "rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture". [footnote 247: *Celebici* Trial Judgement, para 489.] By way of illustration, the Trial Chamber discussed the facts of two central cases, *Fernando and Raquel Mejca v Peru* from the Inter-American Commission and *Aydin v Turkey* from the European Commission for Human Rights. [footnote 248: *Fernando and Raquel Mejia v Peru*, Case No. 10,970, Judgement of 1 March 1996, [...], Inter-American Yearbook on Human Rights, 1996, p. 1120 [available in *Annual Report* 1995, http://www.cidh.org.] and *Aydin v Turkey*, Opinion of the European Commission of Human Rights, 7 March 1996, reprinted in European Court of Human Rights, ECHR 1997-VI, p. 1937, paras 186 and 189.]

183. [...] [T]he Trial Chamber in the *Celebici* case observed that "one must not only look at the physical consequences, but also at the psychological and social consequences of the rape". [footnote 251: *Celebici* Trial Judgement, para 486.] [...]

185. In the circumstances of this case, the Appeals Chamber finds the Appellants' claim entirely unpersuasive. The physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture. These were not isolated instances. Rather, the deliberate and co-ordinated commission of rapes was carried out with breathtaking impunity over a long period of time. Nor did the age of the victims provide any protection from such acts. (Indeed, the Trial Chamber considered the youth of several of the victims as aggravating factors.) Whether rousted from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the

victims endured repeated rapes, implicating not only the offence of rape but also that of torture under Article 5 of the Statute. In the egregious circumstances of this case, the Appeals Chamber finds that all the elements of rape and torture are met. The Appeals Chamber rejects, therefore, the appeal on this point.

(b) Rape and Enslavement

186. Equally meritless is the Appellants' contention that Kunarac's and Kovac's convictions for enslavement under Article 5(c) and rape under Article 5(g) of the Statute are impermissibly cumulative. That the Appellants also forced their captives to endure rape as an especially odious form of their domestic servitude does not merge the two convictions. As the Appeals Chamber has previously explained in its discussion of enslavement, it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape. The Appeals Chamber, therefore, rejects this ground of appeal.

3. Article 3 of the Statute [...]

(b) Intra-Article Convictions under Article 3 of the Statute [...]

194. Article 3 of the Statute, as the Appeals Chamber has previously observed, also prohibits other serious violations of customary international law. The Appeals Chamber in the *Tadic* Jurisdiction Decision outlined four requirements to trigger Article 3 of the Statute [*See* **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A. Jurisdiction, para. 94.] p. 1804.]:

> (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature...; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values ..; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [...]

[R]ape is a "serious" war crime under customary international law entailing "individual criminal responsibility," [...].

195. In keeping with the jurisprudence of the Tribunal, the Appeals Chamber concludes that rape meets these requirements and, therefore, constitutes a recognised war crime under customary international law, which is punishable under Article 3 of the Statute. The universal criminalisation of rape in domestic jurisdictions, the explicit prohibitions contained in the fourth Geneva Convention and in the Additional Protocols I and II, and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights and the Inter-American Commission on Human Rights, all lead inexorably to this conclusion. [...]

VIII. ALLEGED ERRORS OF FACT (DRAGOLJUB KUNARAC) [...]

B. Convictions under Counts 1 to 4

1. Rapes of FWS-75 and D.B.

(a) Submissions of the Parties

(i) The Appellant (Kunarac) [...]

211. [...] [T]he Appellant argues that the Trial Chamber erred in finding that he possessed the requisite *mens rea* in relation to the rape of D.B.. The Appellant concedes that he had sexual intercourse with D.B. but denies being aware that D.B.'s consent was vitiated because of Gaga's threats, and stresses that D.B. initiated the sexual contact with him and not *vice versa*, because, until that moment, he had no interest in having sexual intercourse with her. Further, the Appellant alleges that the Trial Chamber erred in reaching the conclusion that he had committed the crimes with a discriminatory intent solely on the basis of the testimony of a single witness stating that, when he raped women, the Appellant told them that they would give birth to Serb babies or that they should "enjoy being fucked by a Serb".

(ii) The Respondent [...]

214. [...] [T]he Respondent recalls FWS-183's testimony that while a soldier was raping her after she had just been raped by the Appellant, "... he - Zaga (the Appellant) was saying that I would have a son and that I would not know whose it was, but the most important thing was it would be a Serb child". The Respondent submits that the evidence provides a firm basis for the Trial Chamber's finding that the Appellant committed crimes for a discriminatory purpose.

(b) Discussion [...]

218. [...] [T]he Trial Chamber correctly inferred that the Appellant had a discriminatory intent on the basis, *inter alia*, of the evidence of FWS-183 regarding comments made by the Appellant during the rapes in which he was involved. [...] The special circumstances and the ethnic selection of victims support the Trial Chamber's conclusions. For these reasons, this part of the grounds of appeal must fail. [...]

E. Convictions under Counts 18 to 20 - Rapes and Enslavement of FWS-186 and FWS-191

1. Submissions of the Parties

(a) The Appellant (Kunarac) [...]

251. The Appellant denies that FWS-191 was his personal property. He stresses that FWS-191 stated at trial that the Appellant protected her from being

raped by a drunken soldier who had offered money to be with her. Furthermore, the Appellant contends that he did not have any role in keeping FWS -191 at the house in Trnovace because that house was the property of DP 6. He states that FWS-191 had asked DP 6 if she could stay in the house and that DP 6 had offered her security, explaining that if they left the house she and FWS-186 "would be raped by others".

(b) The Respondent [...]

253. As to the crime of enslavement, the Prosecutor argues that the Trial Chamber identified a comprehensive range of acts and omissions demonstrating the Appellant's exercise of the rights of ownership over FWS-186, thus satisfying the criteria of enslavement. [...] In the view of the Prosecutor, there is no contradiction in the finding of the Trial Chamber that the Appellant forbade other men to rape FWS-191. Rather, it submits, this fact indicates a level of control and ownership consistent with the crime of enslavement.

2. Discussion [...]

255. Lastly, as to the crime of enslavement, the Trial Chamber found that the women at Trnovace "were not free to go where they wanted to even if, as FWS-191 admitted, they were given the keys to the house at some point". [footnote 337: Trial Judgement, para 740.] In coming to this finding, the Trial Chamber accepted that "... the girls, as described by FWS-191, had nowhere to go, and had no place to hide from Dragoljub Kunarac and DP 6, even if they had attempted to leave the house...". [footnote 338: *Ibid.*] The Appeals Chamber considers that, in light of the circumstances of the case at bar in which Serb soldiers had exclusive control over the municipality of Foca and its inhabitants, and of the consistent testimony of the victims, the findings of the Trial Chamber are entirely reasonable. For the foregoing reasons, this ground of appeal fails.

F. Conclusion

For the foregoing reasons, the appeal of the Appellant Kunarac on factual findings is dismissed.

IX. ALLEGED ERRORS OF FACT (RADOMIR KOVAC) [...]

B. Conditions in Radomir Kovac's Apartment

1. Submissions of the Parties

(a) The Appellant (Kovac)

261. The Appellant contends that the Trial Chamber erred in not evaluating the evidence as to the *manner* in which, whilst at his apartment, FWS-75, FWS-87, A.S. and A.B. were allegedly subjected to rape and degrading and

humiliating treatment, and, at times, slapped and exposed to threats. [...] He also contends that it was not, as the Trial Chamber has found, proved beyond reasonable doubt that he completely ignored the girls' diet and hygiene and that they were sometimes left without food. He maintains that the girls had access to the whole apartment, that they could watch television and videos, that they could cook and eat together with him and Jagos Kostic, and that they went to cafés in town.

(b) The Respondent

262. The Respondent argues that it was open to the Trial Chamber, on the basis of the evidence presented at trial, to conclude that FWS-75, FWS-87, A.S. and A.B. were detained in the Appellant's apartment and subjected to assault and rape. [...]

2. Discussion

263. The Appeals Chamber notes that the Trial Chamber discussed what the Appellant stated in his defence at trial. [footnote 362: Trial Judgement, paras 151-157.] Further, the Trial Chamber discussed at length the conditions in the Appellant's apartment, [footnote 363: *Ibid.*, paras 750-752.] with reference to the specific abuses suffered by the victims. [footnote 364: *Ibid.*, paras 757-759, 761-765 and 772-773.] The proof accepted by the Trial Chamber describes in detail the manner in which the lives of the victims unfolded in the Appellant's apartment and in which physically humiliating treatment was meted out to them. The Appeals Chamber considers that the relevant findings of the Trial Chamber were carefully considered and that the correct conclusions were drawn in the Trial Judgement. The ground of appeal is obviously ill-founded and is therefore dismissed. [...]

H. Conclusion

290. For the foregoing reasons, the appeal of the Appellant Kovac on factual findings is dismissed. [...]

XII. DISPOSITION

For the foregoing reasons:

A. The Appeals of Dragoljub Kunarac against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his convictions. [...]

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his sentence; [...]

Accordingly, the Appeals Chamber AFFIRMS the sentence of 28 years' imprisonment as imposed by the Trial Chamber.

B. The Appeals of Radomir Kovac against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kovac against his convictions. [...]

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kovac against his sentence; [...]

Accordingly, the Appeals Chamber AFFIRMS the sentence of 20 years' imprisonment as imposed by the Trial Chamber [...]

Done in both English and French, the French text being authoritative. [...]

DISCUSSION

1. According to customary international law is enslavement a crime against humanity? According to customary International Humanitarian Law (IHL)? Has this crime been codified in instruments other than the statutes of the ICTY and the International Criminal Court (ICC)? (*Cf.* Art. 6 (c) of the Statute of the Nuremberg Military Tribunal, http://www.icrc.org/ihl; Art. 5 (c) of the ICTY Statute *Cf.* **Case No. 179**. p. 1791; Art. 7 (1) (c) and 7 (2) (c) of the ICC Statute, *Cf.* **Case No. 15**. p. 608.)
2. a. Is the ban on slavery more a question of International Human Rights Law? (*Cf.* Art. 8 (1) of the International Covenant on Civil and Political Rights, *cf.* http://www.unhchr.ch) Is it a non-derogable human right?
   b. Does IHL address slavery as such? (*Cf.* Art. 4 (2) (f) of Protocol II.)
   c. Does the fact that only Protocol II explicitly bans slavery mean that it remains legal during international armed conflicts? Or does Protocol II only act as a reminder that slavery "remain[s] prohibited at any time and in any place whatsoever"? (*Cf.* Art. 4 (2) of Protocol II.)
3. During international armed conflicts, is rape committed by one of the belligerents outlawed by IHL? By the IHL applicable to non-international armed conflicts?

(*Cf.* Art. 3 common to the Conventions; Arts. 50/51/130/147 respectively of the Conventions; Art. 27 (2) of Convention IV; Art. 76 (1) of Protocol I and Art. 4 (2) (e) of Protocol II.)

4. Is rape a war crime? (*Cf.* Arts. 50/51/130/147 respectively of the Conventions; Art. 85 of Protocol I.) Is it also a crime against humanity? Was the inclusion of rape as a crime against humanity in the Statutes of the ICTY and the ICTR an innovation? Today, in regards to international case law and the ICC Statute, may this development of IHL be seen as having a customary component? (*Cf.* Art. 5 (g) of the ICTY Statute, *cf.* **Case No. 179**, p. 1791; Art. 3 (g) of the ICTR Statute, *cf.* **Case No. 196**, p. 2154; Art. 7 (1) (g) of the ICC Statute, *cf.* **Case No. 15**, p. 608; *see also* **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. p. 2171.) Can rape only be considered as a crime against humanity if conditions specific to crimes against humanity are fulfilled? Which ones? If these conditions are not fulfilled is it then a war crime?

Case No. 187, ICTY, The Prosecutor v. Galic

THE CASE

[**Source:** ICTY, Prosecutor v. Stanislav Galic, Judgement and opinion, 5 December 2003; IT-98-29-T; available on http://www.un.org/icty]

IN TRIAL CHAMBER I
Judgement of:
5 December 2003
PROSECUTOR
v.
STANISLAV GALIC

JUDGEMENT AND OPINION

I. INTRODUCTION

1. Trial Chamber I of the International Tribunal (the "Trial Chamber") is seized of a case which concerns events surrounding the military encirclement of the city of Sarajevo in 1992 by Bosnian Serb forces. [...]

3. In the course of the three and a half years of the armed conflict in and around Sarajevo, [...] Major-General Stanislav Galic, [...] was the commander for the longest period, almost two years, from around 10 September 1992 to 10 August 1994. The Prosecution alleges that over this period he conducted a protracted campaign of sniping and shelling against civilians in Sarajevo. [...]

II. APPLICABLE LAW [...]

1. Prerequisites of Article 3 of the Statute [...]

11. According to the [...] Appeals Chamber Decision, for criminal conduct to fall within the scope of Article 3 of the Statute, the following four conditions ("the *Tadic* conditions") must be satisfied: [Tadic Jurisdiction]
    (i) the violation must constitute an infringement of a rule of international humanitarian law;
    (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
    (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
    (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [...]

12. The Indictment charges the Accused with violations of the laws or customs of war under Article 3 of the Statute, namely with one count of "unlawfully inflicting terror upon civilians" (Count 1) and with two counts of "attacks on civilians" (Counts 4 and 7) pursuant to Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949. These offences are not expressly listed in Article 3 of the Statute. Starting with the crime of attack on civilians, the Trial Chamber will determine whether the offence can be brought under Article 3 of the Statute by verifying that the four *Tadic* conditions are met. The Trial Chamber will also inquire into the material and mental elements of the offence. It will then repeat this exercise for the crime of terror.

2. Attack on Civilians as a Violation of the Laws or Customs of War [...]

(b) First and Second Tadic Conditions

16. Counts 4 and 7 of the Indictment are clearly based on rules of international humanitarian law, namely Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. Both provide, in relevant part, that: "The civilian population as such, as well as individual civilians, shall not be made the object of attack." The first *Tadic* condition, that the violation must constitute an infringement of a rule of international humanitarian law, is thus fulfilled.

17. As for the second *Tadic* condition, that the rule must be customary in nature or, if it belongs to treaty law, that the required conditions must be met, the Prosecution claims that the parties to the conflict were bound by Article 51 of Additional Protocol I and Article 13 of Additional Protocol II as a matter of both treaty law and customary law. [...]

19. The jurisprudence of the Tribunal has already established that the principle of protection of civilians has evolved into a principle of customary

international law applicable to all armed conflicts. Accordingly, the prohibition of attack on civilians embodied in the above-mentioned provisions reflects customary international law.

20. Moreover, as explained below, the same principle had also been brought into force by the parties by convention. [...]

22. The Trial Chamber does not deem it necessary to decide on the qualification of the conflict in and around Sarajevo. It notes that the warring parties entered into several agreements under the auspices of the ICRC. The first of these was the 22 May Agreement, [*See* **Case No. 173**, [*cf.* B.] p. 1761.] by which the parties undertook to protect the civilian population from the effects of hostilities and to respect the principle prohibiting attacks against the civilian population. With regard to the conduct of hostilities, they agreed to bring into force, *inter alia*, Articles 35 to 42 and 48 to 58 of Additional Protocol I. [...]

(c) Third Tadic Condition [...]

27. The act of making the civilian population or individual civilians the object of attack [...], resulting in death or injury to civilians, transgresses a core principle of international humanitarian law and constitutes without doubt a serious violation of the rule contained in the relevant part of Article 51(2) of Additional Protocol I. It would even qualify as a grave breach of Additional Protocol I. It has grave consequences for its victims. The Trial Chamber is therefore satisfied that the third *Tadic* condition is fulfilled.

(d) Fourth Tadic Condition

28. In accordance with the fourth *Tadic* condition, a violation of the rule under examination must incur, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

29. The Appeals Chamber has found that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife." It has further expressly recognized that customary international law establishes that a violation of the principle prohibiting attacks on civilians entails individual criminal responsibility.

30. It should be noted that the intention of the States parties to Additional Protocol I to criminalize violations of Article 51(2) of Additional Protocol I is evidenced by the fact, mentioned above, that an attack on civilians is considered a grave breach of the Protocol, as defined by Article 85(3)(a) therein. The Trial Chamber has also noted that the "Programme of Action on Humanitarian Issues" [i.e. identical unilateral declarations signed by the parties at a conference held in London on 27 August 1992] recognized that

those who committed or ordered the commission of grave breaches were to be held individually responsible.

31. Moreover, national criminal codes have incorporated as a war crime the violation of the principle of civilian immunity from attack. This war crime was punishable under Article 142 of the 1990 Penal Code of the Socialist Federal Republic of Yugoslavia. In the Republic of Bosnia-Herzegovina it was made punishable by a decree-law of 11 April 1992. National military manuals also consistently sanction violations of the principle. [...]

(e) Material and Mental Elements [...]

(ii) Discussion [...]

42. [...] In the Blaskic case [*See* **Case No. 185**, ICTY, The Prosecutor v. Blaskic, p. 1936.] the Trial Chamber observed in relation to the *actus reus* that "the attack must have caused deaths and /or serious bodily injury within the civilian population or damage to civilian property. [...] Targeting civilians or civilian property is an offence when not justified by military necessity." On the *mens rea* it found that "such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity". [...]

44. The Trial Chamber does not however subscribe to the view that the prohibited conduct set out in the first part of Article 51(2) of Additional Protocol I is adequately described as "targeting civilians when not justified by military necessity". This provision states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity. [...]

47. [...] According to Article 50 of Additional Protocol I, "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of Additional Protocol I." For the purpose of the protection of victims of armed conflict, the term "civilian" is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict. It is a matter of evidence in each particular case to determine whether an individual has the status of civilian.

48. The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I is suspended when and for such time as they directly participate in hostilities. To take a "direct" part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces. [...]

50. The presence of individual combatants within the population does not change its civilian character. In order to promote the protection of civilians, combatants are under the obligation to distinguish themselves at all times

from the civilian population; the generally accepted practice is that they do so by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly. In certain situations it may be difficult to ascertain the status of particular persons in the population. The clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian. A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status. The Commentary to Additional Protocol I explains that the presumption of civilian status concerns "persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked". The Trial Chamber understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.

51. As mentioned above, in accordance with the principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked. A widely accepted definition of military objectives is given by Article 52 of Additional Protocol I [...].

53. In light of the discussion above, the Trial Chamber holds that the prohibited conduct set out in the first part of Article 51(2) is to direct an attack (as defined in Article 49 of Additional Protocol I) against the civilian population and against individual civilians not taking part in hostilities.

54. The Trial Chamber will now consider the mental element of the offence of attack on civilians, when it results in death or serious injury to body or health. Article 85 of Additional Protocol I explains the intent required for the application of the first part of Article 51(2). It expressly qualifies as a grave breach the act of *wilfully* "making the civilian population or individual civilians the object of attack". The Commentary to Article 85 of Additional Protocol I explains the term as follows:

> *wilfully*: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.

The Trial Chamber accepts this explanation, according to which the notion of "wilfully" incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts "wilfully".

55. For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to

the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.

56. In sum, the Trial Chamber finds that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:
    1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
    2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.

57. [...] [T]he Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians. It notes that indiscriminate attacks are expressly prohibited by Additional Protocol I. This prohibition reflects a well-established rule of customary law applicable in all armed conflicts.

58. One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack. [...]

60. The Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence.

61. As suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack. [...]

3. Terror against the Civilian Population as a Violation of the Laws or Customs of War [...]

(c) Discussion [...]

(i) Preliminary remarks

91. [...] In its interpretation of provisions of the Additional Protocols and of other treaties referred to below, the Majority will apply Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, namely that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." No word in a treaty will be presumed to be superfluous or to lack meaning or purpose.

92. The Majority also acknowledges the importance of the principle found in Article 15 of the 1966 International Covenant on Civil and Political Rights, which states, in relevant part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. [...] Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations."

93. The principle (known as *nullum crimen sine lege*) is meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission. In practice this means "that penal statutes must be strictly construed" and that the "paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object." [...]

(ii) First and Second Tadic Conditions [...]

96. Thus the first two *Tadic* conditions are met: Count 1 bases itself on an actual rule of international humanitarian law, namely the rule represented by the second part of the second paragraph of Article 51 of Additional Protocol I. As for the rule's applicability in the period covered by the Indictment, the rule had been brought into effect at least by the 22 May Agreement, which not only incorporated the second part of 51(2) by reference, but repeated the very prohibition "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" in the agreement proper.

97. The Majority emphasizes that it is not required to pronounce on whether the rule in question is also customary in nature. As stated above, it belongs to "treaty law". This is enough to fulfil the second *Tadic* condition as articulated by the Appeals Chamber. [...]

iv) Fourth Tadic Condition

113. The Majority now comes to examine the fourth *Tadic* condition, namely whether a serious violation of the prohibition against terrorizing the civilian population entails, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. The issue here, in particular, is whether the intent to spread terror had already been criminalized by 1992. The Majority reiterates that it takes no position on whether a customary basis exists for a crime of terror as a violation of the laws or customs of war. Its discussion below amounts to a survey of statutory and conventional law relevant to the fulfilment of the fourth *Tadic* condition.

114. To the Majority's knowledge, the first conviction for terror against a civilian population was delivered in July 1947 by a court-martial sitting in Makassar in the Netherlands East-Indies (N.E.I.). [...]

116. The list of war crimes in the aforementioned N.E.I. statute reproduced with minor changes a list of war crimes proposed in March 1919 by the so-called Commission on Responsibilities, a body created by the Preliminary Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies during the 1914-1918 war. [...] The Commission's list of war crimes had "Murders and massacres; systematic terrorism" of civilians as one item (the first in the list). [...]

118. Australia's War Crimes Act of 1945 made reference to the work of the Commission on Responsibilities and included "systematic terrorism" in its category of war crimes.

119. The next relevant appearance of a prohibition against terror was in Article 33 of the 1949 Geneva Convention IV, [...] purely by operation of Article 33, civilians in territory not occupied by the adversary are not protected against "measures of intimidation or of terrorism" which the adversary might decide to direct against them.

120. The most important subsequent development on the international stage was the unopposed emergence of Article 51(2) of Additional Protocol I (and of the identical provision in the second Protocol) [...]. [...]

121. The Majority now turns to consider a legislative development in the region relevant to this Indictment. [...]

124. The 22 May 1992 Agreement states in its section on "Implementation" that each party "undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence *and to punish those responsible* in accordance with the law in force." Clearly the parties intended that serious violations of international humanitarian law would be prosecuted as criminal offences committed by individuals.

125. The developments reviewed so far demonstrate that, by the time the second part of 51(2) was added verbatim to the 22 May Agreement it already had a significant history of usage by direct or indirect reference in the region of the former Yugoslavia. [...]

128. The same conclusion is reached by another line of reasoning. [...] The Majority finds in Article 85's [of Protocol I] universal acceptance in the Diplomatic Conference clear proof that certain violations of Article 51(2) of Additional Protocol I had been criminalized. [...]

129. Because the alleged violations would have been subject to penal sanction in 1992, both internationally and in the region of the former Yugoslavia including Bosnia-Herzegovina, the fourth *Tadic* condition is satisfied.

130. [...] The Majority expresses no view as to whether the Tribunal also has jurisdiction over other forms of violation of the rule, such as the form consisting only of threats of violence, or the form comprising acts of violence not causing death or injury. [...]

133. In conclusion, the crime of terror against the civilian population in the form charged in the Indictment is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.

134. The Majority rejects the Parties' submissions that actual infliction of terror is an element of the crime of terror. [...]

135. With respect to the "acts of violence", these do not include legitimate attacks against combatants but only unlawful attacks against civilians.

136. "Primary purpose" signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts - or, in other words, that he was aware of the possibility that terror would result - but that that was the result which he specifically intended. The crime of terror is a specific-intent crime.

137. [...] The Majority accepts the Prosecution's rendering of "terror" as "extreme fear". The *travaux préparatoires* of the Diplomatic Conference do not suggest a different meaning. [...]

C. Cumulative Charging and Convictions [...]

2. Cumulative Convictions [...]

158. According to the Appeals Chamber it is permissible to enter cumulative convictions under different statutory provisions to punish the same criminal acts if "each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not contained in the other." [footnote 270: *Celebici* Appeal Judgment, para. 412.] If it is not the case that each statutory provision involved has a materially distinct element, a conviction should be entered only under the more specific provision, namely the one with the additional element. [footnote 271: *Celebici* Appeal Judgment, para. 413.] [...]

162. Applying the aforementioned test, convictions for the crimes of terror and attack on civilians under Article 3 of the Statute based on the same conduct are not permissible. The legal elements are the same except that the crime of terror contains the distinct material element of "primary purpose of spreading terror." This makes it more specific than the crime of attack on civilians. Therefore, if all relevant elements were proved, a conviction should be entered for Count 1 only.

(b) Articles 3 and 5: Cumulation for War Crimes and Crimes against Humanity

163. The Appeals Chamber has stated that it is permissible to cumulate convictions for the same acts under Articles 3 and 5 of the Statute. Therefore, a conviction for the crime of terror upon the civilian population (Article 3 of the Statute) and convictions for murder and inhumane acts (Article 5 of the Statute) may stand together. [...]

D. Theories of Responsibility under Article 7 of the Statute

165. The Indictment alleges that General Galic, as commander of the Sarajevo Romanija Corps, and pursuant to Article 7(1) of the Statute, bears individual criminal responsibility for planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution of the campaign of shelling and sniping against the civilian population of Sarajevo. The Accused is also alleged to bear individual criminal responsibility pursuant to Article 7(3) of the Statute for the conduct of his subordinates.[...]

1. Individual Responsibility under Article 7 (1) of the Statute [...]

168. The Trial Chamber considers, briefly, the case-law of the International Tribunals which elaborates the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute. Considering them in the order in which they appear in the Statute, "planning" has been defined to

mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases, and the crime was actually committed within the framework of that design by others. "Instigating" means prompting another to commit an offence, which is actually committed. It is sufficient to demonstrate that the instigation was "a clear contributing factor to the conduct of other person(s)". It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement. "Ordering" means a person in a position of authority using that authority to instruct another to commit an offence. The order does not need to be given in any particular form. "Committing" means that an "accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute". Thus, it "covers first and foremost the physical perpetration of a crime by the offender himself." "Aiding and abetting" means rendering a substantial contribution to the commission of a crime. These forms of participation in a crime may be performed through positive acts or through culpable omission. It has been held in relation to "instigating" that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates. The Defence contests the applicability of that case-law and considers that "in all the cases (under Article 7(1)) a person must undertake an action that would contribute to the commission of a crime".

169. In the Majority's opinion, a superior may be found responsible under Article 7(1) where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) (see further below) the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the superior's disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior's liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior's conduct. In such cases the subordinate will most likely be aware of the superior's support or encouragement, although that is not strictly necessary. [...]

2. Article 7 (3) of the Statute

173. The case-law of the International Tribunal establishes that the following three conditions must be met before a person can be held responsible for the criminal acts of another under Article 7(3) of the Statute: (1) a superior-subordinate relationship existed between the former and the latter; (2) the

superior knew or had reason to know that the crime was about to be committed or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator. The Appeals Chamber has said that control must be effective for there to be a relevant relationship of superior to subordinate. Control is established if the commander had "the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed." The Appeals Chamber emphasised that "in general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a Court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced."

174. In the absence of direct evidence of the superior's actual knowledge of the offences committed by his or her subordinates, this knowledge may established through circumstantial evidence. [...] The Trial Chamber also takes into consideration the fact that the evidence required to prove such knowledge for a commander operating within a highly disciplined and formalized chain of command with established reporting and monitoring systems is not as high as for those persons exercising more informal types of authority.

175. In relation to the superior's "having reason to know" that subordinates were about to commit or had committed offences, "a showing that a superior had some general information in his possession which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he had 'reason to know'." [...] [P]ast behaviour of subordinates or a history of abuses might suggest the need to inquire further. [...]

177. Finally, in cases where concurrent application of Articles 7(1) and 7(3) is possible because the requirements of the latter form of responsibility are satisfied alongside those of the former, the Trial Chamber has the discretion to choose the head of responsibility most appropriate to describe the criminal responsibility of the accused.

III. FACTUAL AND LEGAL FINDINGS [...]

C. Was there a Campaign of Sniping and Shelling by SRK Forces against Civilians? [...]

208. The Majority wishes to clarify at this point its reasoning in moving from the level of specific scheduled incidents to the level of a general campaign. It would be implausible to claim that 24 sniping attacks and 5 shelling attacks amounted to a "campaign", in the sense above. The Majority makes no such claim. Spread out over a period of two years, the total of proved attacks, if any, could not in itself represent a convincing "widespread" or "systematic" manifestation of sniping and shelling of civilians. Therefore, the evidence

which demonstrates whether the alleged scheduled incidents, if proved attacks, were not isolated incidents but representative of a campaign of sniping and shelling as alleged by the Prosecution is examined with no less due attention. [...]

1. General Evidence of Sniping and Shelling at Civilians in ABiH-held Areas of Sarajevo during the Indictment Period

210. The city of Sarajevo came under extensive gunfire and was heavily shelled during the Indictment Period. This is documented by UN reports, and other UN sources, which offer general assessments of the death or injury of Sarajevo civilians in the course of such attacks. [...]

211. The Defence submits however that the evidence suggests that the ABiH carried out attacks againt their own civilians to attract sympathy of the international community. The Prosecution accepts that the Trial Record discloses that elements sympathetic or belonging to the ABiH may have attacked the Muslim population of Sarajevo although it argues that this evidence was inconclusive.[...] [A] Canadian officer with the UNPROFOR testified that it was "'common knowledge' that [investigations carried out by the United Nations] strongly pointed to the fact that the Muslim forces did, on occasion, shell their own civilians" though, "for political reasons," that information was not made public. [...] According to Michael Rose, the British general who commanded UNPROFOR forces in Bosnia-Herzegovina from January 1994 to January 1995, what "was certain is that the Bosnian governement forces would, from time to time, fire at the Serbs, at particular moments of political importance, in order to draw back fire on to Sarajevo so that the Bosnian government could demonstrate the continuing plight of the people in Sarajevo".

212. On other occasions, UN sources also attributed civilian injuries and deaths to SRK actions, including deliberate targeting. According to General Francis Briquemont, who commanded UN forces in Bosnia-Herzegovina from 12 July 1993 to 24 January 1994, "There is no doubt that during the shelling" of Sarajevo by the SRK, "civilians were hit." [...]

215. John Ashton, who arrived in Sarajevo in July 1992 as a photographer, remembered that during his stay in Sarajevo, "The majority of things - the targets I saw were civilian targets. I saw a lot of people go out to water lines. These were targeted specifically. And I saw people try to cut down trees. I saw snipers actually shoot at people." Morten Hvaal, a Norwegian journalist covering the conflict from September 1992 to August 1994, witnessed civilians being shot at "more or less every day, if not every day" and estimated that he saw, or arrived within 30 minutes of, "50 to a hundred" instances where civilians were actually hit by small-arms fire. [...]

218. Ashton testified about fire-fighters targeted when tending fires started by shelling. [...]

219. Ambulances were also targeted. They were sometimes driven at night, without flashing their lights, and not on main roads to avoid being fired upon. Witness AD, an SRK soldier, testified that the Commander of the Ilijas Brigade gave orders to his mortar battery to target ambulances, a marketplace, funeral processions, and cemeteries further north from the city, in Mrakovo.

220. Hvaal testified that during the Indictment Period he attended funerals several times a week and saw that the Bosnian Serb army would shell them. [...]

221. According to UN military personnel, trams were also deliberately targeted by Bosnian Serb forces. [...]

222. Civilians in ABiH-held areas of Sarajevo deferred even basic survival tasks to times of reduced visibility, such as foggy weather or night time, because they were targeted otherwise. [...]

2. Sniping and Shelling of Civilians in Urban ABiH-held Areas of Sarajevo

(a) General Grbavica Area [...]

(i) Scheduled Sniping Incident 5

247. Milada Halili and her husband Sabri Halili testified that on the morning of 27 June 1993, at around noon, they were walking with Almasa Konjhodzic, Milada's mother, to the PTT building. [...] Milada Halili, who was a bit ahead, ran across the intersection behind a barrier of containers which had been set up to protect against shooting from Grbavica. Frightened by the shot, Almasa Konjhodzic lost her balance and fell. Sabri Halili helped her to her feet and they continued. They had walked ten metres when Almasa Konjhodzic was struck by a bullet. Sabri Halili turned to see a pool of blood beneath his mother-in-law. The victim was taken to hospital where she died from the wound.

248. The Trial Chamber accepts the description of the incident as recounted by the witnesses and is satisfied that the victim was a civilian. The victim were [sic] wearing civilian clothes. Although Sabri Halili was a member of the ABiH, he was off-duty that day and was not dressed in uniform or carrying weapons. [...]

253. The Majority therefore finds that Almasa Konjhodzic, a civilian, was deliberately targeted and killed by a shot fired from SRK-controlled territory in Grbavica. [...]

(ii) Scheduled Sniping Incident 6

352. Sadiha Sahinovic testified that on 11 July 1993, at about 2 or 3pm, she went with her friend Munira Zametica to fetch water at the Dobrinja river. Sniping had gone on throughout the day. Sahinovic explained that she and Zametica found shelter with a group of 6, 7 persons in an area under the bridge where the river ran. They did not dare to approach the riverbank until Zametica overcame her hesitation and approached the riverbank. She was filling her

bucket with water when she was shot. It was too dangerous for Sahinovic and for Vahida Zametica, the 16-year old daughter of the victim who came to assist once alerted of the incident, to leave the protection of the bridge. The victim was lying face down in the river, blood coming out of her mouth. Vahida heard the shooting continue and saw the bullets hitting the water near her mother. ABiH soldiers passing by the bridge saw what had happened, positioned themselves on the bridge behind sandbags and shot into the direction of the Orthodox Church. The victim was pulled out of the water and taken to hospital; she died later that afternoon.

353. The Defence claims that the victim could not have been hit from "VRS" positions because the Dobrinja River or the victim could not be seen from there; the Defence argues that ABiH soldiers had fortified positions on the bridge, that combat was ongoing at the time the incident occurred and that the victim was hit by a stray bullet.

354. Sahinovic testified that the bullets directed at the victim originated from the Orthodox Church in Dobrinja. She, like the victim's daughter, indicated that shooting at the river always originated from the Orthodox Church. This is both consistent with the side of the bridge at which those who had come to fetch water had taken shelter as with the observations in respect of continuing fire which prevented those present from removing the victim from the riverbank. SRK firing positions on the tower of the Orthodox Church and nearby high-rise buildings were confirmed by several witnesses. [...]

355. The Trial Chamber also rejects the defence's claim that ABiH soldiers at that time held fortified positions on the bridge and that the victim was hit by a stray bullet fired during combat. Reliable testimony establishes that ABiH soldiers passed by after the event and only then opened return fire in the direction of the Orthodox Church. In the present case, the activity the victim was engaged in, the fact that civilians routinely fetched water at this location and her civilian clothing were indicia of the civilian status of the victim. At a disctance of 1100 metres (as determined by Hinchcliffe), the perpetrator would have been able to observe the civilian appearance of Zametica, a 48 year old civilian woman, if he was well equipped, or if no optical sight or binoculars had been available, the circumstances were such that disregarding the possibility that the victim was civilian was reckless. Furthermore, the perpetrator repeateadly shot toward the victim preventing rescuers from approaching her. The Trial Chamber concludes that the perpetrator deliberately attacked the victim. The mere fact that at the distance of 1100 metres the chance of hitting a target deteriorates does not change this conclusion. The suggestion by the Defence that the cause of death should be doubted in the absence of specific forensic medical information is also rejected. The course of events sufficiently proves that Zametica's death was a consequence of direct fire opened on her.

356. The Trial Chamber finds that Munira Zametica, a civilian, was deliberately shot from SRK-held territory. [...]

vi) Scheduled Shelling Incident 1

372. On 1 June 1993, some residents of Dobrinja decided to organize a football tournament in the community of Dobrinja IIIB. It was a beautiful, sunny day. Being aware of the danger of organising such an event, the residents looked for a safe place to hold the tournament. The football pitch was set up in the corner of a parking lot, which was bounded by six-storey apartment blocks on three sides and on the fourth side, which faced the north, by Mojmilo hill, and was not visible from any point on the SRK side of the confrontation line. Around 200 spectators, among whom were women and children, gathered to watch the teams play. [...]

373. The first match of the tournament began at around 9 am and the second one started an hour later. Some minutes after 10 am, during the second match, two shells exploded at the parking lot. Ismet Fazlic, a member of the civil defence, was the referee of the second game. [...]

376. [...] The Majority [...] finds that there is sufficient specific and credible evidence to conclude that it has been shown beyond reasonable doubt that the explosion of 1 June 1993 in Dobrinja killed over 10 persons and injured approximately 100 others.

377. The Defence submits that the shells were not deliberately fired by SRK forces upon civilians. [...]

387. [...] Had the SRK forces launched two shells into a residential neighbourhood at random, without taking feasible precautions to verify the target of the attack, they would have unlawfully shelled a civilian area. The Majority notes that there is no evidence on the Trial Record that suggests that the SRK was informed of the event taking place in the parking lot. However, had the SRK troops been informed of this gathering and of the presence of ABiH soldiers there, and had intended to target these soldiers, this attack would nevertheless be unlawful. Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated. In light of its finding regarding the source and direction of fire, and taking account of the evidence that the neighbourhood of Dobrinja, including the area of the parking lot, was frequently shelled from SRK positions, the Majority finds that the first scheduled shelling incident constitutes an example of indiscriminate shelling by the SRK on a civilian area. [...]

(ii) Scheduled Shelling 5

a. Description of the Incident

438. Witnesses testified that on 5 February 1994, around noon, many people were shopping in the Markale open-air market, when a single explosion shook the

area. [...] Residents and by-passers in the area [...] testified about hearing a loud explosion, which injured and killed a number of people present at the market. People present in the market transported victims of the blast to local hospitals, and the evacuation of the victims was completed by 12:40 hours.

439. Edin Suljic, on behalf of a local investigative team set up to investigate the incident, and Afzaal Niaz, on behalf of the UN, visited the hospitals and the morgue where the victims of the blast were taken. They each counted over 60 persons killed and over 140 persons injured. [...]

h. Conclusion on Deliberateness of the Attack

494. Evidence in the Trial Record establishes that a target, such as Markale market, can be hit from a great distance with one shot if the area is pre-recorded. Niaz testified that in the four months preceding the incident at Markale market, about 10 to 12 mortar shells fell around Markale market and that most of them were of a 120 mm calibre and originated from the direction north-northeast of Sedrenik. The UNMOs who wanted to investigate these attacks were not allowed access to the northeast area of the city controlled by the SRK. After the Markale incident, Hamill visited an SRK representative positioned in the northeastern area of the city, Colonel Cvetkovic, who confirmed to him that there were a number of 120 mm mortars in Mrkovici and along the estimated direction of fire to the north-northeast of Markale.

495. The Majority is convinced that the mortar shell which struck Markale was fired deliberately at the market. That market drew large numbers of people. There was no reason to consider the market area as a military objective. Evidence was presented in relation to the status of the "December 22" building located by the market, which manufactured uniforms for the police and the army. It is unclear whether manufacturing was still on-going at the time of the incident but in any case it is not reasonable to consider that the employees of such a manufacturing plant would be considered legitimate targets.

496. In sum, the Majority finds beyond reasonable doubt that the 120 mm mortar shell fired at Markale market on 5 February 1994, which killed over 60 persons and wounded over 140 others, was deliberately fired from SRK-controlled territory. [...]

4. Pattern of Fire into ABiH-held Areas of Sarajevo

561. A general pattern of fire was noticed in Sarajevo during the Indictment Period. The evidence is that the shelling of the city was fierce in 1992 and 1993. Mole, Senior UNMO from September to December 1992, testified that throughout the three months he spent in Sarajevo, there was not a single day where there were no shell impacts in the city. There was continual background noise of small arms and mortars and artillery. [...] Tucker, a British officer who served as assistant to general Morillon from October 1992 to March 1993, added that "there was daily random shelling of various parts of the city. There was constant sniper fire and there were intense periods of

small arms and artillery fire around the perimeter from time to time as attacks by one side or the other continued. It was a horrible situation". [...]

5. Were Sniping and Shelling Attacks on Civilians in ABiH-held Areas of Sarajevo Committed with the Aim to Spread Terror?

564. The Prosecution alleges that the underlying reason for the "campaign" of sniping and shelling was that of terrorizing the civilian population of Sarajevo. [...]

566. Tucker explained that indeed "from about December 1992 onwards, the Bosnian Serb side wanted peace. They wanted an overall cease-fire in order to consolidate the territory of which they had taken control of." The Bosnians, on the other hand, could not accept a cease-fire which "meant accepting the status quo." Rose also said that it was true that "the forces commanded by General Galic wished not to have war, on the contrary, to have global cease-fire." He added though, that the Bosnian Serb Army "was in the military ascendancy and that it was in their interest to halt the fighting at the moment, politically." Rose added that the international community had some difficulties in accepting peace-plans: "There was certainly a desire amongst the international community not to reward the aggressor." In re-examination, the witness repeated that "the Serbs could never be described as peacemongers. They were the aggressors. They had taken much of Sarajevo as well as Bosnia".

567. That evidence is supported by other evidence in the Trial Record from a considerable number of UN military personnel that, as early as autumn 1992, sniping and shelling fire onto the city of Sarajevo from SRK-held territories was not justified by military necessity, but rather was aimed at terrorizing the civilian population in ABiH-held areas of Sarajevo. [...]

571. Witness Y, a member of the UNPROFOR posted in Sarajevo in the first part of 1993, explained that in his opinion "the objective they [SRK forces] pursued was to make every inhabitant in Sarajevo feel that nobody was sheltered or protected from [...] the shooting and that the shooting was not aimed at military objectives but rather to increase the helplessness of the population [...] and was aimed at cracking them and to make them collapse, nervously speaking[.]"He reiterated the same comment with regard to sniping: "The idea was to exercise psychological pressure, and there we realised that the objectives were very specifically civilian ones." [...]

573. General Van Baal, UNPROFOR Chief of Staff in Bosnia-Herzegovina in 1994, testified that sniping in Sarajevo was "without any discrimination, indiscriminately shooting defenceless citizens, women, children, who were unable to protect and defend themselves, at unexpected places and at unexpected times" and that this led him to conclude that its objective was to cause terror; he specified that women and children were the predominant target. A similar assessment was provided by Francis Briquemont, Commander of UN forces in BiH from July 1993 to January 1994, for whom "the objectives [of the

campaign] were basically civilians in order to put pressure on the population". He added that in a number of cases, either experienced by himself personally or by others, the SRK conduced what he called "quasi-sniping or playing at snipers," a tactic of hitting a target with the aim of actually not neutralising it; this terrorised the population. [...]

6. Number of Civilians Killed or Injured in ABiH-controlled Parts of Sarajevo during the Indictment Period [...]

579. According to the Tabeau Report, the minimum number of persons killed within the confrontation line in Sarajevo during the indictment period was 3,798, of whom 1,399 were civilians. The minimum number of wounded for the same period was 12,919, including 5,093 civilians. [...]

581. The Trial Chamber considers that the main conclusions of the Tabeau Report are supported by other evidence in the Trial Record. [...]

7. Conclusion on whether there was a Campaign of Sniping and Shelling in Sarajevo by SRK Forces [...]

583. The Trial Chamber stated earlier that it understood the term "campaign" in the context of the Indictment to cover military actions in the area of Sarajevo involving widespread or systematic shelling and sniping of civilians resulting in civilian death or injury. The Majority believes that such a campaign existed for the reasons given below. [...]

593. In view of the evidence in the Trial Record it has accepted and weighed, the Majority finds that the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition. The attacks on civilians had no discernible significance in military terms. They occurred with greater frequency in some periods, but very clearly the message which they carried was that no Sarajevo civilian was safe anywhere, at any time of day or night. The evidence shows that the SRK attacked civilians, men and women, children and elderly in particular while engaged in typical civilian activities or where expected to be found, in a similar pattern of conduct throughout the city of Sarajevo. [...]

D. Legal Findings

1. Offences under Article 3 of the Statute

595. In the present instance, it is not disputed that a state of armed conflict existed between Bosnia-Herzegovina and its armed forces on the one hand, and the Republika Sprska and its armed forces, on the other. There is no doubt, from a reading of the factual part of this Judgement, that all the criminal acts described therein occurred not only within the framework of, but in close relation to, that conflict.

596. The Trial Chamber is satisfied beyond reasonable doubt that the crime of attack on civilians within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period. In relation to the *actus reus* of that crime, the Trial Chamber finds that attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence. These acts of violence resulted in death or serious injury to civilians. The Trial Chamber further finds that these acts were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness.

597. The Majority is also satisfied that crime of terror within the meaning of Article 3 of the Statute was committed against the civilian population of Sarejevo during the Indictment Period. In relation to the *actus reus* of the crime of terror as examined above, the Trial Chamber has found that acts of violence were committed against the civilian population of Sarajevo during the Indictment Period. The Majority has also found that a campaign of sniping and shelling was conducted against the civilian population of ABiH-held areas of Sarajevo with the primary purpose of spreading terror.

2. Offences under Article 5 of the Statute

598. Based upon the facts found in the factual part of this Judgement, the Trial Chamber finds that the required elements under Article 5 of the Statute that there must be an attack, that the attack must be directed against any civilian population, and that the attack be widespread or systematic have been satisfied. The Trial Chamber also finds that the crimes committed in Sarajevo during the Indictment Period formed part of an attack directed against the civilian population and this would have had been known to all who were positioned in and around Sarajevo at that time.

599. The Trial Chamber is further satisfied that, as examined in this Part of the Judgement, murder and inhumane acts falling within the meaning of Article 5 of the Statute were committed in Sarajevo during the Indictment Period.

600. In sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment - crime of terror, attacks on civilians, murder and inhumane acts - were committed by SRK forces during the Indictment Period. [...]

IV. CRIMINAL RESPONSIBILITY OF GENERAL GALIC

A. Introduction [...]

3. The Role of General Galic

609. There is no dispute between the parties that General Galic, as Corps commander, was in charge of continuing the planning and execution of the military encirclement of Sarajevo. At the time of General Galic's appointment

as commander of the SRK, the military encirclement of Sarajevo was achieved. [...]

610. [...] The Prosecution submits in particular that after the Accused assumed command of the SRK in September 1992, there was no perceptible change in the campaign of sniping and shelling. According to the Prosecution, the Accused thus became the implementor of a pre-existing strategy and participated in both the legitimate military campaign against the ABIH and the unlawful attacks directed against the civilian population in Sarajevo. [...]

612. The Indictment alleges that General Galic is criminally responsible for his participation in the crimes pursuant to Article 7(1) of the Statute. [...] [T]he Prosecution [...] alleges that evidence concerning General Galic's knowledge of crimes committed in Sarajevo by forces under his command, the high degree of discipline he enjoyed from his subordinates and his failure to act upon knowledge of commission of crimes "establishes beyond reasonable doubt that the targeting of civilians was ordered by him". [...]

B. Was General Galic in Effective Command of the SRK Forces throughout the Relevant Period? [...]

2. Conclusions about the Effectiveness of the Command and Control of the Chain of Command

659. The Trial Chamber has no doubt that General Galic was an efficient and professional military officer. Upon his appointment, he finalised the composition and organisation of the SRK. General Galic gave the impression to his staff and to international personnel that he was in control of the situation in Sarajevo.

660. General Galic was present on the battlefield of Sarajevo throughout the Indictment Period, in close proximity to the confrontation lines, which remained relatively static, and he actively monitored the situation in Sarajevo. General Galic was perfectly cognisant of the situation in the battlefield of Sarajevo. The Trial Record demonstrates that the SRK reporting and monitoring systems were functioning normally. General Galic was in a good position to instruct and order his troops, in particular during the Corps briefings. Many witnesses called by the Defence gave evidence in relation to the fact that the orders went down the chain of command normally. They recalled in particular that orders were usually given in an oral form, the communication system of the SRK being good.

661. There is a plethora of evidence from many international military personnel that the SRK personnel was competent, and under that degree of control by the chain of command which typifies well-regulated armies. That personnel concluded that both sniping and shelling activity by the SRK was under

strict control by the chain of command from observation of co-ordinated military attacks launched in the city of Sarajevo in a timely manner, of the speedy implementation of cease-fire agreements, of threats of attacks followed by effect, or of the type of weaponry used. The Trial Chamber is convinced that the SRK personnel was under normal military command and control.

662. On the basis of the Trial Record, the Trial Chamber is also satisfied beyond reasonable doubt that General Galic, as a Corps commander, had the material ability to prosecute and punish those who would go against his orders or had violated military discipline, or who had committed criminal acts.

663. The Trial Chamber finds that the Accused General Galic, commander of the Sarajevo Romanija Corps, had effective control, in his zone of responsibility, of the SRK troops. [...]

C. Did General Galic Know of the Crimes Proved at Trial? [...]

7. Conclusions about General Galic's Knowledge of Criminal Activity of the SRK

700. Although it has found that the reporting and monitoring system of the SRK was good, the Trial Chamber cannot discount the possibility that General Galic was not aware of each and every crime that had been committed by the forces under his command. [...]

701. The Trial Chamber recalls however that the level of evidence to prove such knowledge is not as high for commanders operating within a highly disciplined and formalised chain of command as for those persons exercising more informal types of authorities, without organised structure with established reporting and monitoring systems. The Trial Chamber has found that the SRK's chain of command functioned properly. [...]

702. [...] First, there is a plethora of credible and reliable evidence that General Galic was informed personally that SRK forces were involved in criminal activity. The Accused's responses to formal complaints delivered to him form the backdrop of his knowledge that his subordinates were committing crimes, some of which are specifically alleged in the Indictment. Not only General Galic was informed personally about both unlawful sniping and unlawful shelling activity attributed to SRK forces against civilians in Sarajevo, but his subordinates were conversant with such activity. The Trial Chamber has no doubt that the Accused was subsequently informed by his subordinates. [...]

705. The Trial Chamber finds that General Galic, beyond reasonable doubt, was fully appraised of the unlawful sniping and shelling at civilians taking place in the city of Sarajevo and its surroundings. [...]

D. Did General Galic Take Reasonable Measures upon his Knowledge of Crime? [...]

2. Conclusions

717. General Galic may have issued orders to abstain not to attack civilians [*sic*]. The Trial Chamber is concerned that, as examined in Part III of this Judgement, civilians in Sarajevo were nevertheless attacked from SRK-controlled territories. Although SRK officers were made aware of the situation on the field, acts of violence against civilians in Sarajevo continued over an extended period of time.

718. There is also some evidence that General Galic conveyed instructions to the effect of the respect of the 1949 Geneva Conventions. The testimonies of DP35 and DP14, both SRK officers, reveal however the extent of the lack of proper knowledge in relation to the protection of civilians. In particular, the statement from DP35, an SRK battalion commander, that a civilian must necessarily be 300 metres away from the confrontation line in order not to be shot at gives rise to concern. In an urban battlefield, it is almost impossible to guarantee that civilians will remain at least 300 meters away from a frontline. Witness DP34 also testified that information about formal protests against unlawful sniping or shelling was never relayed to him. [...]

723. In view of the above, the Trial Chamber finds that the Accused did not take reasonable measures to prosecute and punish perpetrators of crimes against civilians. [...]

F. Conclusion: Does General Galic Incur Criminal Responsibility under Article 7(1) of the Statute?

730. This conclusion expresses the view of a majority of the Trial Chamber. Judge Nieto Navia dissents and expresses his view in the appended separate and dissenting opinion to this Judgement. [...]

2. Did General Galic Order the Commission of Crimes Proved at Trial? [...]

749. In sum, the evidence impels the conclusion that General Galic, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) failed to prevent the commission of crime and punish the perpetrators thereof upon that knowledge, furthered a campaign of unlawful acts of violence against civilians through orders relayed down the SRK chain of command and that he intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo. The Majority finds that General Galic is guilty of having ordered the crimes proved at trial. [...]

VI. DISPOSITION

769. FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, and having excluded from consideration those incidents which the Prosecution has failed to prove exemplary of the crimes charged in the Indictment, the Trial Chamber, Judge Nieto-Navia dissenting, makes the following disposition in accordance with the Statute and Rules:

Stanislav Galic is found GUILTY on the following counts, pursuant to Article 7(1) of the Statute of the Tribunal:

COUNT 1: Violations of the Laws or Customs of War (acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

COUNT 2: Crimes against Humanity (murder) under Article 5(a) of the Statute of the Tribunal.

COUNT 3: Crimes against Humanity (inhumane acts - other than murder) under Article 5(i) of the Statute of the Tribunal.

COUNT 5: Crimes against Humanity (murder) under Article 5(a) of the Statute of the Tribunal.

COUNT 6: Crimes against Humanity (inhumane acts - other than murder) under Article 5(i) of the Statute of the Tribunal.

The finding of guilt on count 1 has the consequence that the following counts are DISMISSED:

COUNT 4: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

COUNT 7: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

The Trial Chamber, by Majority, hereby SENTENCES Stanislav Galic to a single sentence of 20 (twenty) years of imprisonment. [...]

Done on the Fifth Day of December 2003 in English and French, the English text being authoritative.

At The Hague, The Netherlands

Judge Amin El Mahdi;
Judge Alphonse Orie Presiding;
Judge Rafael Nieto-Navia.

VII. SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE NIETO-NAVIA [...]

A. Introduction [...]

2. I begin by reviewing facts of importance in understanding the context of the conflict in Sarajevo during the Indictment Period. I will then explain why I disagree with conclusions found in the Judgment regarding certain incidents involving civilians and why I conclude that the evidence does not establish that the SRK waged a campaign of purposefully targeting civilians throughout the Indictment Period. Finally, I will discuss the law applicable to this case and present my conclusions concerning the appropriate legal findings.

B. Preliminary remarks regarding the conflict in Sarajevo [...]

2. Available weapons

4. Both parties to the conflict took advantage of the chaotic conditions during the first months of 1992 to seize weapons such as pistols and mortars left behind in military barracks after the JNA departed from the city. The evidence indicates that, prior to April 1992, there was a factory manufacturing optical sights for rifles in Sarajevo which may have continued to operate during the conflict. It appears that there had been specialised sniping units within the JNA and that both the ABiH and the SRK had taken possession of some of their special rifles. The Trial Record contains very little evidence though indicating that the SRK used these specialised weapons during the conflict. Furthermore, SRK soldiers appearing before the Trial Chamber explained that they were not aware of sniper units operating within the SRK and no evidence was tendered indicating that such weapons had been used in specific incidents during the Indictment Period. [...]

3. The role of UNMOs

5. The UN was present in Sarajevo during the conflict through UNPROFOR and UNMO representatives. Although UNMOs were charged with monitoring military exchanges between both belligerents, they concentrated their surveillance in practice on the SRK by setting up a greater number of observation posts along the SRK confrontation line than within the city. It was difficult for the UNMOs to accomplish their task effectively since they were understaffed. Their mission was further complicated by the use made by the ABiH of mobile mortars. As a result, discrepancies between UNMO reports about observed military exchanges were relatively frequent. [...]

5. Living conditions within the city

7. The evidence indicates that the SRK permitted humanitarian aid and buses transporting civilians who wished to leave the city to pass through its check-

points. Secure corridors, otherwise known as "blue roads," were established to allow humanitarian convoys and civilians to enter the city. Inspectors were posted along these roads to check that humanitarian convoys were not used to smuggle military equipment. The evidence suggests though that some of these convoys, which were escorted by armoured personnel carriers belonging to the UNHCR, were misused to transport weapons and ammunition into the city.

8. Although Sarajevo was the focal point of an ongoing war, the Trial Record does not disclose that the population within the city suffered from widespread starvation or a generalized shortage of medicine. There were some problems with access to running water and electricity because of damage done by the fighting to power lines and water pipes. According to one UN representative, certain local BiH leaders delayed needed repairs of the utility networks in order to attract international sympathy. It appears though that in areas under the effective control of the BiH Presidency, utilities were repaired promptly. Furthermore, there is no evidence establishing that the SRK obstructed these repairs or wilfully interrupted the water or electric supply. On one occasion, the supply of electricity was interrupted for three months because both the ABiH and the SRK would not guarantee the safety of repair teams who needed access to power lines near the confrontation lines. The Trial Record also discloses that a number of civilians wishing to escape from the city and its living conditions were blocked by the ABiH in order to preserve the morale of troops.

6. The difficulty of waging war in the urban environment of Sarajevo

(a) Sizeable ABiH presence inside the city

9. The evidence reveals the difficulties faced by a commander in avoiding civilian casualties when waging a war in the urban context of Sarajevo. The ABiH had posted during the conflict approximately 45,000 troops inside the city, representing a sizeable minority of Sarajevo's estimated 340,000 inhabitants. This dense military presence inside the city significantly increased the likelihood of harming nearby civilians when attacking ABiH targets, particularly when available weapons such as mortars were used. As a UN representative explained, waging war under these circumstances is "a soldier's worst nightmare." Another UN representative concurred, testifying that "two parties are waging war (in the city) and both are using artillery and mortar. I think that it is impossible, with what I experienced there, to avoid certain civilian neighbourhoods."

10. The SRK also encountered difficulties in distinguishing between military and civilian targets. ABiH troops inside the city were not always uniformed during the Indictment Period. Furthermore, attacks were launched against the SRK from mobile mortars positioned in civilian areas of Sarajevo and the ABiH sheltered military resources in civilian areas, including in civilian buildings

and in the immediate vicinity of the Kosevo hospital in Sarajevo. It also made use of available vehicles in the city, including those belonging to civilians, to transport military assets without systematically identifying these trucks and cars as belonging to the military.

(b) Attacks launched against the SRK from protected facilities

11. The ABiH fired from within and from the immediate vicinity of civilian facilities. For example, mortars were fired from the grounds of the Kosevo hospital, whose medical supply line was also misused for the purpose of replenishing military stocks of gunpowder and fuses. Tank and mortar attacks were launched against the SRK from the immediate vicinity of the PTT building, which was occupied by UN personnel. The evidence also suggests that SRK positions may have been fired upon from schools, places of worship and cemeteries in the city. [...]

7. Attacks on civilian targets

15. Civilians in both SRK and ABiH-controlled parts of the city were harmed during the conflict. Furthermore, complaints were lodged with both the SRK and the ABiH regarding the targeting of civilians with mortars or heavy weaponry. The evidence from UN representatives posted in Sarajevo also strongly suggests that the ABiH at times attacked civilians in parts of the city under its control.

8. Role of the media

16. The media played a pivotal role in the conflict because of the manner in which it reported on the situation in Sarajevo. The evidence establishes that the press at times unfairly singled out Serbian military forces for blame. For example, BBC News reported on one occasion that Serbian forces were shelling the airport when UN representatives had observed that this fire originated from ABiH positions on Mount Igman. The information reported by the press was particularly important since many UN assessments of the situation in the city relied, at least in part, on these news sources. A senior UN representative posted in the city had concluded that the Muslim population "had the entire world press on their side so that (the ABiH sometimes launched attacks against the SRK in order to draw counter-fire)... in order to create an unfavourable image of the Serbs," adding that reports from UN observers contributed to this negative image. Another senior UN representative remembered witnessing a particular incident during which he had concluded that the ABiH had staged an attack on the BiH Presidency during the visit of a British official to draw international attention. Other senior UN observers echoed this sentiment, explaining that they felt that the media regarded the ABiH as the beleaguered party. This media spotlight governed to a certain extent the SRK's conduct during the conflict.

C. Scheduled and unscheduled incidents [...]

97. For the above reasons, I am not satisfied that the Prosecution has established beyond a reasonable doubt that the SRK fired the shell which exploded in Markale market on 5 February 1994. I do not reach this conclusion idly because the ABiH, as well as the SRK, had access during the conflict to 120 millimetre mortars, which are weapons which can be transported with relative ease. Finally, I note that my conclusion about the origin of fire also finds support in the special UN team's official finding, communicated to the UN Security Council, that there "is insufficient physical evidence to prove that one party or the other fired the mortar bomb." [...]

D. Conduct of a campaign

104. I now consider whether the SRK conducted a campaign of purposefully targeting civilians in Sarajevo throughout the Indictment Period by examining issues related to the number of persons killed. I recognize the potential for such a discussion, in its mathematical abstraction of the underlying human suffering, to be misinterpreted as trivializing the individual stories of hardship and sorrow told by every resident of Sarajevo who testified before the Trial Chamber.

105. As seen earlier, the number of persons living in Sarajevo during the conflict was in the order of 340,000, including 45,000 soldiers posted inside the city. The Prosecution presented evidence in the form of a report from three demographic experts regarding the number of these residents injured or killed during the 23 months of the Indictment Period in ABiH-controlled areas. After reviewing extensive sources, the experts concluded that a minimum of 5,093 civilians had been injured and a minimum 1,399 civilians had been killed due to shelling and shooting, although they did not specify the fraction of these casualties which had resulted from deliberate targeting. They also concluded that the minimum total number of civilians and soldiers killed was 3,798 and estimated that this figure understated by about 600 the actual total number of persons killed. Civilian casualties were not spread uniformly over the Indictment Period and fell significantly over time. The monthly number of civilians killed was 105 during the last four months of 1992 and decreased to 63.50 for 1993. This monthly average fell further to 28.33 in the first 6 months of 1994, though the Prosecution's experts warned that this last figure probably understated the true average due to the limitations of the sources consulted.

106. An army characterized by the level of competence and professionalism ascribed to the SRK by the Prosecution would be expected, when conducting during 23 months a campaign of purposefully targeting civilians living in a city of 340,000, to inflict a high number of civilian casualties in relation to the city's total population, accompanied by high monthly averages of civilians killed. The results obtained by the Prosecution's demographic experts indicate otherwise. As seen above, the figures for

civilians injured and killed were on the order of 5,093 and 1,399, respectively, in a city of 340,000 inhabitants which had been the focal point of an ongoing war during the 23 months of the Indictment Period. Furthermore, the monthly number of civilian casualties dropped significantly over this same period. I therefore conclude that the evidence does not establish that the SRK conducted a campaign of purposefully targeting civilians in the city throughout the Indictment Period.

107. My conclusion finds support in the evidence regarding the conduct of the SRK leadership, which relinquished voluntarily control of the airport, authorized the establishment of "blue routes" to allow for the distribution of humanitarian supplies in the city, entered into anti -sniping agreements and agreed to the establishment of the TEZ. Furthermore, I note that Serbian authorities affiliated with the SRK in Bosnia-Herzegovina entered into two agreements and issued two declarations at the beginning of the Indictment Period, including one dated 13 May 1992, stating their commitment to abide by the principles of international humanitarian law. According to one SRK soldier, the 13 May 1992 declaration, issued by the Presidency of Republika Srpska, had been read out to SRK troops and had been implemented "to a high extent" during the conflict.

E. Considerations related to the applicable law

1. Terror against the civilian population as a violation of the laws or customs of war

108. The Majority finds that the Trial Chamber has jurisdiction by way of Article 3 of the Statute to consider the offence constituted of "acts of violence wilfully directed at a civilian population or against individual civilians causing death or serious injury to body or health of individual civilians[,] with the primary purpose of spreading terror among the civilian population." I respectfully dissent from this conclusion because I do not believe that such an offence falls within the jurisdiction of the Tribunal.

109. In his Report to the Security Council regarding the establishment of the Tribunal, the Secretary-General explained that "the application of the [criminal law] principle of *nullum crimen sine lege* requires that the international tribunal should apply rules which are beyond any doubt part of customary law." The Secretary-General's Report therefore lays out the principle that the Tribunal cannot create new criminal offences, but may only consider crimes already well-established in international humanitarian law. Such a conclusion accords with the imperative that "under no circumstances may a court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable or punishable, or by criminalizing an act which had not until the present time been regarded as criminal."

110. In a recent decision, the Appeals Chamber considered this principle to determine the circumstances under which an offence will fall within the jurisdiction of the Tribunal. It concluded that "the scope of the Tribunal's jurisdiction *ratione materiae* [or subject-matter jurisdiction] may ... be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed." With respect to *ratione personae* or personal jurisdiction, the Appeals Chamber found that the Secretary-General's Report did not contain any express limitation concerning the nature of the law which the Tribunal may apply, but concluded "that the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal's jurisdiction *ratione materiae*, that body of law must be reflected in customary international law."

111. Thus, an offence will fall within the jurisdiction of the Tribunal only if it existed as a form of liability under international customary law. When considering an offence, a Trial Chamber must verify that the provisions upon which a charge is based reflect customary law. Furthermore, it must establish that individual criminal liability attaches to a breach of such provisions under international customary law at the time relevant to an indictment in order to satisfy the *ratione personae* requirement. Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, a Trial Chamber must finally confirm that this offence was defined with sufficient clarity under international customary law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.

112. The Accused is charged pursuant to Article 3 of the Statute with "unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949." Since such an offence has never been considered before by this Tribunal, it would seem important to determine whether this offence existed as a form of liability under international customary law in order to confirm that it properly falls within the jurisdiction of this Trial Chamber. The Majority repeatedly retreats from pronouncing itself though on the customary nature of this offence and, in particular, does not reach any stated conclusion on whether such an offence would attract individual criminal responsibility for acts committed during the Indictment Period under international customary law. Instead, it argues that such individual criminal responsibility attaches by operation of conventional law. In support of this conclusion, it observes that the parties to the conflict had entered into an agreement dated 22 May 1992 in which they had committed to abide by Article 51 of the Additional Protocol I, particularly with respect to the second part of the second paragraph of that article which prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."

113. The signing of the 22 May Agreement does not suffice though to satisfy the jurisdictional requirement that the Trial Chamber may only consider offences which are reflected in international customary law. Even if I accepted - *quod non* - that the Trial Chamber has the necessary *ratione materiae* to consider the offence of inflicting terror on a civilian population by virtue of the signing of the 22 May Agreement, the *ratione personae* requirement would still have to be satisfied, meaning that this offence must have attracted individual criminal responsibility under international customary law for acts committed at the time of the Indictment Period. The Prosecution and the Majority cited few examples indicating that the criminalization of such an offence was an admitted state practice at such a time. In my view, these limited references do not suffice to establish that this offence existed as a form of liability under international customary law and attracted individual criminal responsibility under that body of law. I therefore conclude that the offence of inflicting terror on a civilian population does not fall within the jurisdiction of this Trial Chamber. By concluding otherwise without establishing that the offence of inflicting terror on a civilian population attracted individual criminal responsibility under international customary law, the Majority is furthering a conception of international humanitarian law which I do not support.

F. Legal Findings [...]

3. Article 7

(a) Article 7(1)

116. The Majority concludes that the Accused ordered his forces to attack civilians in Sarajevo deliberately, thereby finding him criminally responsible under Article 7(1) of the Statute. This conclusion rests entirely on inferences, since no witness testified to hearing the Accused issue such orders and no written orders were tendered which would indicate that he so instructed his troops. The evidence, in fact, explicitly supports a conclusion that the Accused did not order such attacks. For example, he personally instructed his troops in writing to respect the Geneva Conventions and other instruments of international humanitarian law. [...] Furthermore, the Accused launched internal investigations on at least two occasions when alerted by UN representatives about possible attacks on civilians by his forces. I conclude therefore that the Trial Record does not support a finding that the Accused issued orders to attack civilians in Sarajevo deliberately and dissent from the Majority's conclusion that he incurs criminal responsibility under Article 7(1) of the Statute. [...]

119. Finally, when examining the jurisprudence of the Tribunal relevant to the elements of the various heads of individual criminal responsibility under Article 7(1), the Majority had explained that the act of ordering refers "to a person in a position of authority using that authority to instruct another to commit an offence." It had then explained that where a superior "under duty to suppress unlawful behaviour of subordinates of which he has notice does

nothing to suppress that behaviour, the conclusion is allowed that that person, by ... culpable omissions, directly participated in the commission of crimes through one or more of the modes of participation described in Article 7(1)." Such an interpretation of Article 7(1) then does not exclude the possibility that a superior may be deemed to have "ordered" a subordinate to commit a crime by "culpable omission." This latter notion, though understated, exerts on the Majority's conclusion concerning the Accused's criminal responsibility a perceptible influence which can be felt throughout its prose. For example, the Majority argues that

> [t]he evidence is compelling *that failure* to act for a period of approximately twenty-three months by a corps commander who has substantial knowledge of crimes committed against civilians by his subordinates and is reminded on a regular basis of his duty to act upon that knowledge *bespeaks of a deliberate intent to inflict acts of violence on civilians*.

In another instance, the Majority argues in the very paragraph where it concludes that the Accused ordered the crimes proven at trial that

> the evidence impels the conclusion that General Galic, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) *failed to prevent the commission of a crime and punish the perpetrators thereof* upon that knowledge, *furthered* a campaign of unlawful acts of violence against civilians ... and ... *intended to conduct* that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo.

According to the Majority therefore, the Accused's "failure to act" or "failure to prevent the commission of a crime" during the Indictment Period contributes to the conclusion that he ordered the commission of the crimes proven at trial. I fail to understand though how the Accused may be found responsible for ordering the commission of a crime on the basis of his failure to act or of an omission, be it a "culpable one."

(b) Article 7(3)

120. The elements of individual criminal responsibility under Article 7(3) of the Statute are firmly established by the jurisprudence of the Tribunal. Three conditions must be met before a superior can be held responsible for the acts of his or her subordinates: (1) the existence of a superior-subordinate relationship, (2) the superior knew or had reason to know that the subordinate was about to commit such acts or had done so, and (3) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. I am satisfied that the Trial Record establishes that all three conditions have been met and conclude that the Accused is guilty of the crimes of unlawful attacks against civilians, murder and inhumane acts under Article 7(3) of the Statute. [...]

Rafael Nieto-Navia Judge

Done this fifth day of December 2003, At The Hague, The Netherlands.

DISCUSSION

1. a. *(paras. 12-31, 96-129)* Does the Trial Chamber classify the conflict around Sarajevo as international or non-international? Would it have had to classify it if it could not have referred to the Agreement of 22 May 1992? In order to establish that the acts Galic is accused of are prohibited by IHL? In order to establish that they were criminalized?

   b. Does the Agreement of 22 May 1992 make the conflict an international armed conflict? According to the majority of the Trial Chamber? (*Cf.* Art. 3 (3) and (4) common to the Conventions.)

   c. (Dissenting opinion of Judge Nieto-Navia, paras. 108-113) Does Judge Nieto-Navia classify the conflict? According to his theory, should he have done so?

2. *(paras. 12-31)* Do both conventional and customary IHL prohibit attacks on civilians in both international and non-international conflicts? Do both criminalize them? Does the International Tribunal have jurisdiction? Under customary international law? Conventional law? Would the Tribunal have jurisdiction over the crime of attack on civilians without the Agreement of 22 May 1992? (*Cf.* Arts. 51 (2) of Protocol I and 13 (2) of Protocol II.)

3. *(para. 44)* May military necessity justify the targeting of civilians?

4. *(paras. 47-51)* When is a person protected from the crime of attack on civilians? What if the person attacked directly participated in hostilities? When does a person directly participate in hostilities? Does IHL provide the same answers to those questions in international and in non-international armed conflicts? (*Cf.* Arts. 50 and 51 (3) of Protocol I and Art. 13 of Protocol II.)

5. *(paras. 16-61)* What are the elements that the Trial Chamber found as being specific to the crime of attack on civilians?

6. *(paras. 53-56)* Can an individual be convicted of the crime of attack on civilians if he or she has doubts as to the status of combatant or civilian of the person attacked? If he or she was not aware that he or she was attacking civilians, but should have been aware of their civilian status? How can can an individual accept the possibility of attacking civilians (para. 54) if he or she is not aware that the persons attacked are civilians (but should have been aware of their status) (para. 55)? Is this recklessness? According to the Trial Chamber? According to the ICRC Commentary?

7. *(paras. 57-61)* When is an indiscriminate attack a crime of attack on civilians? Is an indiscriminate attack an attack on civilians or may it simply provide evidence for the necessary *mens rea*?

8. (*paras. 94-137*; Dissenting opinion of Judge Nieto-Navia, paras. 108-113) Do both conventional and customary IHL prohibit terror against the civilian population in both international and non-international conflicts? Do both criminalize them? Does the International Tribunal have jurisdiction? Under customary international law? Conventional law? Would the Tribunal have jurisdiction over the crime of attack on civilians without the Agreement of 22 May 1992? On which of those

questions does Judge Nieto-Navia differ from the majority? Do you agree with the majority's findings on what constitutes a crime of terror? (*Cf.* Arts. 51 (2) of Protocol I and 13 (2) of Protocol II.)

9. *(Dissenting opinion of Judge Nieto-Navia, paras. 108-113)* Does Judge Nieto-Navia consider that only violations of customary IHL may be prosecuted before the ICTY (under Art. 3 of its Statute)? Why? Does he disagree with paras. 94 and 143 of the ICTY Appeals Chamber decision on Jurisdiction in the Tadic case (*See* **Case No. 180**. p. 1804.)?

10. *(paras. 113-137)* Are all forms of violations of the second sentence of Article 51 (2) of Protocol I criminalized? By Protocol I? By customary international law? By the Agreement of 22 May 1992? (*Cf.* Art. 85 (3) (a) of Protocol I.)

11. *(paras. 113-129)* Does the survey of statutory and conventional law relevant to the fulfilment of the fourth Tadic condition by the majority of the Tribunal truly not take a position on whether a customary basis exists for a crime of terror (para. 113)? What other basis does the majority discuss? Does this discussion leave the classification of the conflict open?

12. *(paras. 133, 158 and 162)* What elements did the Trial Chamber find as being specific to the crime of terror against the civilian population? What additional mental element of a crime of terror differentiates it from the crime of attack on civilians?

13. *(paras. 158-163)* May an accused be convicted cumulatively for the crime of attack on civilians and for the crime of terror against the civilian population for the same acts? For the crime of terror against the civilian population and for a crime against humanity?

14. (*paras. 165-177, 609-749*; *Dissenting opinion of Judge Nieto-Navia, paras. 116-120*)

    a. When does a commander bear individual responsibility for acts committed by subordinates? Is an omission sufficient? For the majority of the Chamber? For Judge Nieto-Navia? When does a commander bear command responsibility? What if he bears both forms of responsibility?

    b. Why is the level of evidence necessary to prove knowledge of criminal activity not as high for commanders operating within a highly disciplined and formalised chain of command as for those persons exercising more informal types of authority? Do you agree with this?

15. (*paras. 208-593*; *Dissenting opinion of Judge Nieto-Navia, paras. 104-107*) Why was it necessary to establish that there was a general campaign of sniping and shelling? For the majority? For Judge Nieto-Navia? Does the latter agree that such a campaign existed?

16. *(para. 211)* If some attacks upon the population of Sarajevo controlled by the Bosnian government were attributable to that government itself, would that have relieved Galic of his responsibility for attacks by his forces? What do such attacks by the authorities on their own population tell us about the relevance of violations of IHL in the conflict?

17. Was Sabri Halili (referred to in para. 247) a civilian? Is this of any importance for establishing the unlawfulness of the killing of Almasa Konjhodzic? (*Cf.* Art. 50 of Protocol I.)

18. Was the shelling of the football tournament (paras. 373-387) a violation of IHL even if the Serb forces did not know that such a tournament was taking place? Even if they could not have known? (*Cf.* Art. 51 (2), (4) and (5) of Protocol I.)

19. *(paras. 564-573)* Was the pattern of shelling and sniping of Sarajevo by Serb forces not militarily necessary because "the Serbs" were the aggressors? Was the shelling militarily necessary because "the Bosnians" refused a cease-fire? Are those elements relevant in a discussion on whether the aim of those attacks was to spread terror?

20. Were the factual findings discussed in paras. 609-723 necessary to hold Galic individually responsible? Why? Does Judge Nieto-Navia in paras. 116-120 of his dissenting opinion disagree with the factual findings of the majority or with the legal standard applied?

21. What relevance do the preliminary remarks made by Judge Nieto-Navia in paras. 4-16 of his dissenting opinion have for the conviction of Galic? For history's judgment?

Case No. 188, ICTY, The Prosecutor v. Strugar

THE CASE

[N.B.: The judgements of Tadic, Blaskic and Galic referred to in the case are available in this volume, **Case No. 180**, p. 1804, **Case No. 185**, p. 1936, and **Case No. 187**, p. 1986, respectively. The other cases mentioned are available on http://www.icty.org.]

A. Appeals Chamber, Decision on Interlocutory Appeal

[**Source:** *Prosecutor v. Pavle Strugar*, IT-01-42-AR72 Decision on Interlocutory Appeal of 22 November 2002 [on lack of jurisdiction over violations of Protocols I and II]; footnotes omitted.]

[...]

9. Articles 51 and 52 of Additional Protocol I and, to a lesser extent, Article 13 of Additional Protocol II consist of a number of provisions focusing on but not limited to the prohibition of attacks on civilians and civilian objects cited in the relevant counts of the Indictment. [...] [T]he Trial Chamber did not pronounce on the legal status of the whole of the relevant Articles, as, having found that they did not form the basis of the charge against the Appellant, it was not obliged to do so. It rather examined "whether the *principles contained* in the relevant provisions of the Additional Protocols have attained the status of customary international law" (emphasis added), and in particular the principles explicitly stated in the Indictment: the prohibition

of attacks on civilians and of unlawful attacks on civilian objects. It held that they had attained such a status, and in this it was correct.

10. Therefore [...] the Trial Chamber made no error in its finding that, as the Appeals Chamber understood it, the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law. Customary international law establishes that a violation of these principles entails individual criminal responsibility.

B. Trial Chamber, Judgment

[**Source:** *Prosecutor v. Pavle Strugar*, IT-01-42-T (Trial Chamber Judgment) 31 January 2005; some footnotes omitted.]

1. The Accused, Pavle Strugar, a retired Lieutenant-General of the then Yugoslav Peoples' Army (JNA), is charged in the Indictment with crimes allegedly committed from 6 to 31 December 1991, in the course of a military campaign of the JNA in and around Dubrovnik in Croatia in October, November and December of 1991.

2. The Indictment, as ultimately amended, alleges that in the course of an unlawful attack by the JNA on the Old Town of Dubrovnik on 6 December 1991, two people were killed, two were seriously wounded and many buildings of historic and cultural significance in the Old Town, including institutions dedicated to, *inter alia*, religion, and the arts and sciences, were damaged. These allegations support six counts of violations of the laws or customs of war under Article 3 of the Statute of the Tribunal, namely murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, attacks on civilian objects and destruction of institutions dedicated to, *inter alia*, religion, and the arts and sciences. The Accused is charged with individual criminal liability under Article 7(1) of the Statute for allegedly ordering, and aiding and abetting, the aforementioned crimes, as well as with superior responsibility pursuant to Article 7(3) of the Statute for the crimes of his subordinates. The Accused's liability is alleged to arise out of the position he then held as commander of the Second Operational Group (2 OG). It is alleged that it was, *inter alia*, forces of the 3rd Battalion of the 472nd Motorised Brigade (3/472 mtbr) under the command of Captain Vladimir Kovacevic, which unlawfully shelled the Old Town on 6 December 1991. The battalion commanded by Captain Kovacevic was at the time directly subordinated to the Ninth Military Naval Sector (9 VPS), commanded by Admiral Miodrag Jokic, and the 9 VPS, in turn, was a component of the 2 OG, commanded by the Accused. [...]

IV. THE ATTACK ON 6 DECEMBER 1991

[...]

B. The attack on the Old Town on 6 December 1991 - the experience of the residents

99. Well before sunrise, at around 0550 hours on the morning of 6 December 1991, residents of the Old Town of Dubrovnik awoke to the sound of explosions. An artillery attack had commenced. It continued for most of the day with a brief but not complete lull a little after 1115 hours. Especially in the afternoon, it tended to be somewhat sporadic. Initially, the firing was mainly concentrated on, but not confined to, the area around Mount Srdj, the prominent geographical feature of Dubrovnik located nearly one kilometre to the north of the Old Town. There was a Napoleonic stone fortress, a large stone cross and a communications tower at Srdj. [...]

103. [...] [S]ome shelling occurred on residential areas of Dubrovnik, including the Old Town and on the port of the Old Town, virtually from the outset of the attack, notwithstanding an initial primary concentration on Srdj. However, the focus of the attack came to shift from Mount Srdj to the wider city of Dubrovnik, including the Old Town. [...]

112. The attack on Dubrovnik, including the Old Town, on 6 December 1991 inevitably gave rise to civilian casualties. [...] [T]he Third Amended Indictment charges the Accused only in relation to two deaths and two victims of serious injuries, both alleged to have occurred in the Old Town. [...] Civilian, religious and cultural property, in particular in the Old Town, also suffered heavy damage as a result of the attack.

C. The attack on the Old Town of Dubrovnik on 6 December 1991 - the attackers

113. The Chamber finds that on 6 December 1991, units of the 9 VPS of the JNA [...] attempted to take Mount Srdj, which was the dominant feature and the one remaining position held by Croatian forces on the heights above Dubrovnik. [...]

116. The JNA plan was to take Srdj quickly, certainly before 1200 hours, when a ceasefire was anticipated to come into force in the area. The capitulation of the Croatian defenders of Srdj during the morning appears to have been anticipated by Captain Kovacevic who had the immediate command of the attacking troops and who coordinated the artillery and ground forces from Zarkovica, a position which gave him an excellent overview of both Srdj and Dubrovnik, especially the Old Town.

117. There was no capitulation by the Croatian defenders. The close fighting at Srdj was desperate. [...] At a time after 1400 hours, the JNA troops were permitted to withdraw from Srdj. Withdrawal was also a difficult process and it was not until after 1500 hours that this was completed.

118. The JNA plan to take Srdj had failed. Casualties had been suffered, with five men killed and seven wounded among the [Serbian] troops. JNA artillery

continued to fire on Dubrovnik until after 1630 hours, although with noticeably reduced intensity after 1500 hours. [...]

122. At around 0600 hours, the troops advancing on Srdj observed that JNA ZIS cannons opened fire at the lower fortifications around Srdj where Croatian snipers had dug in, and in addition, a mortar barrage was directed at Srdj. [...] Lieutenant Pesic and his soldiers came under fire. This was from two 82mm mortars which he describes as firing from the area of the tennis courts in Babin Kuk. The T-55 tank supporting Lieutenant Pesic's group at this point also came under lateral fire from the direction of Dubrovnik. In addition to attracting fire from positions in the wider Dubrovnik area, they were also shot at from Srdj as they continued to advance. [...] The Chamber notes that the references to fire from the direction of Dubrovnik, or the wider Dubrovnik, are not evidence of firing from the Old Town. [...] Both the Hotel Libertas and Babin Kuk are well to the northwest of the Old Town. [...]

124. [...] Once the JNA had thus seized control of the Srdj plateau, it came under fierce mortar attack from Croatian forces. Lieutenant Lemal's evidence was that the mortar fire originated in the area of Lapad, which is also well to the northwest of the Old Town. [...]

139. The truth seems to be, in the finding of the Chamber, that there was inadequate direction of the fire of the JNA mortars and other weapons against Croatian military targets. Instead, they fired extensively and without disciplined direction and targeting correction, at Dubrovnik, including the Old Town. Hence, the few Croatian artillery weapons were able to continue to fire and to concentrate their fire on Srdj, where the few remaining Croatian defenders were underground and the JNA attackers were exposed. [...]

159. [...] [I]t is the Chamber's finding that at that meeting the Accused told [a witness] that he had responded to an attack on his troops in Bosnia and Herzegovina by firing on the city of Dubrovnik. For reasons it explains later, the Chamber finds this to be an admission of the Accused that he ordered the attack on the Srdj feature at Dubrovnik. [...]

F. How did the Old Town come to be shelled?

[...]

3. Did JNA forces fire only at Croatian military positions?

182. Yet a further Defence submission [...] is that any damage to the Old Town on 6 December 1991 was a regrettable but unavoidable consequence of artillery fire of the JNA targeted at Croatian military positions in and in the immediate vicinity of the Old Town. The Defence submits that the attack on the Old Town by the JNA was merely in response to Croatian fire from its positions. [...]

183. By way of general observation, to which the Chamber attaches significant weight, the Chamber notes that by 6 December 1991 there were quite compelling circumstances against the proposition that the Croatian defenders had defensive military positions in the Old Town. To do so was a clear violation of the World Heritage protected status of the Old Town. The Chamber accepts there was a prevailing concern by the citizens of the Old Town not to violate the military free status of the Old Town. That is the view of the Chamber, notwithstanding suggestions in the evidence that at times in earlier stages of the conflict there were violations of this by Croatian defending forces. [...]

193. The Chamber concludes that the evidence of Croatian firing positions or heavy weapons within the Old Town on 6 December 1991 is inconsistent, improbable, and not credible. It further observes that the witnesses who claimed to have seen weapons located at those positions were at the material time JNA commanders or staff officers, or officers having responsibility for JNA artillery firing on the day. [...] When all factors are weighed, including the directly contradicting evidence, the Chamber is entirely persuaded and finds that there were no Croatian firing positions or heavy weapons in the Old Town or on its walls on 6 December 1991.

194. The further question arises whether, even though there were in truth no Croatian firing positions or heavy weapons in the Old Town, it was believed by those responsible for the JNA shelling of the Old Town that there were. In this regard the primary finding of the Chamber is that the evidence of the existence of such firing positions or heavy weapons is in each case false, not that it is merely mistaken. Even if it were to be assumed for present purposes, however, that one, some or all of the firing positions or heavy weapons referred to in the evidence we have considered was believed to exist in the Old Town or on its walls, the evidence discloses that they were not treated as posing any significant threat to the JNA forces on the day. [...]

195. The Chamber further notes that the evidence of the alleged Croatian firing positions, even were it to be assumed to be true or that it was believed to be true, and if it were accepted in the version which is most favourable to the Defence, would not provide any possible explanation for, or justification of, the nature, extent and duration of the shelling of the Old Town that day, and the variety of positions shelled. In the Chamber's finding the evidence [...] would preclude a finding that the JNA artillery was merely firing at Croatian military targets in the Old Town. There would be simply no relationship in scale between the evidence offered as the reason for the attack, and the JNA artillery response. [...]

203. The [Croatian] firing positions described in the preceding paragraphs are located various distances from the Old Town. All are outside the Old Town. Some of them are so remote from the Old Town that any attempt to neutralise them by the JNA forces, even using the most imprecise weapons, could not affect the Old Town. As regards the positions which are closer to the Old

Town, the Chamber heard expert evidence as to which positions in the vicinity of the Old Town, if targeted by the JNA, would give rise to a risk of incidental shelling of the Old Town. [...]

211. In the Chamber's finding, the most that can be made of the evidence of the experts [regarding e.g. weather conditions and weapons] is that if Croatian military positions, outside, but in close proximity to, the Old Town, had in fact been targeted by JNA mortars on 6 December 1991, it is possible that some of the shells fired might have fallen within the Old Town. For reasons already given, few of the possible Croatian military targets considered by the experts were the subject of JNA targeting by mortars, and none of them were the subject of intensive or prolonged firing. In view of the [...] shortcomings of the expert reports and the differences between them, the Chamber is unable to rely exclusively on one or the other in determining which targets in close proximity to the Old Town could give rise to a risk of incidental shelling of the Old Town. [...]

214. In view of the foregoing, the Chamber finds that the shelling of the Old Town on 6 December 1991 was not a JNA response at Croatian firing or other military positions, actual or believed, in the Old Town, nor was it caused by firing errors by the Croatian artillery or by deliberate targeting of the Old Town by Croatian forces. In part the JNA forces did target Croatian firing and other military positions, actual or believed, in Dubrovnik, but none of them were in the Old Town. These Croatian positions were also too distant from the Old Town to put it in danger of unintended incidental fall of JNA shells targeted at those Croatian positions. It is the finding of the Chamber that the cause of the established extensive and large-scale damage to the Old Town was deliberate shelling of the Old Town on 6 December 1991 [...].

V. JURISDICTION UNDER ARTICLE 3 OF THE STATUTE

A. Existence of an armed conflict and nexus between the acts of the Accused and the armed conflict

215. All the crimes contained in the Indictment are charged under Article 3 of the Statute of this Tribunal. For the applicability of Article 3 of the Statute two preliminary requirements must be satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be "closely related" to the hostilities. The Appeals Chamber considered that the armed conflict "need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed". [footnote 745: *Kunarac* Appeals Judgement para. 58.]

216. With regard to the issue of the nature of the conflict, it has been established in the jurisprudence of the Tribunal that Article 3 of the Statute is applicable regardless of the nature of the conflict. [Footnote 746: *Tadic* Jurisdiction para. 94.] In the present case, while the Prosecution alleged in the Indictment that an *international* armed conflict and partial occupation existed in Croatia at the time of the offences, both parties concur in saying that the nature of the conflict does not constitute an element of any of the crimes with which the Accused is charged. The Chamber will therefore forbear from pronouncing on the matter [...].

217. As will be apparent from what has been said already in this decision, the evidence establishes that there was an armed conflict between the JNA and the Croatian armed forces throughout the period of the Indictment. These were each forces of governmental authorities, whether of different States or within the one State need not be determined. The offences alleged in the Indictment all relate to the shelling of the Old Town of Dubrovnik, which was a significant part of this armed conflict. It follows that the acts with which the Accused is charged were committed during an armed conflict and were closely related to that conflict.

B. The four Tadic conditions

218. The Appeals Chamber in the *Tadic* case observed that Article 3 functions as a "residual clause" designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the Tribunal. In the Appeals Chamber's view, this provision confers on the Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5 of the Statute, on the condition that the following requirements are fulfilled: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is the view of the Chamber that these conditions must be fulfilled whether the crime is expressly listed in Article 3 of the Statute or not. Accordingly, the Chamber will discuss whether the offences with which the Accused is charged meet the four Tadic conditions.

1. Murder and cruel treatment

219. In the present case, the charges of cruel treatment and murder are brought under common Article 3 (1) (a) of the Geneva Conventions. At the outset, the Chamber notes that the jurisprudence of the Tribunal in relation to common Article 3 is now settled. [...] First, it is well established that Article 3 of the Statute covers violations of common Article 3. [Footnote 752: *Tadic* Jurisdiction decision

para. 89.] The crimes of murder and cruel treatment undoubtedly breach a rule protecting important values and involving grave consequences for the victims. Further, it is also undisputed that common Article 3 forms part of customary international law applicable to both internal and international armed conflicts and that it entails individual criminal responsibility. Thus, the Chamber finds that the four *Tadic* conditions are met in respect of these offences.

2. Attacks on civilians and civilian objects

(a) Attacks on civilians

220. The Chamber notes that Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, on which Count 3 is based, clearly set out a rule of international humanitarian law. Therefore, the first *Tadic* condition is fulfilled. [Footnote 755: *Galic* Trial Judgement, para. 16.] As regards the second condition, the Chamber recalls the ruling given in the present case and upheld by the Appeals Chamber, according to which the prohibition of attacks on civilians stated in the Additional Protocols attained the status of customary international law and the Additional Protocols' provisions at issue constitute a reaffirmation and reformulation of the existing customary norms. [...] [T]he prohibition of attacks on civilians is included in both Additional Protocols, of which Protocol I deals with international armed conflicts and Protocol II with non-international armed conflicts. Therefore, the nature of the conflict is of no relevance to the applicability of Article 3 of the Statute. The Chamber thus finds that the second *Tadic* requirement is met.

221. As regards the third *Tadic* requirement, the prohibition of attacks on civilians is one of the elementary rules governing the conduct of war and undoubtedly protects "important values". [Footnote 757: *Galic* Trial Judgement, paras. 27 and 45.] The Chamber considers that any breach of this prohibition encroaches upon the fundamental principle of the distinction between combatants and non-combatants. This principle has developed throughout the history of armed conflict with the purpose of keeping civilians from the danger arising from hostilities. The Chamber points out that attacks on civilians jeopardise the lives or health of persons who do not take active part in combat. [...] Accordingly, the third requirement for the applicability of Article 3 of the Statute is fulfilled.

222. With regard to the fourth *Tadic* condition, the Chamber reiterates the Appeals Chamber's statement that "a violation of (the rule prohibiting attacks on civilians) entails individual criminal responsibility". [Footnote 760: *Strugar* Appeals Chamber Decision on Jurisdiction, para. 10.] In addition, the Chamber observes that at the material time there existed "Regulations concerning the Application of the International Law of War to the Armed Forces of SFRY", which provided for criminal responsibility for "war crimes or other serious violations of the law of war" and contained a list of laws binding upon the armed forces of the SFRY, including Additional Protocols I and II.

(b) Attacks on civilian objects

223. The offence of attacking civilian objects is a breach of a rule of international humanitarian law. As already ruled by the Chamber in the present case and upheld by the Appeals Chamber, Article 52, referred to in respect of the count of attacking civilian objects, is a reaffirmation and reformulation of a rule that had previously attained the status of customary international law. [Footnote 762: *Strugar* Appeals Chamber Decision on Jurisdiction para. 9.]

224. The Chamber observes that the prohibition of attacks on civilian objects is set out only in Article 52 of Additional Protocol I, referred to in relation to Count 5. Additional Protocol II does not contain provisions on attacking civilian objects. Nonetheless, as the Appeals Chamber found, the rule prohibiting attacks on civilian objects has evolved to become applicable also to conflicts of an internal nature. [Footnote 763: *Tadic* Jurisdiction Decision, para. 127.] [...] The Chamber therefore concludes that despite the lack of a provision similar to Article 52 in Additional Protocol II, the general rule prohibiting attacks on civilian objects also applies to internal conflicts. Accordingly, the first and second jurisdictional requirements are met.

225. As regards the third *Tadic* condition, the Chamber notes that the prohibition of attacks on civilian objects is aimed at protecting those objects from the danger of being damaged during an attack. It further reiterates that a prohibition against attacking civilian objects is a necessary complement to the protection of civilian populations. The Chamber observes that in the [...] 1970 resolution of the General Assembly [on the protection of civilians in "armed conflicts of all types"] the prohibition of making civilian dwellings and installations the object of military operations was listed among the "basic principles for the protection of civilian populations in armed conflicts". Those principles were reaffirmed because of the "need for measures to ensure the better protection of human rights in armed conflicts". The General Assembly also emphasised that civilian populations were in "special need of increased protection in time of armed conflicts". The principle of distinction, which obliges the parties to the conflict to distinguish between civilian objects and military objectives, was considered "basic" by the drafters of Additional Protocol I. [...] All the same, the Chamber recalls that the requirement of seriousness contains also the element of gravity of consequences for the victim. The Chamber is of the view that, unlike in the case of attacks on civilians, the offence at hand may not necessarily meet the threshold of "grave consequences" if no damage occurred. Therefore, the assessment of whether those consequences were grave enough to bring the offence into the scope of the Tribunal's jurisdiction under Article 3 of the Statute should be carried out on the basis of the facts of the case. The Chamber observes that in the present case it is alleged that the attacks against civilian objects, with which the Accused is charged, did incur damage to those objects. It will thus pursue the examination of the case on the assumption that the attacks as charged in the Indictment did bring about grave consequences for their victims and the third *Tadic* condition is met. The Chamber would only need

to return to the analysis of applicability of Article 3 of the Statute if the evidence on the alleged damage were to fail to demonstrate the validity of the Prosecution allegations to such an extent as to render it questionable whether the consequences of the attack were grave for its victims. As will be seen later in this decision, that is not the case.

226. As recalled above, the fourth *Tadic* condition concerns individual criminal responsibility. The Appeals Chamber has found that under customary international law a violation of the rule prohibiting attacks on civilian objects entails individual criminal responsibility. [Footnote 772: *Strugar* Appeals Chamber Decision on Jurisdiction, para. 10.] Furthermore, the Chamber recalls its above findings as to the SFRY regulations establishing criminal responsibility for violations of Additional Protocol I.

3. Destruction and devastation of property, including cultural property

227. As to the first and the second *Tadic* conditions, the Chamber observes that Article 3(b) is based on Article 23 of the Hague Convention (IV) of 1907 and the annexed Regulations. Both The Hague Convention (IV) of 1907 and The Hague Regulations are rules of international humanitarian law and they have become part of customary international law.

228. Recognising that the Hague Regulations were made to apply only to international armed conflicts, the Chamber will now examine whether the prohibition contained in Article 3(b) of the Statute covers also non-international armed conflicts. The rule at issue is closely related to the one prohibiting attacks on civilian objects, even though certain elements of those two rules remain distinct. Both rules serve the aim of protecting property from damage caused by military operations. In addition, the offence of devastation charged against the Accused is alleged to have occurred in the context of an attack against civilian objects. Therefore, and having regard to its conclusion that the rule prohibiting attacks on civilian objects applies to non-international armed conflicts, the Chamber finds no reason to hold otherwise than that the prohibition contained in Article 3 (b) of the Statute applies also to non-international armed conflicts.

229. Turning now to the crime charged under Article 3(d), the Chamber notes that this provision is based on Article 27 of the Hague Regulations. Moreover, protection of cultural property had developed already in earlier codes. The relevant provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 [Footnote 780: "The Chamber is of the opinion that the institutions and objects falling under Article 3(d) of the Statute are included into the definition of the "cultural property" provided in Article 1" of that convention] confirm the earlier codes. The Appeals Chamber in the *Tadic* case explicitly referred to Article 19 of the Hague Convention of 1954, as a treaty rule which formed part of customary international law binding on parties to non-international armed conflicts. More generally, it found that the customary rules relating to the protection of cultural property had developed to govern internal strife. The Chamber

additionally notes that it is prohibited "to commit any act of hostility directed against [cultural property]" both in Article 53 of Additional Protocol I relating to international armed conflicts and Article 16 of Additional Protocol II governing non-international armed conflicts. [Footnote 785: [...] ICRC Commentary on Additional Protocol I, para. 2046. [...].]

230. In view of the foregoing, the Chamber is satisfied that Article 3(d) of the Statute is a rule of international humanitarian law which not only reflects customary international law but is applicable to both international and non-international armed conflicts. Accordingly, the first and second *Tadic* conditions with regard to Article s 3(b) and 3(d) are met.

231. As to the third *Tadic* condition, the Chamber recalls its conclusion that the offence of attacking civilian objects fulfils this condition when it results in damage severe enough to involve "grave consequences" for its victims. It is of the view that, similarly to the attacks on civilian objects, the crime of devastation will fall within the scope of the Tribunal's jurisdiction under Article 3 of the Statute if the damage to property is such as to "gravely" affect the victims of the crime. Noting that one of the requirements of the crime is that the damage be on a large scale, the Chamber has no doubt that the crime at hand is serious.

232. As regards the seriousness of the offence of damage to cultural property (Article 3 (d)), the Chamber observes that such property is, by definition, of "great importance to the cultural heritage of every people". [1954 Hague Convention Art 1(a)] It therefore considers that, even though the victim of the offence at issue is to be understood broadly as a "people", rather than any particular individual, the offence can be said to involve grave consequences for the victim. In the *Jokic* case, for instance, the Trial Chamber [...] found that "since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town [of Dubrovnik]." In view of the foregoing, the Chamber finds that the offences under Articles 3(b) and 3(d) of the Statute are serious violations of international humanitarian law. Hence, the third *Tadic* condition is satisfied.

233. As to the fourth *Tadic* condition, the Chamber notes that Article 6 of the Charter of the Nuremberg International Military Tribunal already provided for individual criminal responsibility for war crimes, including devastation not justified by military necessity, which is listed in Article 3(b) of the Statute. Concerning Article 3(d) of the Statute, the Chamber recalls that Article 28 of the Hague Convention of 1954 stipulates that "the high contracting parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention." [...] Accordingly, the Chamber finds that Articles 3(b) and 3(d) of the Statute entail individual criminal responsibility. Thus, the fourth *Tadic* condition is fulfilled.

VI. THE CHARGES

A. Crimes against persons (Count 1 and 2)

1. Murder (Count 1)

234. The Indictment charges the Accused with criminal liability for murder as a violation of the laws or customs of war under Article 3 of the Statute. The alleged victims of this crime are Tonci Skocko and Pavo Urban. [...]

240. On the basis of the foregoing analysis, it would seem that the jurisprudence of the Tribunal may have accepted that where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterised as murder, when the perpetrators had knowledge of the probability that the attack would cause death. Whether or not that is so, given the acceptance of an indirect intent as sufficient to establish the necessary *mens rea* for murder and wilful killing, there appears to be no reason in principle why proof of a deliberate artillery attack on a town occupied by a civilian population would not be capable of demonstrating that the perpetrators had knowledge of the probability that death would result. The Chamber will proceed on this basis. [...]

248. [...] In the Chamber's finding, Tonci Skocko died from haemorrhaging caused by shrapnel wound from a shell explosion in the course of the JNA artillery attack on the Old Town on 6 December 1991.

249. With respect to the *mens rea* required for murder, the Chamber reiterates its findings that the JNA attack on the Old Town was deliberate and that the perpetrators knew it to be populated. The Chamber finds that the perpetrators of the attack can only have acted in the knowledge that the death of one or more of the civilian population of the Old Town was a probable consequence of the attack.

250. On the basis of the foregoing, and leaving aside for the present the question of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of murder are established in relation to Tonci Skocko.

B. Attacks on civilians and civilian objects (Counts 3 and 5)

1. Law

[...]

280. The offence of attacks on civilians and civilian objects was defined in earlier jurisprudence as an attack that caused deaths and/or serious bodily injury within the civilian population or damage to civilian objects, and that was "conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity". The Appeals Chamber recently clarified some of the

jurisprudence relating to the various elements of the crime. First, the Appeals Chamber rejected any exemption on the grounds of military necessity and underscored that there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law. [Footnote 895: *Blaskic* Appeals Judgement, para. 109. [...].] In this respect, the Chamber would observe that on the established facts in the present case, there was no possible military necessity for the attack on the Old Town on 6 December 1991. Further, the Appeals Chamber confirmed that criminal responsibility for unlawful attacks requires the proof of a result, namely of the death of or injury to civilians, or damage to civilian objects. With respect to the scale of the damage required, the Appeals Chamber, while not discussing the issue in detail, appeared to endorse previous jurisprudence that damage to civilian objects be extensive. In the present case however, in light of the extensiveness of the damage found to have been caused, the Chamber finds no need to elaborate further on the issue and will proceed on the basis that if extensive damage is required, it has been established in fact in this case.

281. [...] [T]he issue whether the attack charged against the Accused was directed at military objectives and only incidentally caused damage does not arise in the present case. Therefore, the Chamber does not find it necessary to determine whether attacks incidentally causing excessive damage qualify as attacks directed against civilians or civilian objects.

282. Pursuant to Article 49(1) of Additional Protocol I to the Geneva Conventions "attacks" are acts of violence against the adversary, whether in offence or in defence. According to the ICRC Commentary an attack is understood as a "combat action" and refers to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict. As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. The presence of certain non-civilians among the targeted population does not change the character of that population. It must be of a "predominantly civilian nature". Further, Article 50 (1) of Additional Protocol I provides for the assumption that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. The Chamber reiterates that "civilian property covers any property that could not be legitimately considered a military objective".

283. The Chamber therefore concludes that the crime of attacks on civilians or civilian objects, as a crime falling within the scope of Article 3 of the Statute, is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the

object of the attack. [...] [T]he issue whether a standard lower than that of a direct intent may also be sufficient does not arise in the present case.

2. Findings

284. The Chamber has already found that on 6 December 1991 there was an attack launched by the JNA forces against the Old Town of Dubrovnik. It is also the finding of the Chamber, as recorded earlier, that there were no military objectives within the Old Town and the attack was not launched or maintained in the belief that there were. It is possible that there may have been individuals in the Old Town on 6 December 1991 who were connected with the Croatian defending forces, however, any such persons did not fire on JNA forces or undertake any overt military activity. Their presence could not change the character of the population. It was properly characterised as a civilian population, and the objects located there were civilian objects. As regards the Defence submission concerning alleged military activities of the Crisis Staff, the headquarters of which was located in the Old Town, the Chamber notes that no persuasive evidence has been supplied to the effect that the Crisis Staff was conducting military operations from the Old Town. On the contrary, () the Crisis Staff did not deal with issues of defence. [...] [I]ts members did not fight and did not wear uniforms. It was his testimony that the headquarters of the Territorial Defence was in Lapad [an island north-west of Dubrovnik]. There is nothing in the evidence to suggest that the building of the Crisis Staff made "an effective contribution to military action" or that its destruction would offer "a definite military advantage". Accordingly, the Chamber finds on the evidence in this case that the presence of the Crisis Staff in a building located in the Old Town did not render the building a legitimate military objective. The Chamber would also note that the building in question was not proved to have been damaged during the shelling so that this Defence submission apparently lacks factual foundation.

285. 6 December 1991, the evidence is unequivocal that the Old Town was, as it still is, a living town. Though a protected World Heritage site, it had a substantial resident population of between 7,000 and 8,000, many of whom were also employed in the Old Town, as were very many others who came to the Old Town from the wider Dubrovnik to work. The Old Town was also a centre of commercial and local government activity and religious communities lived within its walls. Because of, and under the terms of, the JNA blockade, some women and children had temporarily left the Old Town, but many remained. In addition, families and individuals displaced by the JNA advance on Dubrovnik had found shelter in the Old Town. Some people from the wider Dubrovnik had also been able to take up temporary residence in the Old Town during the blockade in the belief that its World Heritage listing would give them protection from military attack. The existence of the Old Town as a living town was a renowned state of affairs which had existed for centuries. [...]

286. In addition to this long established and renowned state of affairs, it is clear from the evidence that the JNA forces had both the wider Dubrovnik and the

Old Town under direct observation from many positions since its forces had closed in on Dubrovnik in November. The presence and movements of a large civil population, in both the Old Town and the wider Dubrovnik, of necessity would have been obvious to this close military observation. Of course, JNA leaders, including the Accused and Admiral Jokic were directly concerned with negotiations with *inter alia* representatives of the civilian population. Further, one apparent objective of the JNA blockade of Dubrovnik was to force capitulation of the Croatian defending forces by the extreme hardship the civilian population was being compelled to endure by virtue of the blockade. In the Chamber's finding it is particularly obvious that the presence of a large civilian population in the Old Town, as well as in the wider Dubrovnik, was known to the JNA attackers, in particular the Accused and his subordinates, who variously ordered, planned and directed the forces during the attack.

287. One or two particular aspects of the evidence related to the issue of a civilian population in the Old Town, and in the wider Dubrovnik, warrants particular note. On 6 December 1991 the attacking JNA soldiers could hear that a defence or air-raid alarm was sounded at about 0700 hours on 6 December 1991 in Dubrovnik. In his report concerning that day Lieutenant-Colonel Jovanovic, commanding the 3 /5 mtbr, purported to assume that after the alarm the city dwellers had hidden in shelters. Hence, as he asserted in evidence, he ordered firing on the basis that anyone who was still moving around in the Dubrovnik residential area was participating in combat activities. This view assumes, of course, the presence of civilians but seeks to justify the targeting of persons and vehicles moving about on the basis suggested. The view which Lieutenant-Colonel Jovanovic purported to hold on that day does not hold up to scrutiny. Common sense and the evidence of many witnesses in this case, confirms that the population of Dubrovnik was substantially civilian and that many civilian inhabitants had sound reasons for movement about Dubrovnik during the 10 1/2 hours of the attack. An obvious example is those trying to reach the wounded or to get them to hospital. Others sought better shelter as buildings were damaged or destroyed. Others sought to reach their homes or places of work. There are many more examples. [...] The presence of civilians within the Old Town was also directly communicated to the JNA at command level by the protests they received on that day from the Crisis Staff. [...]

288. The Chamber has found that the Old Town was extensively targeted by JNA artillery and other weapons on 6 December 1991 and that no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA. Hence, in the Chamber's finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town. The Chamber has, in addition, found that a relatively few military objectives (actual or believed) in the wider city of Dubrovnik, but outside the Old Town, were targeted by JNA forces on 6 December 1991. These were, in most cases, widely separated and in positions distant from the Old Town. Shelling targeted at the Croatian military positions in the wider Dubrovnik, including those closer to the Old

Town, and whether actual or believed positions, would not cause damage to the Old Town, for reasons given in this decision. That is so for all JNA weapons in use on 6 December 1991, including mortars. In addition to this, however, the Chamber has found there was also extensive targeting of non-military objectives outside the Old Town in the wider city of Dubrovnik. [...]

C. Crimes against property, including cultural property (Counts 4 and 6)

1. Law on devastation not justified by military necessity (Count 4)

[...]

292. While the crime of "devastation not justified by military necessity" has scarcely been dealt with in the Tribunal's jurisprudence, the elements of the crime of "wanton destruction not justified by military necessity" were identified by the Trial Chamber in the *Kordic* case, and recently endorsed by the Appeals Chamber in that same case, as follows:

(i) the destruction of property occurs on a large scale;

(ii) the destruction is not justified by military necessity; and

(iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.

293. At least in the context of the present trial this definition appears equally applicable to devastation. The Chamber will adopt this definition, with appropriate adaptions to reflect "devastation", for the crime of "devastation not justified by military necessity." Both the Prosecution and the Defence submit that this should be done.

294. Turning to the first element, that is, that the devastation occurred on a "large scale", the Chamber is of the view that while this element requires a showing that a considerable number of objects were damaged or destroyed, it does not require destruction in its entirety of a city, town or village. [...]

295. The second requirement is that the act is "not justified by military necessity". The Chamber is of the view that military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Whether a military advantage can be achieved must be decided, as the Trial Chamber in the *Galic* case held, from the perspective of the "person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action." [Footnote 940: *Galic* Trial Judgement para. 51.] [...] Recalling its earlier finding that there were no military objectives in the Old Town on

6 December 1991, the Chamber is of the view that the question of proportionality in determining military necessity does not arise on the facts of this case.

296. According to the consistent case-law of the Tribunal the *mens rea* requirement for a crime under Article 3(b) is met when the perpetrator acted with either direct or indirect intent, the latter requiring knowledge that devastation was a probable consequence of his acts.

297. In sum, the elements of the crime of "devastation not justified by military necessity", at least in the present context, may be stated as: (a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.

2. Law on destruction or wilful damage of cultural property (Count 6)

298. Count 6 of the Indictment charges the Accused with destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, punishable under Article 3(d) of the Statute. [...]

300. This provision has been interpreted in several cases before the Tribunal to date. The *Blaskic* Trial Chamber adopted the following definition:

> The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives. [Footnote 943: *Blaskic* Trial Judgement, para. 185.]

301. The *Naletilic* Trial Judgement, while rejecting the *Blaskic* holding that, in order to be protected, the institutions must not have been located in the immediate vicinity of military objectives, held that the elements of this crime with respect to destruction of institutions dedicated to religion would be satisfied if: "(i) the general requirements of Article 3 of the Statute are fulfilled; (ii) the destruction regards an institution dedicated to religion; (iii) the property was not used for military purposes; (iv) the perpetrator acted with the intent to destroy the property." [Footnote 945: *Naletilic* Trial Judgement, para. 605.]

302. Further, [...] when the acts in question are directed against cultural heritage, the provision of Article 3(d) is *lex specialis*.

303. In order to define the elements of the offence under Article 3(d) it may be useful to consider its sources in international customary and treaty law. Acts against cultural property are proscribed by Article 27 of the Hague Regulations of 1907, by the Hague Convention of 1954, by Article 53 of Additional Protocol I and by Article 16 of Additional Protocol II.

304. Article 27 of the Hague Regulations of 1907 reads [*see* **Document No. 1**, p. 517]

305. Article 4 of The Hague Convention of 1954 requires the States Parties to the Convention to: [*See* **Document No. 3**, Conventions on the Protection of Cultural Property. [*Cf.* A.] p. 525.]

306. Article 53 of Additional Protocol I reads: [...]

This text is almost identical in content to the analogous provision in Additional Protocol II (Article 16) the only differences being the absence in the latter of a reference to "other relevant international instruments" and the prohibition on making cultural property the object of reprisals.

307. The Hague Convention of 1954 protects property "of great importance to the cultural heritage of every people." The Additional Protocols refer to "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples." [...] [T]the basic idea [underlying the two provisions] is the same. [...] The Chamber will limit its discussion to property protected by the above instruments (hereinafter "cultural property").

308. While the aforementioned provisions prohibit acts of hostility "directed" against cultural property, Article 3(d) of the Statute explicitly criminalises only those acts which result in damage to, or destruction of, such property. Therefore, a requisite element of the crime charged in the Indictment is actual damage or destruction occurring as a result of an act directed against this property.

309. The Hague Regulations of 1907 make the protection of cultural property dependent on whether such property was used for military purposes. The Hague Convention of 1954 provides for an obligation to respect cultural property. This obligation has two explicit limbs, viz. to refrain "from any use of the property and its immediate surroundings for purposes which are likely to expose it to destruction or damage in the event or armed conflict", and, to refrain "from any act of hostility directed against such property." [Art. 4(1) Hague Convention] The Convention provides for a waiver of these obligations, however, but only when "military necessity imperatively requires such a waiver." [*ibid.* Art. 4(2)] The Additional Protocols prohibit the use of cultural property in support of military efforts, but make no explicit provision for the consequence of such a use, i. e. whether it affords a justification for acts of hostility against such property. Further, the Additional Protocols prohibit acts of hostility against cultural property, without any explicit reference to military necessity. However, the relevant provisions of both Additional Protocols are expressed to be "[w]ithout prejudice to" the provisions of the Hague Convention of 1954. This suggests that in these respects, the Additional Protocols may not have affected the operation of the waiver provision of the Hague Convention of 1954 in cases where military necessity imperatively requires waiver. In this present case, no military necessity arises on the facts in respect of the shelling of the

Old Town, so that this question need not be further considered. For the same reason, no consideration is necessary to the question of what distinction is intended (if any) by the word "imperatively" in the context of military necessity in Article 4, paragraph 2 of the Hague Convention of 1954.

310. Nevertheless, the established jurisprudence of the Tribunal confirming the "military purposes" exception [Footnote 956: *Blaskic* Trial Judgment, para. 185 [...].] which is consistent with the exceptions recognised by the Hague Regulations of 1907 and the Additional Protocols, persuades the Chamber that the protection accorded to cultural property is lost where such property is used for military purposes. Further, with regard to the differences between the *Blaskic* and *Naletilic* Trial Judgements noted above (regarding the use of the immediate surroundings of cultural property for military purposes), [...] the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection. [footnote 957: "As Article 27 of The Hague Regulations explicitly refers to "in sieges and bombardments", it is not because of the location of cultural property, but because of their use when cultural property loses its protection. Article 16 of the Second Protocol of the Hague Convention of 1954 strengthens this view. It states, as a waiver of the protection of cultural property, that "when and as long as (i) that cultural property *has, by its function, been made into a military objective*". (emphasis added).] Therefore, contrary to the Defence submission, the Chamber considers that the special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were "directed against" that cultural property, rather than the military installation or use in its immediate vicinity.

311. As for the *mens rea* element for this crime, the Chamber is guided by the previous jurisprudence of the Tribunal that a perpetrator must act with a direct intent to damage or destroy the property in question. There is reason to question whether indirect intent ought also to be an acceptable form of *mens rea* for this crime [...].

312. In view of the above, the definition established by the jurisprudence of the Tribunal appears to reflect the position under customary international law. For the purposes of this case, an act will fulfil the elements of the crime of destruction or wilful damage of cultural property, within the meaning of Article 3(d) of the Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.

3. Findings on Counts 4 and 6

[...]

318. The Chamber finds that of the 116 buildings and structures it listed in the Annex to its Rule 98bis Decision, 52 were destroyed or damaged during the 6 December shelling of the Old Town by the JNA. [...]

319. The nature and extent of the damage to the 52 buildings and structures from the 6 December 1991 attack varied considerably [...].

320. The Chamber also observes that among those buildings which were damaged in the attack, were monasteries, churches, a mosque, a synagogue and palaces. Among the other buildings affected were residential blocks, public places and shops; damage to these would have entailed grave consequences for the residents or the owners, *i.e.* their homes and businesses suffered substantial damage. [...]

326. In relation to Count 4 specifically, the Chamber finds that the Old Town sustained damage on a large scale as a result of the 6 December 1991 JNA attack. In this regard, the Chamber has considered the following factors: that 52 individually identifiable buildings and structures were destroyed or damaged; that the damaged or destroyed buildings and structures were located throughout the Old Town and included the ramparts surrounding it; that a large number of damaged houses bordered the main central axis of the Old Town, the Stradun, which itself was damaged, or were in the immediate vicinity thereof; and finally, that overall the damage varied from totally destroyed, *i.e.* burned out, buildings to more minor damage to parts of buildings and structures.

327. In relation to Count 6 specifically, the Chamber observes that the Old Town of Dubrovnik in its entirety was entered onto the World Heritage List in 1979 upon the nomination of the SFRY. The properties inscribed on the World Heritage List include those which, "because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science." [Footnote 991: Convention concerning the protection of the world cultural and natural heritage, adopted by the General Conference at its seventeenth session, Paris, 16 November 1972, Exhibit P63/11, Article 1.] The Chamber is of the view that all the property within the Old Town, i.e. each structure or building, is within the scope of Article 3(d) of the Statute. The Chamber therefore concludes that the attack launched by the JNA forces against the Old Town on 6 December 1991 was an attack directed against cultural property within the meaning of Article 3(d) of the Statute, in so far as that provision relates to cultural property.

328. In relation to Count 6, there is no evidence to suggest that any of the 52 buildings and structures in the Old Town which the Chamber has found to have been destroyed or damaged on 6 December 1991, were being used for military purposes at that time. [...] As discussed earlier, military necessity can, in certain cases, be a justification for damaging or destroying property.

In this respect, the Chamber affirms that in its finding there were no military objectives in the immediate vicinity of the 52 buildings and structures which the Chamber has found to have been damaged on 6 December 1991, or in the Old Town or in its immediate vicinity. In the Chamber's finding, the destruction or damage of property in the Old Town on 6 December 1991 was not justified by military necessity.

329. As to the *mens rea* element for both crimes the Chamber makes the following observations. In relation to Count 4, the Chamber infers the direct perpetrators' intent to destroy or damage property from the findings that the attack on the Old Town was deliberate, and that the direct perpetrators were aware of the civilian character of the Old Town. Similarly, for Count 6, the direct perpetrators' intent to deliberately destroy cultural property is inferred by the Chamber from the evidence of the deliberate attack on the Old Town, the unique cultural and historical character of which was a matter of renown, as was the Old Town's status as a UNESCO World Heritage site. As a further evidentiary issue regarding this last factor, the Chamber accepts the evidence that protective UNESCO emblems were visible, from the JNA positions at Zarkovica and elsewhere, above the Old Town on 6 December 1991. [...]

VII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE ACCUSED

A. Ordering

[...]

2. Findings

334. The Indictment alleges that on 6 December 1991, the Accused ordered the unlawful artillery and mortar shelling of the Old Town of Dubrovnik conducted by forces under his command, including the forces under the command of Captain Kovacevic, which were directly subordinated to the 9 VPS commanded by Admiral Jokic.

335. The Prosecution submits that "[a]lthough there is no direct evidence of ordering, circumstantial evidence exists such that the conclusion must be drawn that the Accused gave an express or implied order to attack Srdj prior to the attack which was launched on 6 December 1991." It further argues that "an express or implied order by the Accused to attack Srdj on 6 December 1991 had to be an order given with the awareness of the substantial likelihood that the Old Town would also be unlawfully attacked during the course of the attack on Srdj." [...]

338. In the finding of the Chamber the evidence does not, however, establish that there was an express order of the Accused to attack or to fire on the Old Town, or the greater city of Dubrovnik. The relevant order was directed against Srdj. [...]

341. While very substantial provision was made for artillery support, the plans that were developed are not shown to be inappropriate for the objective of attacking and taking Srdj. There is nothing to suggest that they were outside the scope of what was or ought to have been contemplated by the Accused in respect of the troops and artillery to be employed in the assault. So far as the evidence indicates the plan was one which, if well executed, should have enabled the successful taking of Srdj well before 1200 hours on 6 December 1991.

342. While the attack ordered by the Accused was directed at Srdj, it is apparent from the evidence, as noted elsewhere in this decision, that any such attack necessarily contemplated that JNA artillery fire would be necessary against any Croatian forces which threatened the JNA forces attacking Srdj and jeopardised the success of the attack on Srdj. As has been indicated the reality was obvious that, apart from the limited Croatian forces on Srdj itself, any such defensive action by the Croatian forces could only come from the very limited artillery and other weapons in the wider city of Dubrovnik.

343. Given these circumstances, in the finding of the Chamber, the Accused with his very considerable military knowledge and experience, was well aware that his order to attack Srdj necessarily also involved the prospect that his forces might well have need to shell any Croatian artillery and other military positions in the wider Dubrovnik which, by their defensive action, threatened the attacking JNA troops on Srdj and the success of their attack to capture Srdj. That is the inference the Chamber draws.

344. As the Chamber has found earlier, the JNA forces attacking Srdj did come under limited but determined Croatian mortar, heavy machine gun (anti-aircraft gun) and other fire directed from the wider Dubrovnik. This fire caused JNA fatalities and other casualties on Srdj. It is clear that it threatened the success of the attack. JNA artillery fire [...] was, in part, directed against a number of these Croatian defensive positions in the wider Dubrovnik. [...] On 6 December 1991, no Croatian defensive fire was directed to Srdj or to other JNA positions from the Old Town, and the JNA forces did not act under any other belief.

345. What did occur is that the JNA artillery did not confine its fire to targeting Croatian military positions, let alone Croatian positions actually firing on the JNA forces on Srdj or other JNA positions. The JNA artillery which was active that day came to fire on Dubrovnik, including the Old Town, without regard to military targets, and did so deliberately, indiscriminately and extensively over a prolonged time. In respect of the shelling of the Old Town by the JNA, it caused substantial damage to civilian property and loss of life and other casualties to civilians. It is not proved that the Accused ordered this general artillery attack on Dubrovnik, or the Old Town. The evidence indicates otherwise. His order was confined to an attack on Srdj. The implications with regard to the use of JNA artillery against Dubrovnik, of the Accused's ordered attack on Srdj, has not been shown to extend to such a general artillery attack on Dubrovnik, or the Old Town.

346. For the purposes of the Accused's individual criminal responsibility, so far as it is alleged that he ordered the attack on the Old Town on 6 December 1991, the further issue arises whether the Accused was aware of the substantial likelihood that in the course of executing his order to attack Srdj, there would be a deliberate artillery attack by his forces on the Old Town. Previous JNA shelling of Dubrovnik, during which there was unauthorised shelling of the Old Town, in the course of JNA military action in October and November 1991 in the vicinity of the city of Dubrovnik, including Srdj, would certainly have alerted the Accused that this could occur, especially as the 3/472 mtbr had been identified to him as a likely participant in the November shelling.

347. There were, however, relevant differences. The JNA operations in October and November 1991 each involved a general widespread attack and advance over several days by many JNA units over a wide front, with naval and air support. The attack on Srdj in December 1991 was a much more limited operation both in terms of the forces engaged in the attack, the ground to be gained and the time allocated to the troops in which to do so. While the Accused's order to attack Srdj necessarily had the implication of JNA artillery support against Croatian forces threatening the attacking JNA troops and the success of the attack on Srdj including, if necessary, artillery fire against specific Croatian defensive positions in Dubrovnik, that implication was of limited, specifically targeted and controlled responsive fire by the Accused's forces. The escalation of JNA artillery fire on Dubrovnik into the deliberate, indiscriminate and extensive shelling which occurred, although not dissimilar to the previous episodes, was a marked step further than was implied by the Accused's order, and occurred in circumstances sufficiently different from the previous episodes as to reduce to some degree the apparent likelihood of a repetition of the previous conduct of his forces. While the circumstances known to the Accused, at the time of his order to attack Srdj, can only have alerted him to the possibility that his forces would once again ignore orders and resort to deliberate and indiscriminate shelling, it must be established by the Prosecution that it was known to the Accused that there was a substantial likelihood of this occurring. The risk as known to the Accused was not slight or remote; it was clearly much more real and obvious. Nevertheless, the evidence falls short, in the Chamber's view, of establishing that there was a "substantial likelihood" that this would occur known to the Accused when he ordered the attack on Srdj. [...]

C. Command Responsibility

1. Law [...]

(a) Superior-subordinate relationship

361. In the present case, the issue is raised whether a commander may be found responsible for the crime committed by a subordinate two levels down in the chain of command.

362. It appears from the jurisprudence that the concepts of command and subordination are relatively broad. Command does not arise solely from the superior's formal or *de jure* status, but can also be "based on the existence of *de facto* powers of control". In this respect, the necessity to establish the existence of a superior-subordinate relationship does "not [...] import a requirement of *direct* or *formal* subordination". Likewise, there is no requirement that the relationship between the superior and the subordinate be permanent in nature. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination.

363. Consistently with the above reasoning, other persuasive sources seem to indicate that there is no requirement that the superior-subordinate relationship be immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior's effective control over the subordinate, whether that subordinate be immediately answerable to that superior or more remotely under his command. [...]

366. [...] As to whether the superior has the requisite level of control, the Chamber considers that this is a matter which must be determined on the basis of the evidence presented in each case.

(b) Mental element: the superior knew or had reason to know

367. A superior may be held responsible under Article 7(3) of the Statue for crimes committed by a subordinate if, *inter alia*, he knew or had reason to know that the subordinate was about to commit or had committed such crimes. [...]

(c) Necessary and reasonable measures

374. What the duty to prevent will encompass will depend on the superior's material power to intervene in a specific situation. [...]

2. Findings

(a) Superior-subordinate relationship

(i) Command structure

[...]

391. [...] [T]he Chamber is satisfied that on 6 December 1991 the [units carrying out the attack], were directly subordinated to the 9 VPS, which was subordinated to the 2 OG. The [units] were at the second level of subordination to the 2 OG. The Chamber is satisfied, therefore, and finds that the Accused, as the commander of the 2 OG, had *de jure* authority over the JNA forces involved in the attack on Srdj and the shelling of Dubrovnik, including the Old Town.

(ii) Effective control

392. As discussed above, the indicators of effective control depend on the specific circumstances of the case. The Chamber turns now to consider whether the evidence in the case establishes that the Accused had the power to prevent the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991, and punish or initiate disciplinary or other adverse administrative proceedings against the perpetrators.

a. Did the Accused have the material ability to prevent the attack on the Old Town of 6 December 1991?

[...]

405. The Chamber is satisfied that the Accused, as the commander of the 2 OG, had the material ability to prevent the unlawful shelling of the Old Town on 6 December 1991 and to interrupt and stop that shelling at any time during which it continued.

b. Did the Accused have the material ability to punish the perpetrators?

[...]

414. [...] [T]he Chamber is satisfied that as the commander of the 2 OG the Accused had effective control over the perpetrators of the unlawful attack on the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to issue orders to the 3/472 mtbr, and all the other JNA forces involved in the attack on Srdj and the shelling of Dubrovnik, including the Old Town, explicitly prohibiting an attack on the Old Town, as well as to take other measures to ensure compliance with such orders and to secure that the Old Town would not be attacked by shelling, or that an existing attack be immediately terminated. Further, the Chamber is satisfied that following the attack of 6 December 1991 the Accused had the legal authority and the material ability to initiate an effective investigation and to initiate or take administrative and disciplinary action against the officers responsible for the shelling of the Old Town.

(b) Mental element: did the Accused know or have reason to know that his subordinates were about to or had committed crimes?

415. The factual circumstances relevant to the mental element, as established by the evidence in this case, have been reviewed in this decision. Against that factual background Article 7(3) of the Statute gives rise to a significant issue. This is whether, by virtue of the JNA artillery fire on Dubrovnik to be expected in support of the attack the Accused ordered on Srdj, he knew or had reason to know that in the course of the attack the JNA artillery would commit offences such as the acts charged. By way of general analysis the Accused knew of the recent shelling of the Old Town in October and November by his forces. Indeed, the forces in the attack on 6 Decem-

ber 1991 were among the forces involved at the time of the November shelling [...]. Existing orders in December precluded shelling of the Old Town, however that had also been the position with the October and November shelling, so that general orders had not proved effective as a means of preventing his troops from shelling Dubrovnik, especially the Old Town. The Accused well knew that no adverse action had been taken against anyone by virtue of the previous acts of shelling the Old Town, so that there had been no example of adverse disciplinary or other consequences shown to those who breached the existing orders, or international law, on previous occasions.

416. In the view of the Chamber, as discussed earlier in this decision, what was known to the Accused when he ordered the attack on Srdj on 5 December 1991, and at the time of the commencement of the attack on 6 December 1991, gave the Accused reason to know that criminal acts such as those charged *might* be committed by his forces in the execution of his order to attack Srdj. Relevantly, however, the issue posed by Article 7(3) of the Statute is whether the Accused then had reason to know that offences were about to be committed by his forces. [...]

417. In the Chamber's assessment of what was known to the Accused at or before the commencement of the attack on Srdj, there has been shown to be a real and obvious prospect, a clear possibility, that in the heat and emotion of the attack on Srdj, the artillery under his command *might well* get out of hand once again and commit offences of the type charged. It has not been established, however, that the Accused had reason to know that this *would* occur. This is not shown to be a case, for example, where the Accused had information that before the attack his forces planned or intended to shell the Old Town unlawfully, or the like. It is not apparent that additional investigation before the attack could have put the Accused in any better position. Hence, the factual circumstances known to the Accused at the time are such that the issue of "reason to know" calls for a finely balanced assessment by the Chamber. In the final analysis, and giving due weight to the standard of proof required, the Chamber is not persuaded that it has been established that the Accused had reasonable grounds to suspect, before the attack on Srdj, that his forces were about to commit offences such as those charged. Rather, he knew only of a risk of them getting out of hand and offending in this way, a risk that was not slight or remote, but nevertheless, in the Chamber's assessment, is not shown to have been so strong as to give rise, in the circumstances, to knowledge that his forces were about to commit an offence, as that notion is understood in the jurisprudence. It has not been established, therefore, that, before the commencement of the attack on Srdj, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence.

418. That being so, the Chamber will therefore consider whether, in the course of the attack on Srdj on 6 December 1991, what was known to the Accused

changed so as to attract the operation of Article 7(3). In the very early stages of the attack, well before the attacking JNA infantry had actually reached the Srdj feature and the fort, at a time around 0700 hours as the Chamber has found, the Accused was informed by the Federal Secretary of National Defence General Kadijevic of a protest by the ECMM against the shelling of Dubrovnik. For reasons given earlier, the order of the Accused to attack Srdj necessarily involved knowledge by him that JNA artillery might need to act against Croatian defensive positions in Dubrovnik which were threatening the lives of the attacking soldiers and the success of the attack on Srdj. His knowledge, in the Chamber's finding, was that only a limited number of such Croatian defensive positions could exist and that, as the attack progressed, these positions could be subjected to controlled and limited JNA shelling targeted on these positions, or on what were believed by his forces to be such positions. While a protest such as had been made to General Kadijevic could perhaps have arisen from shelling targeted at such Croatian defensive positions, the description that Dubrovnik was being shelled, the extremely early stage in the attack of the protest (before sunrise), and the circumstance that the seriousness of the situation had been thought by the ECMM to warrant a protest in Belgrade at effectively the highest level, would have put the Accused on notice, in the Chamber's finding, at the least that shelling of Dubrovnik beyond what he had anticipated at that stage by virtue of his order to attack Srdj, was then occurring. This knowledge was of a nature, in the Chamber's view, that, when taken together with his earlier knowledge, he was on notice of the clear and strong risk that already his artillery was repeating its previous conduct and committing offences such as those charged. In the Chamber's assessment the risk that this was occurring was so real, and the implications were so serious, that the events concerning General Kadijevic ought to have sounded alarm bells to the Accused, such that at the least he saw the urgent need for reliable additional information, i.e. for investigation, to better assess the situation to determine whether the JNA artillery were in fact shelling Dubrovnik, especially the Old Town, and doing so without justification, i.e. so as to constitute criminal conduct. [...]

(c) Measures to prevent and to punish

(i) Measures to prevent

420. [...] [T]here was, in the Accused's knowledge at the time of his decision to order the attack on Srdj and when the attack commenced, a real risk that in the heat of the attack the JNA artillery would once again repeat its then recent and already repeated conduct of unlawful shelling of Dubrovnik, in particular of the Old Town. [...] [T]he known risk was sufficiently real and the consequences of further undisciplined and illegal shelling were so potentially serious, that a cautious commander may well have thought it desirable to make it explicitly clear that the order to attack Srdj did not include authority to the supporting artillery to shell, at the least, the Old Town. Depending on the attitude of such a commander to the status of the

Old Town, any such explicit clarification may have been qualified, for example, by words such as "except in the case of lethal fire from the Old Town", words which reflect the terms of one of the earlier orders. [T]he Chamber is not persuaded that a failure to make any such clarification before the attack commenced gives rise to criminal liability of the Accused, pursuant to Article 7(3) of the Statute, for what followed. Any such clarification would have been merely by way of wise precaution. It remains relevant, however, when evaluating the events that followed, that no such precaution was taken.

421. There were of course existing orders. As described elsewhere in this decision, in some cases, their effect was to preclude shelling of Dubrovnik, others forbade the shelling of the Old Town itself. [...] The existence of such orders had not been effective to prevent the previous shellings. Further, no action had been taken to deal with those who were responsible for the previous breaches of existing orders. In these circumstances, in the Chamber's finding, the mere existence of such orders could not on 6 December 1991 be seen to be effective to prevent repetition of the past shelling of Dubrovnik, and especially the Old Town. In the Chamber's view, however, there is a relevant distinction between such existing orders which, with apparent impunity, had not been faithfully observed by the forces to whom they were given, and a further clear and specific order to the same effect, if given at the time of, and specifically for the purposes of, a fresh new attack. A new express order prohibiting the shelling of the Old Town (had that been intended by the Accused) given at the time of his order to attack Srdj, would both have served to remind his forces of the existing prohibition, and to reinforce it. Further, and importantly, it would have made it clear to those planning and commanding the attack, and those leading the various units (had it been intended by the Accused) that the order to attack Srdj was not an order which authorised shelling of the Old Town. In the absence of such an order there was a very clear prospect that those planning, commanding and leading the attack would understand the new and specific order to attack Srdj as implying at least that shelling necessary to support the attack on Srdj was authorised, notwithstanding existing orders. [...] There is nothing to support the view that the Accused took any measures to guard against this. Indeed, as the Chamber has found, the intended implication of the Accused's order to attack Srdj was that shelling, even of the Old Town, which was necessary to support the attacking infantry on Srdj, could occur. As has been made clear in this decision, however, in the Chamber's finding what did occur on 6 December was deliberate, prolonged and indiscriminate shelling of the Old Town, shelling quite outside the scope of anything impliedly ordered by the Accused. It remains relevant, however, that nothing had been done by the Accused before the attack on Srdj commenced to ensure that those planning, commanding and leading the attack, and especially those commanding and leading the supporting artillery, were reminded of the restraints on the shelling of the Old Town, or to reinforce existing prohibition orders.

422. Hence, when the Accused was informed by General Kadijevic around 0700 hours of the ECMM protest, that put the Accused directly on notice of

the clear likelihood that his artillery was then already repeating its earlier illegal shelling of the Old Town. The extent of the Accused's existing knowledge of the October and November shelling of the Old Town, of the disciplinary problems of the 3/472 mtbr and of its apparent role, at least as revealed by Admiral Jokic's November investigation, in the November shelling of Dubrovnik, especially the Old Town, and of his failure to clarify the intention of his order to attack Srdj in regard to the shelling of Dubrovnik or the Old Town are each very relevant. In combination they give rise, in the Chamber's finding to a strong need to make very expressly clear, by an immediate and direct order to those commanding and leading the attacking forces, especially the artillery, the special status of the Old Town and the existing prohibitions on shelling it, and of the limitations or prohibition, if any, on shelling the Old Town intended by the Accused on 6 December 1991. This should have been starkly obvious. The evidence contains no suggestion whatever that any such order was issued by the Accused, or anyone else that day [...].

423. There was also the obvious immediate need to learn reliably what JNA shelling was in truth occurring, and why. [...]

424. Just as the Accused had the ready and immediate means to be informed of the circumstances in Dubrovnik, and the Old Town, regarding JNA shelling, and to readily send his own staff to further investigate and report, he also had the ready and immediate means throughout 6 December 1991 to communicate orders to the commander of the attacking forces, Captain Kovacevic, and to the other senior 9 VPS officers at Zarkovica, including Warship-Captain Zec. [...]

433. [...] [T]he Accused had the legal authority and the material means to have stopped the shelling of the Old Town throughout the ten and a half hours it continued, as he also had the means and authority to stop the shelling of the wider Dubrovnik. No steps that may have been taken by the Accused were effective to do so. While the forces responsible for the shelling were under the immediate command of the 9 VPS, they were under his superior command and were engaged in an offensive military operation that day pursuant to the order of the Accused to capture Srdj.

434. While the finding of the Chamber is that the Accused did not order that the attack on Srdj be stopped when he spoke to Admiral Jokic around 0700 hours on 6 December 1991, the Chamber would further observe that had he in truth given that order, the effect of what followed is to demonstrate that the Accused failed entirely to take reasonable measures within his material ability and legal authority to ensure that his order was communicated to all JNA units active in the attack, and to ensure that his order was complied with. This failure, alone, would have been sufficient for the Accused to incur liability for the acts of his subordinates pursuant to Article 7(3), even if he had ordered at about 0700 hours that the attack on Srdj be stopped.

(ii) Measures to punish

[...]

444. The evidence establishes, in the Chamber's finding, that the Accused at all material times had full material and legal authority to act himself to investigate, or take disciplinary or other adverse action, against the officers of the 9 VPS who directly participated in, or who failed to prevent or stop, the unlawful artillery attack on the Old Town on 6 December 1991. Despite this the Accused chose to take no action of any type. Given that one line of the Defence case is to submit that Admiral Jokic, and his staff at 9 VPS, planned, authorised and oversaw the attack on Dubrovnik on 6 December 1991, and deliberately kept word of the attack from the Accused and 2 OG, until the attack had failed, it must also be recorded, in the Chamber's finding, that at no time did the Accused institute any investigation of the conduct of Admiral Jokic or his staff, or take any disciplinary or other adverse action against them in respect of the events of 6 December 1991. [...]

3. Conclusion

446. In view of the findings made earlier in this section, the Chamber is satisfied that the Accused had effective control over the perpetrators of the unlawful shelling of the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators. The Chamber is further satisfied that as of around 0700 hours on 6 December 1991 the Accused was put on notice at the least of the clear prospect, that his artillery was then repeating its previous conduct and committing offences such as those charged. Despite being so aware, the Accused did not ensure that he obtained reliable information whether there was in truth JNA shelling of Dubrovnik occurring, especially of the Old Town, and if so the reasons for it. Further, the Accused did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped. The Chamber is further satisfied that at no time did the Accused institute any investigation of the conduct of his subordinates responsible for the shelling of the Old Town, nor did he take any disciplinary or other adverse action against them, in respect of the events of 6 December 1991. The Chamber is therefore satisfied that the elements required for establishing the Accused's superior responsibility under Article 7(3) of the Statute for the unlawful shelling of the Old Town by the JNA on 6 December 1991 have been established.

VIII. CUMULATIVE CONVICTIONS

A. Should there be cumulative convictions?

447. The question of cumulative convictions arises where more than one charge arises out of what is essentially the same criminal conduct. In this case the artillery attack against the Old Town by the JNA on 6 December 1991

underlies all the offences charged in the Indictment. The Appeals Chamber has held that it is only permissible to enter cumulative convictions under different statutory provisions to punish the same criminal conduct if "each statutory provision involved has a materially distinct element not contained in the other". Where, in relation to two offences, this test is not met, the Chamber should enter a conviction on the more specific provision. [...]

449. The issue of cumulation arises first in relation to the offences of murder (Count 1), cruel treatment (Count 2) and attacks on civilians (Count 3). [...] [S]ince murder and cruel treatment do not contain an element in addition to the elements of attacks on civilians and because the offence of attacks on civilians contains an additional element (*i.e.* an attack) it is, theoretically, the more specific provision.

450. In the present case, the essential criminal conduct was an artillery attack against the Old Town inhabited by a civilian population. In the course of that attack civilians were killed and injured. The essential criminal conduct of the perpetrators is directly and comprehensively reflected in Count 3. The offence of attacks on civilians, involved an attack directed against a civilian population, causing death, and also serious injury, with the intent of making the civilian population the object of the attack. Given these circumstances, in the present case, the offence of murder adds no materially distinct element, nor does the offence of cruel treatment the gravamen of which is fully absorbed by the circumstances in which this attack on civilians occurred. [...]

452. The issue of cumulation also arises in relation to the remaining offences charged in the Indictment. These are devastation not justified by military necessity (Count 4), unlawful attacks on civilian objects (Count 5), and destruction or wilful damage of cultural property (Count 6). The statutory basis and the elements of each of these offences have been set out earlier in this decision. The elements of each of these three offences are such that they each, on a theoretical basis, contain "materially" distinct elements from each other.

453. The offence of attacks on civilian objects requires proof of an attack, which is not required by any element of either the offence of devastation not justified by military necessity or the offence of destruction of or wilful damage to cultural property. The offence of destruction of or wilful damage to cultural property requires proof of destruction or wilful damage directed against property which constitutes the cultural or spiritual heritage of peoples, which is not required by any element of the offence of attacks on civilian objects or the offence of devastation not justified by military necessity. The offence of devastation not justified by military necessity requires proof that the destruction or damage of property (a) occurred on a large scale and that (b) was not justified by military necessity. What is required by one offence, but not required by the other offence, renders them distinct in a material fashion.

454. In the present case, however, the offences each concern damage to property caused by the JNA artillery attack against the Old Town of Dubrovnik on 6 December 1991. The entire Old Town is civilian and cultural property. There was large scale damage to it. There was no military justification for the attack. In the view of the Chamber, given these particular circumstances, the essential criminal conduct is directly and comprehensively reflected in Count 6, destruction or wilful damage to cultural property. Counts 4 and 5 really add no materially distinct element, given the particular circumstances in which these offences were committed. The criminal conduct of the Accused in respect of these three Counts, is fully, and most appropriately reflected in Count 6 [...].

455. For these reasons, in the particular circumstances in which these offences were committed, the Chamber will enter convictions against the Accused only in respect of Count 3, attacks on civilians, and Count 6, destruction and willful damage of cultural property.

[...]

DISPOSITION

1. For the foregoing reasons, having considered all of the evidence and the submissions of the parties, the Chamber decides as follows:

2. The Chamber finds the Accused **guilty** pursuant to Article 7(3) of the Statute of the following two counts:

   Count 3: Attacks on civilians, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

   Count 6: Destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works or art and science, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

3. While the Chamber is satisfied that the elements of the following four counts have been established pursuant to Article 7(3) of the Statute, for reasons given earlier the Chamber does **not** record a finding of guilty against the Accused in respect of:

   Count 1: Murder, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

   Count 2: Cruel Treatment, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

   Count 4: Devastation not justified by military necessity, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

   Count 5: Unlawful Attacks on Civilian Objects, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

4. The Chamber does **not** find the Accused guilty pursuant to Article 7(1) of the Statute in respect of any of the six Counts.

5. The Chamber hereby sentences the Accused to a single sentence of eight years of imprisonment.

6. The Accused has been in custody for 457 days. Pursuant to Rule 101(C) of the Rules, he is entitled to credit for time spent in detention so far.

7. Pursuant to Rule 103(C) of the Rules, the Accused shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

DISCUSSION

1. Does the Trial Chamber classify the conflict? Why or why not? How would you classify the conflict? On what would a correct classification depend? Does the classification of a conflict as international or non-international have an impact on the legal analysis of the shelling of Dubrovnik? Does the nature of the conflict have an impact on whether the shelling of civilians or civilian objects is criminalized? (*Cf.* Art. 2 common to the Conventions; Arts. 51 and 52 of Protocol I and Art. 13 of Protocol II.)

2. Why does the Tribunal refer to whether Article 52 of Protocol I is covered by Protocol II? Why does it assess whether the Hague Regulations are also customary in non-international armed conflicts (Trial Chamber, para. 228)? (*Cf.* Arts. 51 and 52 of Protocol I and Art. 13 of Protocol II.)

3. a. How does the Trial Chamber classify the Old Town of Dubrovnik? Can an entire section of a city be a 'civilian object'? Even if there are military persons stationed there? Even if there are rockets and other weapons located there? Does the classification of the Old Town of Dubrovnik as a World Heritage site mean that it can never be a military object? (*Cf.* Art. 4 of the Hague Convention on Cultural Property of 1954, **Document No 3**. [*Cf.* A.] p. 525.)

   b. How can cultural property become a military objective? Do you agree with the Trial Chamber that the use and not the location of such property must be determinative? (Trial Chamber, para. 310) What does the Hague Convention on Cultural Property of 1954 (*See* **Document No. 3**. [*Cf.* A.] p. 525.) suggest?

   c. Is "imperative military necessity", as the standard for when cultural property may be legitimately attacked, a higher standard than the classification of "military objective", which is the standard for other objects? Does the Tribunal address this question? Why or why not? Which is the relationship between the protection of cultural objects in Protocols I and II and in the 1954 Hague Convention? Who determines whether the military necessity is "imperative"? (*Cf.* Art. 53 of Protocol I, Art. 16 of Protocol II and Art. 4 of the Hague Convention on Cultural Property of 1954, **Document No. 3**. [*Cf.* A.] p. 525.)

d. Why does the Tribunal discuss the nature of the Crisis Staff whose offices are situated in the Old Town (Trial Chamber, para. 284)? If the staff had been providing information to Croatian forces, would the Crisis Staff headquarters be a legitimate military objective, in your opinion? Would such provision of information fit within the requirement of "imperative military necessity" for when cultural property may be targeted? (*Cf.* Art. 52 of Protocol I and Art. 4 of the Hague Convention on Cultural Property of 1954, **Document No. 3**. [*Cf.* A.] p. 525.)

e. In this case, the Old Town of Dubrovnik is a registered World Heritage site. What other factors may determine whether a civilian object amounts to "cultural property"? Does the Tribunal list other factors? Why? Is there any significance to the fact that many women and children had left the Old Town due to the ongoing naval blockade (Trial Chamber, para. 285)?

f. What is the significance of the fact that there were "protective UNESCO emblems" on the Old Town (Trial Chamber, para. 329)? Do UNESCO emblems have the same protective power as the red cross or red crescent? Do they confer the same protection? (*Cf.* Arts. 39-43 of Convention I; Art. 18 of Protocol I and Arts. 4 and 17 of the Hague Convention on Cultural Property of 1954, **Document No. 3**. [*Cf.* A.] p. 525.)

4. What are the elements of the offence of attacks on a civilian population and attacks on civilian objects? Is there a distinction between the two?

5. How does the Tribunal determine that destruction of cultural property entails individual criminal responsibility? Is a treaty provision obliging States to criminalize certain behaviour sufficient to determine that individual criminal responsibility attaches to that behaviour under international law?

6. Does the Trial Chamber distinguish between whether the attack was indiscriminate or whether it was a deliberate attack on civilian or cultural property? Does it matter under IHL whether the shelling of civilians and civilian objects was deliberate or indiscriminate? Is there a relevant distinction for criminal responsibility to arise? (*Cf.* Art. 51 of Protocol I and Art. 13 of Protocol II.)

7. Does every violation of IHL in terms of unlawful attacks entail criminal liability? What additional elements are required for criminal responsibility to attach to acts of hostility directed against cultural property (Trial Chamber, para. 308)?

8. Is the Trial Chamber correct in holding that the question of proportionality does not arise on the facts of this case (Trial Chamber, para. 295)? Why or why not? Does the Trial Chamber indicate what its findings might have been under a proportionality assessment had there been military objectives in the Old Town (Trial Chamber, para. 195)?

9. Did the Trial Chamber find that Strugar knew or should have known that Dubrovnik more generally would be attacked when he ordered the attack on Srdj? What level of certainty that troops may engage in unlawful shelling of Dubrovnik is necessary in order to hold a superior criminally responsible for ordering an attack on a legitimate military objective (Trial Chamber, para. 347)? Is

less certainty required under the doctrine of command responsibility (Trial Chamber, paras. 415-417)?

10. Why does the Tribunal note that Croatian fire was sufficiently serious to threaten the success of the JNA attack on Srdj (Trial Chamber, para. 343)?

11. Does the Tribunal hold that Strugar was under an obligation to order that the attack on Srdj be stopped once he was aware that supporting fire for that attack was being directed at the city of Dubrovnik and the Old Town (Trial Chamber, para. 433)? Does IHL require a commander to stop an attack under such circumstances? What rules of IHL could be used to support such a holding? (*Cf.* Arts. 51 (4) and 57 of Protocol I.)

12. Under the doctrine of command responsibility, is the obligation to prevent and punish an obligation of result or of means (Trial Chamber, paras. 433-434)? In the view of the Tribunal? In your view, which should it be?

13. Regarding the measures to prevent under command responsibility, does IHL require a commander to be "cautious" in making orders (Trial Chamber, para. 420)? Does the failure to make an explicit order not to attack the Old Town give rise to criminal liability? Would issuing an order specifying that the Old Town should not be attacked during the attack on Srdj be part of the precautionary measures a commander must take? Is there a distinction between precautionary measures required by IHL and measures to prevent required by command responsibility when it comes to planning attacks? (*Cf.* Art. 57 of Protocol I.)

14. Why does the relationship between Lieutenant-General Strugar and Captain Kovacevic matter with respect to command responsibility?

15. Does the Tribunal accept the position of Lieutenant-Colonel Jovanovic that due to air-raid sirens, he could safely assume that all civilians were indoors and that therefore anyone in sight was a combatant? Does an air-raid siren absolve attackers of the obligation to take precautions in an attack and to verify whether a person is civilian or combatant (Trial Chamber, para. 287)? (*Cf.* Arts. 57 and 58 of Protocol I.)

16. Why could Strugar not be convicted of murder even though all of the elements of the crime were established? According to the doctrine of cumulative convictions as applied by the Tribunal, can there ever be a situation in which a superior is guilty of murder for deaths caused during an unlawful attack? What distinct elements may exist?

5. Decisions by National Courts

Case No. 189, US, Kadic et al. v. Karadzic

THE CASE

[**Source:** *ILM*, vol. 34 (6), 1995, pp. 1595-1614; footnotes partially omitted.]

S. KADIC, *et al.*, Plaintiffs-Appellants
v.
RADOVAN KARADZIC, Defendant-Appellee
October 13, 1995

[...]

OPINION: JOHN O. NEWMAN, Chief Judge:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. at 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action [...].

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject-matter jurisdiction, their suits against defendant-appellee Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of "Srpska". [...] For the reasons set forth below, we hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

Background. The plaintiffs-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia. Their complaints, which we accept as true for purposes of this appeal, allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as

part of a genocidal campaign conducted in the course of the Bosnian civil war. Karadzic, formerly a citizen of Yugoslavia and now a citizen of Bosnia-Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, sometimes referred to as "Srpska", which claims to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia-Herzegovina. In his capacity as President, Karadzic possesses ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by the military forces under his command. The complaints allege that Karadzic acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia. [...]

Without notice or a hearing, the District Court by-passed the issues briefed by the parties and dismissed both actions for lack of subject-matter jurisdiction. [...]

Turning to the issue of subject-matter jurisdiction under the Alien Tort Act, the Court concluded that "acts committed by non-state actors do not violate the law of nations" [...].

The District Judge also found that the apparent absence of state action barred plaintiffs' claims under the Torture Victim Act, which expressly requires that an individual defendant act "under actual or apparent authority, or color of law, of any foreign nation", Torture Victim Act at 2(a). [...]

Discussion. Though the District Court dismissed for lack of subject-matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadzic urges us to affirm on any one of these three grounds. We consider each in turn.

I. SUBJECT-MATTER JURISDICTION

Appellants allege three statutory bases for the subject-matter jurisdiction of the District Court - the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. The Alien Tort Act

1. General Application to Appellants' Claims

[...]

Judge Leisure accepted Karadzic's contention that "acts committed by non-state actors do not violate the law of nations," [...]

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. [...]

2. Specific Application of Alien Tort Act to Appellants' Claims

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant." Amerada Hess, 830 F.2d at 425. In making that inquiry, it will be helpful to group the appellants' claims into three categories: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.

(a) Genocide [...]

Appellants' allegations that Karadzic personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadzic acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

(b) War crimes

Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. See In re Yamashita, 327 U.S. 1, 14, 90 L. Ed. 499, 66 S. Ct. 340 (1946). Moreover, international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities. Id. at 15-16.

After the Second World War, the law of war was codified in the four Geneva Conventions, [...] which have been ratified by more than 180 nations, including the United States [...]. Common article 3, which is substantially identical in each of the four Conventions, applies to "armed conflicts not of an international character" and binds "each Party to the conflict ... to apply, as a minimum, the following provisions": [here parts of Article 3 common are quoted] Thus, under the law of war as codified in the Geneva Conventions, all "parties" to a conflict - which includes insurgent military groups - are obliged to adhere to these most fundamental requirements of the law of war.

[Footnote No. 8 reads: Appellants also maintain that the forces under Karadzic's command are bound by [...] Protocol II [...], which has been signed but not ratified by the United States [...]. Protocol II supplements the fundamental requirements of common article 3 for armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." [...]. [Protocol II] art. 1. In addition, plaintiffs argue that the forces under Karadzic's command are bound by the remaining provisions of the Geneva Conventions, which govern international conflicts, see Geneva Convention I art. 2, because the self-proclaimed Bosnian-Serb republic is a nation that is at war with Bosnia-Herzegovina or, alternatively, the Bosnian-Serbs are an insurgent group in a civil war who have attained the status of "belligerents," and to whom the rules governing international wars therefore apply.
At this stage in the proceedings, however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into universally accepted norms of international law, or whether the provisions of the Geneva Conventions applicable to international conflicts apply to the Bosnian-Serb forces on either theory advanced by plaintiffs]

The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nüremberg after World War II [...]. The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

(c) Torture and summary execution

[...] It suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes, and otherwise may be pursued against Karadzic to the extent that he is shown to be a state actor. Since the meaning of the state action requirement for purposes of international law violations will likely arise on remand and has already been considered by the District Court, we turn next to that requirement.

3. The State Action Requirement for International Law Violations

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian-Serb entity" headed by Karadzic does not meet the definition of a state. [...] Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadzic acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

(a) Definition of a state in international law

[...] The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. [...] It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime - sometimes due to human rights abuses - had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Appellants' allegations entitle them to prove that Karadzic's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

(b) Acting in concert with a foreign state

Appellants also sufficiently alleged that Karadzic acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. at 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. [...] A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. [...] The appellants are entitled to prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid. [...]

Conclusion

The judgment of the District Court dismissing appellants' complaints for lack of subject-matter jurisdiction is reversed, and the cases are remanded for further proceedings in accordance with this opinion.

DISCUSSION

1. a. Who can violate IHL: Only a State? Also a non-State party to a non-international armed conflict? Also an individual acting for a State or for a non-State party to a non-international armed conflict? Also an individual acting in an armed conflict but not for a State or for a non-State party to a non-international armed conflict? (*Cf.* Art. 3 of Hague Convention IV, Art. 3 common to the Conventions, Arts. 51/52/131/148 and Arts. 49/50/129/146 respectively of the four Conventions, Arts. 1 (1), 75 (2), 86 and 91 of Protocol I and Arts. 4-6 of Protocol II.)

   b. Does the Court consider that "Srpska" is a State? Does it need to prove that to affirm that "Srpska" has obligations (and rights) under IHL?

2. How does the Court qualify the conflict in Bosnia and Herzegovina? Is Protocol II only applicable if its "requirements [...] have ripened into universally accepted norms of international law" (fn.8) or is it sufficient that the Former Yugoslavia and Bosnia and Herzegovina were parties to Protocol II?

3. Is a violation of Art. 3 common to the Conventions a violation of the law of nations under the Alien Tort Act? Is it a war crime?

4. a. Has each State Party under IHL an obligation to adopt legislation offering a civil cause of action to a victim against the individual who violated that provision? Even if the violation has no connection with that State Party? Does such legislation conform to IHL? (*Cf.* Art. 3 of Hague Convention IV, Arts. 51/52/131/148 respectively of the four Conventions, and Art. 91 of Protocol I.)

   b. Has each State Party under IHL an obligation to adopt legislation giving its penal courts jurisdiction over the individual who violated IHL, if that violation is qualified as a grave breach by IHL? Even if the violation has no connection with that State Party? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions and Art. 85 (1) of Protocol I.)

Case No. 190, France, Javor and Others

THE CASE

[**Source:** Jurisprudence Française, *Revue générale de droit international public,* vol. 4, 1996, pp. 1083-1084; original in French, unofficial translation.]

JAVOR ELVIR, [*ET AL.*]
26 March 1996
Criminal Division of the Court of Cassation
France
No. 95-81.527

REJECTION of the appeal lodged by Javor Elvir [*et al.*], claimants in a civil action, against the judgment of the Indictment Division of the Paris Court of Appeal, on 24 November 1994, which declared that the investigating judge had no jurisdiction over the complaints made on the counts of torture, genocide, war crimes and crimes against humanity.

THE COURT,

[...]

[reasoning of the petition:]

As to the second argument concerning the violation of Articles 55 of the Constitution, 146, para. 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 49, para. 2, of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 129, para. 2, of the Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949, 485, 593 of the Code of Criminal Procedure:

> *"since the decision appealed against declared the French courts to have no jurisdiction;*
>
> *"whereas, according to the terms of the four Geneva Conventions which came into force for France on 28 December 1951, the States Parties undertake to enact any legislation necessary to provide effective sanctions for the repression of grave breaches; whereas these Conventions also impose the obligation on the Contracting Parties to search for the perpetrators of such grave breaches, and to bring such persons, regardless of their nationality, before their own courts or to hand them over to another Contracting Party which wishes to institute legal proceedings; whereas it may be inferred from these texts that the aforementioned obligations apply only to States Parties and are not directly applicable in domestic law; whereas these provisions are too general in character directly to create rules of extraterritorial jurisdiction in penal matters, which rules must necessarily be drafted in a detailed and precise manner; whereas the provisions of the four Geneva Conventions relating to the search for and prosecution of persons having committed grave breaches do not have direct effect, Article 689 of the Code of Criminal Procedure cannot apply;*

"whereas an international convention sufficiently precise so as not to require specific measures prior to its execution is directly applicable; whereas such a convention, which becomes part of the domestic French internal legal order, creates rights benefiting the individual; whereas this is the case of the Geneva Conventions, which impose on each [Contracting] Party the obligation to search for persons alleged to have committed, or to have ordered to be committed, any of the grave breaches defined in the Conventions, and to bring such persons before its own courts, regardless of their nationality; whereas these clear, precise and self-contained provisions must be considered as being directly applicable, without the option given to States to hand such persons over for trial to another Contracting Party detracting from the enforceable nature of the provisions of the Conventions";

[reasons for the dismissal of the petition by the Court]

Whereas it appears from the judgment being challenged and the case file that on July 20, 1993, Elvir Javor [*et al.*], Bosnian nationals residing in France, filed a petition with the investigating judge of Paris, together with an application to join the proceedings as a civil party, against an unnamed person for war crimes, torture, genocide and crimes against humanity; whereas the complainants invoked acts of which they had allegedly been victims in 1992 in Bosnia-Herzegovina; [...] whereas in a ruling dated 6 May 1994, the investigating judge [...] declared that he had jurisdiction to conduct the investigation on the grounds [...] of the [provisions of the] four Geneva Conventions of 12 August 1949 relative to war crimes; [...]

Whereas, to set aside the aforementioned ruling, at the public prosecutor's request, and to declare that the investigating judge does not have jurisdiction, the Indictment Division states in particular that the jurisdiction of the French courts, as provided for under Articles 689-1 and 689-2 of the Code of Criminal Procedure, is founded on an objective and material connecting factor, namely the presence on French territory of the alleged perpetrators; whereas the judges note that in this case there is no evidence pointing to such a presence in France; [...] whereas the judgment adds that the provisions of the four Geneva Conventions relating to the search for and prosecution of perpetrators of grave breaches have no direct effect, Article 689 of the Code of Criminal Procedure cannot apply;

Whereas, this being the case, the Court of Cassation is in a position to ascertain that the decision does not affect the allegations invoked;

Whereas the acts cited by the complainants come within the scope of the law of 2 January 1995, amending French legislation according to the provisions of resolution 827 of the United Nations Security Council, establishing an international tribunal to prosecute persons allegedly responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1 January 1991; whereas it arises from the provisions of Articles 1 and 2 of said law, applicable in the cases pending, that the French courts cannot prosecute and judge, unless they are found to be in France, persons, or their accomplices, responsible for crimes or offences as defined by French legislation which constitute, within the meaning of Articles 2 to 5 of the

Statute of the International Tribunal, grave breaches of the Geneva Conventions of August 12, 1949, violations of the laws or customs of war, genocide or crimes against humanity; whereas the presence in France of victims of such breaches alone cannot justify setting a prosecution in motion, since, in the present case, the persons suspected of such breaches or their accomplices have not been discovered on French territory;

It therefore follows that the arguments cannot be accepted;

[...]

REJECTS the appeals.

[...]

DISCUSSION

1. For what reasons does the Court consider France incompetent to search for and prosecute the alleged victimizers of Elvir Javor?
2. Is Art. 146 (2) of Convention IV self-executing? In a legal system like the French one, where international treaties are directly applicable as the law of the land, does this article enable French courts to exercise universal jurisdiction over alleged perpetrators of grave breaches? Does your answer differ depending on whether the alleged perpetrators are found in France or not? Could the decision be interpreted as implying that certain aspects of Art. 146 (2) are self-executing, while others are not? Which aspects could be claimed as needing internal legislation for their application ?
3. Does Art. 146 (2) imply that a State Party has to search for alleged perpetrators of grave breaches even if they are not on its territory or otherwise under its jurisdiction?

Case No. 191, Switzerland, Military Tribunal of Division 1, Acquittal of G.

THE CASE

[**Source:** Divisional Court Martial I, Hearing of 14 to 18 April 1997; original in French, unofficial translation.]

DIVISIONAL COURT MARTIAL I
Hearing of April 14 to 18, 1997

[...]

JUDGMENT

[...]

PROCEEDINGS HAVE BEEN BROUGHT AGAINST

G.

born on ... in ..., Bosnia-Herzegovina, [...], married, a driver, temporarily resident at the Registration Centre for Asylum Seekers in ..., presently remanded in custody at ... prison

who is charged with

a breach of the laws and customs of war (Article 109 of the CPM [Code pénal militaire - Military Penal Code, *see* **Case No. 47**. p. 912.]),

that is to say:

a) a breach of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (Article 3(1)(a) and (c) and Articles 13, 14, 129 and 130),

b) a breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Article 3(1)(a) and (c) and Articles 16, 27, 31, 32, 146 and 147),

c) a breach of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Articles 4, 5 and 13),

d) a breach of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International [sic] Armed Conflicts (Protocol I) (Articles 10, 11, 75, 76, 77 and 85).

- for having, in July 1992, in the company of three other persons unknown, probably soldiers, struck with his truncheon (beat) at least six prisoners detained at the Omarska camps, including at least one woman and a young adult male, and thus at least having caused injury to two of them;
- for having, between May 30, and August 15, 1992, in the Keraterm prison camp, in the company of at least two other persons in uniform, participated at least in two rounds of beatings of several prisoners, including A., and thus having caused violence to their physical and mental well-being;

- for having, between May 30, and August 15, 1992, in the Keraterm prison camp, in the company of at least two other persons in uniform, committed outrages upon the personal dignity of several prisoners, including A., by forcing one of them to lick the boots of a uniformed person in that group, [...]

The Court rules as follows:

THE FACTS

Overall situation with regard to the conflict in the Former Yugoslavia

The facts of the case fall within the context of the conflict in the Former Yugoslavia. As far as the overall situation with regard to that conflict is concerned, the Court examined various public sources, in particular the Decision in the Tadic case by the Appeals Chamber of the International Criminal Tribunal in The Hague and the report compiled by [...] the Federal Office for Refugees which relates, in particular, to the Omarska and Keraterm camps.

The armed conflict in the former Yugoslavia broke out between the armed forces of the Federal Republic of Yugoslavia and those of Slovenia and Croatia shortly after the declaration of independence by Slovenia and Croatia on June 25, 1991.

Within the framework of that overall conflict various internal armed conflicts broke out, including the conflict between Bosnian, when the Bosnian Serb army attempted to implement the objective of Federal Republic of Yugoslavia to create a new Yugoslav State from areas of Croatia and Bosnia-Herzegovina.

In the spring of 1992 the Bosnian Serb army, backed by Serb militias, launched military attacks throughout the territory of Bosnia-Herzegovina.

Therefore, the Government of Bosnia-Hercegovina, which considered itself to be the target of aggression on the part of the Republic of Serbia in particular, officially declared a state of war in the country on June 20, 1992.

From the beginning of the conflict it was possible to observe a deliberate policy of expelling and destroying the civilian Croat and Muslim population over the entire territory of Bosnia-Herzegovina (ethnic cleansing).

Particular situation in the Prijedor region

In that region Serb troops and militias conducted surprise attacks against towns in the north-west of Bosnia-Herzegovina, in particular Banja Luka, Kozarac and Prijedor.

During those attacks many civilians, principally Muslims, were arrested, rounded up and held prisoner. In addition to the ill-treatment inflicted on those people, a large number of summary executions were carried out.

The Omarska and Keraterm camps

A large proportion of the civilian population, which was considered hostile by the Serb forces, were deported to camps, with men and women often being separated. No distinction was made between civilian and military prisoners.

The Serb troops set up the camps after occupying the town of Prijedor, that is to say as of May 25, 1992, in the buildings of the Omarska mine situated some twenty kilometres from the town, and at Keraterm in an abandoned ceramics factory on the outskirts of the town of Prijedor.

It is apparent both from various reports which have been compiled and many witness testimonies, in particular those made during the hearing of this case, that the conditions under which people were held at the Omarska and Keraterm camps were catastrophic. The basic infrastructure failed to provide the prisoners with sufficient hygiene, food or water supplies, minimum medical care, or even sufficient space in which to sleep.

The organisation of camps such as the one in Omarska was in the hands of the civilian authorities. In addition to the prison conditions, the prisoners were also subject to the arbitrary will of the guards and those authorised to enter the camps. Thus, they were subjected daily to harassment and abuse, blows, brutality and acts of torture which most frequently resulted in death. Summary executions were a frequent occurrence.

In particular, many witnesses have described two small huts in Omarska camp situated away from the main buildings and particularly feared by the prisoners, i.e., the red house which, it is claimed, no prisoner left alive, and the white house where the guards had set up a torture chamber. There the prisoners were beaten, some of them to death. Many testimonies describe how the most frequent reason given for the beatings and executions was the simple desire of the guards to strike out indiscriminately.

The camp guards and the gangs of torturers

The Omarska and Keraterm camps were guarded by permanent uniformed guards armed with automatic weapons and subject to the camps civilian authorities.

In general they were from the region and knew one other. Many testimonies describe them as insulting and brutal to the prisoners, in particular the guards Bosko Baltic, Zivko Grahovac - known as Zika - and Zelko Karlica - known as Zak - who served at Keraterm.

In addition to the permanent guards, many testimonies state that entry to the camps was also open to groups of people from outside who were not part of the camp organisation. They held no formal position and only remained in the camps for a short time. According to the testimonies of former prisoners, access to the camps was open to such people because they were known to the guards and the officials of the camp authorities.

Many testimonies concur with regard to the fact that the guards avoided being seen by the prisoners by making them remain face down on the ground and forcing them to keep their heads down while standing. Moreover, they avoided calling each other by their names and used nicknames instead.

Those groups have often been described as particularly brutal and cruel and sometimes persisted in beating their victims to death. They were generally uniformed soldiers, although not members of the organised armed forces. One of

the most feared teams was that led by Dusko Tadic and one other led by Dusan Knejevic - known as Duca - accompanied by Zoran Zigiv, as has been confirmed in particular by the witness Dr. who was heard during the trial.

B., Ki., Ka., A. and J. in particular, who were also heard in their capacity as witnesses during the hearing, have confirmed the barbaric acts committed against civilian prisoners at the aforementioned camps, in particular the beatings and the torture carried out by the guards.

Personal situation of the accused

G. was born on ... in Prijedor, Bosnia-Herzegovina. [...] His father, who is now retired, was a policeman by profession.

The accused had average school results which led him to receive training as a locksmith. From September 1986 to September 1987 he performed his military service as a driver in Slovenia where he subsequently worked for a time.

On his return to Prijedor he worked as a taxi driver until 1989. In 1990 and 1991 the accused, who lived with his parents, was unemployed apart from a short period in 1991 when he worked as a lorry driver for a bakery.

On a personal level, the accused went out with a young woman, Mi., with whom he had a child., Al., who was born in mid-1992. However, it would appear that he no longer has any contact with his girlfriend or his son.

Dr D. Vlatkovic, the senior physician at the Bellelay psychiatric clinic, produced a psychiatric report on the accused dated March 27, 1997 from which it is evident, in particular, that he has never suffered from any mental illness which might diminish his criminal responsibility. At present he is suffering from depression which, in the opinion of the expert, is the result of his imprisonment. The accused finds his imprisonment an injustice and is consequently finding it difficult to endure, so much so that he claims it may cause him to attempt to commit suicide. Furthermore, the expert suggests that the accused is of average intelligence. He is someone who submits but without losing his critical sense. The accused has little inclination towards the military and, on the contrary, displays a certain fear and anguish with respect to the tragic events threatening Bosnia. In response to that anguish the accused made plans to go abroad for reasons which remain unclear.

In general the accused's violent nature is evident from the file, in particular the statement made during the hearing of the judgment [by] Ka., former chief of police in Prijedor, who stated that at secondary school the accused had used a knife on a schoolmate. It is also clear from the file that the accused was allegedly convicted in Yugoslavia for carrying thieves in his taxi, that he entered Austria illegally and that he was convicted of car theft there.

Alleged acts

All the witnesses refer to the accused as Goran Karlica, brother of Zoran, the Chetnik commander killed on May 31, 1992 during the seizure of Prijedor.

When questioned by the Geneva police the accused gave his name as G. and categorically denied being Goran Karlica, having been in Omarska or Keraterm

camps or having struck anyone. He claims that during the period during which the acts imputed to him were committed he was in Austria and Germany.

It is also evident from the case file that at some point in February 1992 the accused left Bosnia for Wels near Linz in Austria where he found a job at the firm of D. The latter sent him to work on a building site in Germany accompanied by another employee, R.

It is also apparent from the file that in May 1992 the accused and R. witnessed the murder of one of their colleagues, known as S., which was committed by a certain Bo. The next day the accused and R. returned to Austria to report that fact to their employer. Finally, on May 16, 1992 the accused and R. went to the police in Linz to report Bo's crime. The Austrian police then took the two men to Germany to hand them over to the German police authorities.

The exhibits produced (exhibits 147 ff) show that the accused G. was in Germany until May 12 or 13, 1992, then in Austria at Gasthof Bayrischer Hof until May 20, 1992, then at the Wohnheim Voest-Alpine in Linz, and subsequently at the Gasthof Steyermühl in Steyermühl.

Furthermore, it is also clear from the file that the accused submitted a request for a visa in Austria and took certain steps by twice appearing in person before the competent authority on June 12, 1992 and subsequently on July 3, 1992.

During his witness testimony A. stated that the accused, accompanied by Zoran Zigic and a certain Dusan, had struck him during that period at the Keraterm camp. At a later stage the accused is claimed to have beaten the witness and other prisoners again at the same camp. On that occasion Zigic is claimed to have forced the witness to lick his shoe and the accused was allegedly present at that scene.

During his witness testimony Mu. also maintained that the accused was in Prijedor during May and July 1992. He stated that he had seen him wearing a speckled uniform. However, Mu. had never seen the accused beat or kill anyone.

Witness Bs. was held at the Omarska camp from May 27, to August 6, 1992. Around June 30, 1992 the witness saw a black car with four or five occupants arrive at the camp. A fellow prisoner then allegedly pointed out that G. was among them even though in his statement to the examining judge he stated that he had seen G. and Goran Karlica, who were two different people, at the camp.

In Geneva on April 24, 1995 witness Mu. thought that he recognised the accused as a torturer from the Trnopolje camp. On April 26, 1995 witness Ki. thought that he recognised him as a torturer from the Omarska and Keraterm camps. Witness B. considered him to be a guard at the Keraterm camp. As for witness Ki., he stated on April 28, 1995 that he considered him to be a torturer from the Omarska camp who violently struck six people, including his former physics teacher, Md., and his wife and his son of around twenty years of age.

Witness Ki. also thought that he had seen the accused present at, and perhaps even participate in, the killing of Md., his former physics teacher, in the White House at the Omarska camp. That sad event is said to have taken place at the end of June or the beginning of July 1992. However, it is established in the file that it was Duca who killed Md.

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It is evident from the file that the accused had a room at the Wohnheim Voest-Alpine from May 15 to August 1, 1992. Furthermore, the accused was in Germany and Austria until May 20, 1992 and in Austria between 6 June and 3 July to carry out certain formalities in connection with his visa application. Witness D., who did not make a great impression, nevertheless made it appear likely that the accused was in Linz at the end of June and the beginning of July 1992. However, it has been impossible to establish for certain whether the accused always stayed in Linz or Steyermühl as he claims.

The Court is of the opinion that although the accuseds identity as G. is beyond doubt, the witnesses are confusing, albeit in good faith, the accused with someone else by the name of Karlica, a person hated in the region whom they believe they recognise as the accused. That is because all the witnesses have personally suffered physically and psychologically from atrocities committed by the guards at the Omarska or Keraterm camp and the visitors to those camps. They have lost everything and are now refugees in Switzerland. Their testimonies are disturbing and moving, but contain contradictions with regard to places, dates and identities of whom the are accusing.

The contradictory evidence before the Court fails to convince it that the accused was in Prijedor, Kozarac, Omarska and Keraterm between May 27, and the end of July 1992. As the presence of the accused has not been proven it is doubtful whether he committed the acts imputed to him.

[...]

Despite the minimal amount of credibility that can be generally accorded to what the accused has said, it must be acknowledged that he has never deviated in his statements concerning his absence from Prijedor and his stays in Germany and Austria. Any doubt must be to the benefit of the accused and therefore he shall be acquitted on all counts.

Compensation and non-pecuniary injury

G. was remanded in custody on May 8, 1995. Although he protested his imprisonment to Col Bieler, who was then president of the Court, he never asked to be released pending trial. Moreover, he never lodged an appeal with the Appeal Court against the decisions to extend his imprisonment.

As a refugee [...] G. would have been able to find work after being in Switzerland for six months. [...] Having regard to those facts, it appears fair to grant him damages of Fr. 30,000 as compensation for the injury resulting from his time remanded in custody.

On the other hand, the accusation that he was a war criminal, which was not proven beyond reasonable doubt, has caused him serious injury, but within the framework of the conflict in the former Yugoslavia it does not have the same magnitude as it might have had elsewhere. The fact that he was accused and then acquitted should in no way diminish the esteem which he may enjoy in the Serb part of Bosnia. Moreover, G. demonstrates in his correspondence in particular that he does not have high regard for the opinions and esteem of the Bosnian Muslims.

He has indeed suffered from his prolonged imprisonment and has had to be treated, in particular psychologically, by prison doctors.

Having regard to all those facts, it appears just to grant him the sum of Fr. 70,000 as compensation for non-pecuniary injury.

[...]

ON THOSE GROUNDS

Divisional Court Martial I [...]

HEREBY RULES THAT

G.

is acquitted,

[...]

and furthermore, he shall be awarded the sum of Fr. 30,000 as damages and the sum of Fr. 70,000 as non-pecuniary damages to be paid by the Federal Government,

and consequently the president of the Court orders the immediate release of G. [...]

DISCUSSION

1. Why were the Swiss Courts competent to try G.? Was it because IHL prescribes universal jurisdiction over crimes such as those of which G. was accused? Does jurisdiction under Swiss law go beyond the jurisdiction prescribed by IHL? Would the Swiss courts have been competent under Swiss law even if the acts of which G. was accused did not violate IHL? (*See* **Case No. 47**, Switzerland, Military Penal Code. p. 912, *Cf.* Art. 2 common to the Conventions, Arts. 49/50/129/146 respectively of the four Conventions and Art. 85 of Protocol I.)

2. a. Does the Court qualify the conflicts in the Former Yugoslavia? Was such qualification necessary to have jurisdiction over G.? Under IHL? Under Swiss law? (*See* **Case No. 47**, Switzerland, Military Penal Code. p. 912, *cf.* Art. 2 common to the Conventions, Arts. 49/50/129/146 respectively of the four Conventions and Art. 85 of Protocol I.)

   b. When was the conflict between the Yugoslav Peoples' Army and Slovenia and Croatia an international armed conflict according to the Court? Since the latter's declaration of independence? Since the entry into force of the declaration of independence? Since its recognition by some other States? Did the Court use the proper standard to assess the status of the conflict? Do you think the Court would have applied the law of international armed conflicts to a hypothetical armed conflict between a Swiss Canton declaring its independence and the rest of Switzerland?

   c. When the conflict between Croatia and Slovenia on one side and Yugoslavia on the other became classified as an international conflict, did that necessarily imply that the conflict in Bosnia and Herzegovina had to be

considered as an international armed conflict? Would you consider that the acts allegedly perpetrated by G. were falling within the ambit of IHL of international armed conflicts? What is the opinion of the Court in that regard?

3. a. Were the acts of which G. was accused violations of IHL? Even if the conflict was a non-international one? (*Cf.* Arts. 3, 13 and 14 of Convention III, Arts. 3, 27, 31 and 32 of Convention IV, Arts. 75 and 76 of Protocol I and Arts. 4 and 5 of Protocol II.)

   b. If the conflict was an international one, were the acts of which G. was accused considered as grave breaches of IHL? Could the victims be considered as "protected persons"? (*Cf.* Arts. 50/51/130/147 respectively of the four Conventions and Art. 85 of Protocol I.)

   c. Is the Court's qualification of the conflict in the Prijedor region the same as the one made by the ICTY in the Tadic case? (*See* **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction, paras. 72 and 73 and B., Trial Chamber, Merits, paras. 584-608.] p. 1804.)

4. Which particular problems may arise in assessing the credibility of witnesses in an inter-ethnic conflict? And in establishing responsibility of a party for violations of IHL?

5. Does the case show particular problems in establishing a universal jurisdiction over violations of IHL in countries not involved in a given conflict? Is such jurisdiction realistic? Are there alternatives? How could it become more effective?

6. Is the acquittal of G. satisfactory? Should he at least have been denied compensation for his pre-trial detention?

7. Did this case contribute to the credibility of IHL or rather diminish it? Should the prosecutor rather not have charged G.?

Case No. 192, Croatia, Prosecutor v. Rajko Radulovic and Others

THE CASE

[**Source:** Split country court, Record, May 26, 1997, K-15/95; not the final version, unofficial translation.]

RECORD

[Arguments of the defence]

[O]n the continuation of the main hearing in the criminal procedure against the accused Rajko Radulovic and others, due to the criminal act pursuant the Article 121 and 122, Basic Criminal Law of the Republic of Croatia, held on 21.05.1997. [...]

The defence attorney of the accused Miroslav Vincic, [...] Ivan Matesic, in his final presentation pointed out that the court procedure had lasted six months and

all the cases had been presented on the professional level. The goal of the whole procedure was to establish the truth. The statements of witnesses, accused, and all the other material evidence helped to make a case. However has the truth concerning the accused been established? All the accused were questioned initially at the police station and all the levels of the police investigation method had been used, later on[,] in the investigation procedure[,] the accused gave their statements complying to the methods of the main hearing. [...]

All the accused behaved during the whole procedure in the manner which had to be taken in consideration while bringing the final verdict. In his speech [...] Matesic said that all the accused were common people simply forced by the outside circumstances, out of their control, to participate in the war skirmishes, and than [sic] they had to face charges for the serious crimes against humanity and violation of the international law. True, they had taken active part in the war but they had equally been the victims. [...]

All the witnesses had recalled the events, however[,] nobody had mentioned the names of the present accused persons. An enormous amount of witnesses had given all kinds of statements, however not enough to bring charges against the accused. The court expert had ruled out the possibility that the accused actually performed the demolition of the Peruca dam. [...]

According to him the international bodies showed particular interest in that and similar cases so due to the reports in the mass media the citizens considered the accused guilty even before the court actually had proclaimed them guilty. It was necessary to establish the personal guilt of each one of the accused. [...]

[...]

Not one of the witnesses mentioned Miroslav Vincic in connection with the action of expelling the civilians from the area of Dabar, Vucipolje, Zasiok and Donji Jukici. He took an active part in the military action in Gradina. He never participated in setting fire and demolishing the houses on the right bank of the Pruca lake, and never opened fire from Opsenjak to Dabar, Vucipolje and Zasiok. Numerous army units came to and went away from the post so it would really be difficult to make a list with names of those who opened fire on civilian settlements from that particular post.

Vincic never took part in the action of delivering the explosive to the Peruca dam on 27/28.01.1993. As established from the evidence he had been on the dam in December 1991 [...]. The police from Vrlika under all kind of threats forced him to fill the ranks on the Peruca dam, it was a kind of forced labour activity. He was unloading lorries and knew nothing of the content of the parcels [...]. As the member of the territorial defence he was not informed on the actual content of the parcels in the lorry. There could only be a presumption that the lorry was loaded with explosive for demolishing the dam. And anyway upon the arrival of the Kenya [sic] UN battalion all the explosive had been removed from the dam. There is no evidence whatsoever the explosive Vincic allegedly unloaded from the truck had been used for [the] actual demolishing of the dam. There is no evidence to accuse Vincic of anything.

The defence claims there is not enough evidence for bringing charges against the accused. Neither the hard evidence nor the statements of the witnesses has [sic] been relevant enough to accuse Vincic for any kind of criminal activity.

Miroslav Vincic gave himself voluntarily up to the Croat authority, without any fear, he voluntarily surrendered. It is expected from this Court to acquit the suspect. [...]

THE MAIN HEARING TERMINATED

The Council withdraws for counselling and voting.

The clients are informed on the date and time of proclaiming the verdict, 26.05.1997 at 09,00 a.m.

Terminated at 10,15 a.m.

President of the Council

Recording Secretary

The Council brought the following decision on 26.05.1997, at 09.00 a.m. and the President of the Council announces and explains in detail the following:

V E R D I C T

IN THE NAME OF THE REPUBLIC OF CROATIA

ACCUSED:

1. RAJKO RADULOVIC
   [...]
38. MIROSLAV VINCIC
39. PETAR PEOVIC

Found guilty

The accused from the 3rd till 39th [...] acted as the members of the so called border police Snits, members of the Republic Srpska Army from 30.05.1992, and in the armed clashes against the Croatian police units[,] performed violation of the Articles 3, 27, 32, 33, 39, 53 of the Geneva Convention on the Protection of Civilians in the war of 12.08.1949 and Articles 51, 52, 53, 56, 57 Additional Protocol - Protocol I and Articles 4, 13, 14, 15, 16, 17 and Additional Protocol - Protocol II of 1977 along with the Geneva Convention. [T]heir only goal was the ethnic cleansing, looting and demolishing, private property of civilians on the territory conquered by force [...] according to the [...] prepared plan. [...]

The 1st accused Rajko Radulovic and his deputy 2nd accused [...] opened fire from tanks [...] as well as co-ordinated gun and infantry fire on the populated area and on civilians, hitting houses, factories, churches, schools, Peruca dam, not one object was even close to resembling the army object and triggered the mass exodus of the population. [T]hey entered the [UN] [...]protected areas and confiscated and looted everything they could lay their hands on from the deserted homes. [T]hose who remained at home were mistreated and terrorised, and numerous explosive devices were set in the deserted houses and factories

causing indescribable damage, all the private property on the conquered territory has either been demolished or looted, the remaining civilians were placed under house arrest, and numerous were killed.

- T]he accused from 3 to 5 [...] decided to expel by forced [sic] the civilians and [...] loot[ed] and destroy[ed] their material property. [...] They beforehand made a plan of terrorising and mistreating the civilians and planned in advance some terrorist actions. [...]
- [F]rom 16.09.1991 till the end of May 1992 the accused from 1 till 5, [...] were introduced to all the plans in relation to the conquest of the territory[:] [...] expelling [...] civilians along with demolishing [...] their property in the settlements on the right and left bank of the Peruca lake[.] [...]

[...]

[The] 14th accused Stevan Cetnik opened fire and other accused opened fire from machine guns and [the] so called Cetina territorial defence unit was under the command of the 14th accused and the [the] territorial defence Otisic was under the command of the 3rd accused soldiers [...][,] opened fire at random against the civilian population and villages [...][.] [A]t the same time on the left bank of the Peruca lake the accused from 27 till 39 under the command of the 1st accused and under the direct orders of the direction commander [...] opened machine gun fire at random also in the direction of the aforementioned villages and Potravlje and Satric. The civilians from the mentioned places were forced to exodus. The aforementioned armed units entered defenceless villages on the left and right bank of the Peruca lake and continued targeting houses and farms, planting explosives and setting fires. [...]

Small number of those [the remaining civilians] who did not depart at the beginning, [were] unprotected and totally helpless, [and were] undefended against the aggression, looting [...] and unable to defend their material property [...] [O]n the other side those in command were obliged to [...] behave differently and comply to the Geneva Convention rules, but instead organised so called "cleansing of the area", with the only goal to mistreat and expel those who stayed behind in the area[.] [...]. [The] 35th accused and 36th accused personally looted and did nothing to prevent the other groups from the territorial defence, JNA and Martic militia from looting the property from the deserted houses and farms, and in an organised way confiscated the property from the deserted houses and farms and planted mines in the empty houses[.] [...]

[The] 1st accused ordered the civilian Mile Buljan to enter the combat carrier [with] [...] his son Ivica Buljan and drove them along the demolished and burnt villages firing from the machine gun, ordering the house arrests, and after throwing them out from the combat carrier ordered to his soldiers to beat them up. Ivica Buljan after [...] a violent biting [*sic*] died the next day.

[The] 9th accused, 11th accused, 14th accused, 17th accused, 18th accused, 21st accused and 23rd accused[,] apart from firing on several occasions [...] seriously damaged [...] churches and on several occasions planted [...] enormous quantities of explosive devices [...]. [T]he 7th accused personally demolished the interior of the church and the fortress Prozor in Vrlika, the

accused rang the church bells, wore the priests clothes and forbid the church goers [sic] to attend the mass, with about 10 members of the so called SAO Krajina Maric militia mistreated civilians. [...]

[The] 1st accused searched the homes of civilian population looking for money and valuable things, so in the home of Ivan Vucemilovic - Vranic they found the Croatian flag, went to the town found the owner of the flag on the street and mistreated him violently with the wooden part stander [sic] of the flag beat him up head to toe, forced him to swallow the flag along with some beans, consequently he choked [...] to death. [...]

- [The] 3rd accused [...] and 11th accused in the police station premises [...] finished with questioning Bozo Coric - [a] civilian and accus[ed] him for the alleged cooperation with Ustashas [and] threatened him with firing squad and forced him to give information on the movements of the Croat police and army forces. [The 3rd accused] gave order to Krunic to put the accused Coric in the firing squad and faked [an] execution. [T]he accused was taken away to the place called Busic and threatened to be shot dead in five minutes, demanding from him information on the names of his collaborators [...]. He was ordered to stand by one stone and the accused prepared everything for his execution, the armed men prepared their guns and again he was ordered to shout at the top of his voice "I'm a Serb".
- On 20.09.1991 until 28.01.1993 [the] 3rd accused [and the accused] from 5 till 26 carried the orders of their commanders with the goal to terrorise and threaten[ed] [to] demolish [...] the Peruca dam and drowning of 30.000 people and their material belonging downstream. [...]

Under the command of [the] 6th accused, 7th accused, 16th accused, 17th accused and with their cooperation and supervision [during the] [...] cease fire[,] brought extensive quantity of explosives [...]. [T]he 5th accused, 11th accused, 18 accused, 22nd accused, 26th accused and some other members of the so called Republik Srpska Krajina militia unit, us[ed] [...] fire arms on the left and right bank of the Peruca dam on the UNPROFOR check points [and] attacked and disarmed the members of the UNPROFOR battalion from Kenya [and] expelled them [...], [The] Kenyan battalion was stationed along the Peruca dam as a security measure. The aforementioned accused persons captured the UNPROFOR soldiers and posted themselves instead in [*sic*] [of] the former Kenya [*sic*] battalion positions and in this way [brought] in the explosives to [...] demolish [...] the dam [...]. All those who participated in planting the explosive retreated [...] and an unidentified person switched on the device on 28.01.1993 at 10:00 a.m. and activated the detonating cord. [T]he dam collapsed and the so called "gallery", tower of the bridge and the unit for water level regulation had been heavily damaged, the water entered the administration building, covered water turbines, and the dam completely collapsed[.] [T]he high tide water wave had been created and the innocent civilians and their material belonging downstream [...] had been placed in danger. However the employees of the "Croatian Electric Power Industry", sealed off the openings and opened the dam and in that way [...] slowed down the outpour of the water from the storage lake.

By violating the International Law during the armed conflict and occupation the aforementioned persons ordered and carried out [...] attacks on the civilian population[s] and settlements, without selecting the targets, and the result of it was [the] death of numerous persons, inhuman treatment of civilians, expelling of people, terrorising, intimidating, looting, destructing [sic] property, unjustified from the military point of view, and above all the attacks were performed on the buildings and dam and water power plant objects with enormous and dangerous power. [...]

DISCUSSION

1. How can the Court apply the law of international armed conflict to the soldiers belonging to the army of the so-called "Republic of Serb Krajina"? Does it thereby recognize that "Republic" as a State? Does the Court consider those soldiers as fighting for the Federal Republic of Yugoslavia? Taking into account the events described in **Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p. 1732, Sections 2, 6, and 31, when could the conflict be qualified as international?

2. Is "ethnic cleansing" prohibited by IHL? In international armed conflicts? In non-international armed conflicts? Does the qualification of the conflict matter for determining whether any of the acts mentioned in the verdict are prohibited? Is the forced movement of civilians, independently of the means used, prohibited in international armed conflicts? Inside and outside occupied territories? In non-international armed conflicts? (*Cf.* Arts. 2, 27, 31-33, 35-39, 49 and 53 of Convention IV, Arts. 51-53, 56 and 57 of Protocol I and Arts. 1-17 of Protocol II.)

3. Was the destruction of the Peruca dam a violation of IHL? Even though IHL of non-international armed conflict had been applicable? Was the destruction an "attack" and so prohibited by Art. 56 of Protocol I? Could such an attack under the circumstances described in the verdict have possibly been justified under Art. 56 of Protocol I? Is the destruction of the dam a grave breach of IHL? (*Cf.* Art. 23 (g) of the Hague Convention IV, Arts. 53 and 147 of Convention IV, Arts. 49, 52 and 85 (3) (a) of Protocol I and Art. 15 of Protocol II.)

4. Was the attack against the Kenyan UNPROFOR soldiers a violation of IHL?

5. If one assumes the accuracy of the argument of the defence, how could Miroslav Vincic be sentenced? Does the verdict mention any individual responsibility? Is it a sufficient factor that he belonged to a unit which violated IHL to sentence him? Is it also sufficient that he unloaded explosives at the Peruca dam to make him responsible for its destruction? At least if he knew that these explosives were to be used to destroy the dam?

6. NATO Intervention in the Federal Republic of Yugoslavia

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention

THE CASE

[*See also*, **Case No. 194**, ECHR, Bankovic and Others v. Belgium and 16 other States. p. 2093.]

A. Amnesty International, NATO Intervention in Yugoslavia, "Collateral Damage" or Unlawful Killings?

[**Source:** Amnesty International, Eur 70/018/2000 6 June 2000, *NATO/Federal Republic of Yugoslavia, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, London June; footnotes partially reproduced, paragraph numbers added by us; available on http://www.amnesty.org]

AI INDEX: EUR 70/018/2000
London 6 June 2000
Public Document

NATO/FEDERAL REPUBLIC OF YUGOSLAVIA
"COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS?
Violations of the Laws of War by NATO
during Operation Allied Force [...]

5.1 Attack on Grdelica railroad bridge, hitting passenger train: 12 April

[1] On 12 April, a civilian passenger train crossing a bridge in Grdelica, southern Serbia, was hit by two bombs. The attack took place in the middle of the day. At least 12 civilians reportedly died. NATO admitted that its aircraft had bombed the bridge and hit the train, but said that the target had been the bridge itself and that the train had been hit accidentally. At a press conference on 13 April, General Clark, Supreme Allied Commander, Europe (SACEUR), explained that the pilot's mission had been to destroy the railroad bridge. He launched the weapon from a distance of several miles unaware that the train was heading towards the bridge:

> "All of a sudden at the very last instant with less than a second to go he caught a flash of movement that came into the screen and it was the train coming in. Unfortunately he couldn't dump the bomb at that point, it was locked, it was going into the target and it was an unfortunate incident which he, and the crew, and all of us very much regret."

[2] General Clark then gave the following account of how the pilot returned to drop another bomb on the bridge, striking the train again, even though he had realized that he had hit the train instead of the bridge in the first attack.

"The mission was to take out the bridge.... He believed he still had to accomplish his mission. He put his aim point on the other end of the bridge from where the train had come, by the time the bomb got close the bridge was covered with smoke and clouds and at the last minute again in an uncanny accident, the train had slid forward from the original impact and parts of the train had moved across the bridge, and so that by striking the other end of the bridge he actually caused additional damage to the train."

[3] The video of the cockpit view of both attacks was shown at the press conference on 13 April. Several months later it was reported in Germany's Frankfurter Rundschau newspaper that this video was shown at three times speed, giving the impression to viewers that the civilian train was moving extremely fast. [...] Jamie Shea, NATO spokesperson, told Amnesty International in Brussels that, due to the volume of videotape that analysts had to review each day during the campaign, the tapes were speeded up to facilitate viewing. [...]

[4] NATO's explanation of the bombing - particularly General Clark's account of the pilot's rationale for continuing the attack after he had hit the train - suggests that the pilot had understood the mission was to destroy the bridge regardless of the cost in terms of civilian casualties. This would violate the rules of distinction and proportionality.

[5] Also, NATO does not appear to have taken sufficient precautionary measures to ensure that there was no civilian traffic in the vicinity of the bridge before launching the first attack. The attacking aircraft - or another aircraft - could have overflown the area to ascertain that no trains were approaching the bridge. Had it done so, it might have been able to wait until the train had crossed before launching the attack.

[6] Yet, even if the pilot was, for some reason, unable to ascertain that no train was travelling towards the bridge at the time of the first attack, he was fully aware that the train was on the bridge when he dropped the second bomb, whether smoke obscured its exact whereabouts or not. This decision to proceed with the second attack appears to have violated Article 57 of Protocol I which requires an attack to "be cancelled or suspended if it becomes clear that the objective is a not a military one ... or that the attack may be expected to cause incidental loss of civilian life...which would be excessive in relation to the concrete and direct military advantage anticipated." Unless NATO is justified in believing that destroying the bridge at that particular moment was of such military importance as to justify the number of civilian casualties likely to be caused by continuing the attack - an argument that NATO has not made - the attack should have been stopped.

[7] Further questions about this attack were raised in the *New York Times* on 14 April, which reported that while NATO officials had refused to name the type of weapon or aircraft involved, officials in Washington had said that the plane had been an American F-15E, firing an AGM-130 bomb. General Clark had only referred to the aircraft pilot as being involved, but the F-15E carries a crew of two: the pilot and a weapons officer who controls the bombs. According to

this report, the AGM-130 is at first guided by satellite, but as it nears its target, the pilot or weapons officer can guide it, using a video image. [...]

5.3 Serbian state television and radio: 23 April

[8] In the early morning of 23 April, NATO aircraft bombed the headquarters and studios of Serbian state television and radio (*Radio Televisija Srbije* - RTS) in central Belgrade. There was no doubt that NATO had hit its intended target. The building was occupied by working technicians and other production staff at the time of the bombing. There were estimated to be at least 120 civilians working in the building at the time of the attack. At least 16 civilians were killed and a further 16 were wounded. A news broadcast was blacked out as a result. RTS broadcasting resumed about three hours after the bombing.

[9] At the press conference later that day, NATO's Colonel Konrad Freytag placed this attack in the context of NATO's policy to "disrupt the national command network and to degrade the Federal Republic of Yugoslavia's propaganda apparatus." He explained: "Our forces struck at the regime leadership's ability to transmit their version of the news and to transmit their instruction to the troops in the field." In addition to housing Belgrade's main television and radio studios, NATO said the building "also housed a large multi-purpose communications satellite antenna dish."

[10] On the day of the attack Amnesty International publicly expressed grave concern, saying that it could not see how the attack could be justified based on the information available which stressed the propaganda role of the station. The organization wrote to NATO Secretary General Javier Solana requesting "an urgent explanation of the reasons for carrying out such an attack." In a reply dated 17 May, NATO said that it made "every possible effort to avoid civilian casualties and collateral damage by exclusively and carefully targeting the military infrastructure of President Milosevic." It added that RTS facilities "are being used as radio relay stations and transmitters to support the activities of the FRY military and special police forces, and therefore they represented legitimate military targets."

[11] At the Brussels meeting with Amnesty International, NATO officials clarified that this reference to relay stations and transmitters was to other attacks on RTS infrastructure and not this particular attack on the RTS headquarters. They insisted that the attack was carried out because RTS was a propaganda organ and that propaganda is direct support for military action. The fact that NATO explains its decision to attack RTS solely on the basis that it was a source of propaganda is repeated in the US Defence Department's review of the air campaign, which justifies the bombing by characterizing the RTS studios as "a facility used for propaganda purposes." No mention is made of any relay station.

[12] In an interview for a BBC television documentary, UK Prime Minister Tony Blair reflected on the bombing of RTS and appeared to be hinting that one of the reasons the station was targeted was because its video footage of the human toll of NATO mistakes, such as the bombing of the civilian convoy at Djakovica, was being re-broadcast by Western media outlets and was

thereby undermining support for the war within the alliance. "This is one of the problems about waging a conflict in a modern communications and news world... We were aware that those pictures would come back and there would be an instinctive sympathy for the victims of the campaign."

[13] The definition of military objective in Article 52(2) of Protocol I, accepted by NATO, specifies that

> "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite military advantage.*" [emphasis added by Amnesty International]

[14] Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of "effective contribution to military action" and "definite military advantage" beyond the acceptable bounds of interpretation. Under the requirements of Article 52(2) of Protocol I, the RTS headquarters cannot be considered a military objective. As such, the attack on the RTS headquarters violated the prohibition to attack civilian objects contained in Article 52 (I) and therefore constitutes a war crime.

[15] The authoritative ICRC Commentary on the *Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* interprets the expression "definite military advantage anticipated" by stating that "it is not legitimate to launch an attack which only offers potential or indeterminate advantages." More recently the commentary on the German Military Manual states, "If weakening the enemy population's resolve to fight were considered a legitimate objective of armed forces, there would be no limit to war." And, further on, it says that "attacks having purely political objectives, such as demonstrating military power or intimidating the political leaders of the adversary" are prohibited. British Defence doctrine adopts a similar approach: "the morale of an enemy's civilian population is not a legitimate target."

[16] It is also worth recalling in this context the judgment of the International Military Tribunal in Nuremberg in 1946 in the case of Hans Fritzsche, who served as a senior official in the Propaganda Ministry of the Third Reich, including as head of its Radio Division from November 1942. The prosecution asserted that he had "incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities." The Tribunal acknowledged that Fritzsche had shown in his speeches "definite anti-Semitism" and that he had "sometimes spread false news", but nevertheless found him not guilty. The Tribunal concluded its judgment in this case as follows:

> "It appears that Fritsche [*sic*] sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German People to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. *His aim was rather to*

arouse popular sentiment in support of Hitler and the German war effort." [See American Journal of International Law, vol. 41 (1947), p.328.] [emphasis added by Amnesty International]

[17] On the issue of the legitimacy of attacking a television station in general, reference has been made to a list of categories of military objectives included in a working document produced by the ICRC in 1956, the Draft Rules for the Limitations of Dangers incurred by the Civilian Population in Time of War. [Note 53: this list is mentioned in the ICRC Commentary on the Additional Protocols, paragraph 2002, note 3; available on http://icrc.org/ihl.] In paragraph (7) the list included "The installations of broadcasting and television stations." However, the French text of the Draft Rules made clear that such installations must be of "fundamental military importance." Also, Article 7 of the Draft Rules stated that even the listed objects cannot be considered military objectives if attacking them "offers no military advantage."

[18] Whatever the merit of the Draft Rules, it is doubtful that they would have supported the legitimacy of the attack on the RTS headquarters. In any case the Draft Rules were discussed at the 1957 International Conference of the Red Cross, for which they had been prepared, but in the following years the approach of drawing up lists of military objectives was abandoned in favour of the approach eventually adopted by Protocol I in Article 52.

[19] The attack on the RTS headquarters may well have violated international humanitarian law even if the building could have been properly considered a military objective. Specifically, that attack would have violated the rule of proportionality under Article 51(5)(b) of Protocol I and may have also violated the obligations to provide effective warning under Article 57(2)(c) of the same Protocol.

[20] Article 51(5)(b) prohibits attacks "which may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated." The ICRC Commentary specified that "the expression 'concrete and direct' was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded." NATO must have clearly anticipated that civilians in the RTS building would have been killed. In addition, it appears that NATO realized that attacking the RTS building would only interrupt broadcasting for a brief period. SACEUR General Wesley Clark has stated: "We knew when we struck that there would be alternate means of getting the Serb Television. There's no single switch to turn off everything but we thought it was a good move to strike it and the political leadership agreed with us." In other words, NATO deliberately attacked a civilian object, killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.

[21] Article 57(2) (c) of Protocol I requires that "Effective warning shall be given of attacks which may affect the civilian population, unless circumstances do

not permit." Official statements, issued prior to the RTS bombing, on whether NATO was targeting the media were contradictory. On 8 April, Air Commodore Wilby stated that NATO considered RTS as a "legitimate target in this campaign" because of its use as "an instrument of propaganda and repression." He added that radio and television would only become "an acceptable instrument of public information" if President Milosevic provided equal time for uncensored Western news broadcasts for two periods of three hours a day. And on the same day, General Jean Pierre Kelche, French armed forces chief, said at a press conference, "We are going to bust their transmitters and their relay stations because these are instruments of propaganda of the Milosevic regime which are contributing to the war effort."

[22] But [...] Jamie Shea [...] wrote to the Brussels-based International Federation of Journalists on 12 April that "Allied Force targets military targets only and television and radio towers are only struck if they are integrated into military facilities...There is no policy to strike television and radio transmitters as such."

[23] It appears that the statements by Wilby and Shea came after some members of the media had been alerted to the fact that an attack on the television station had already been planned. According to Eason Jordan, the President of CNN International, in early April he received a telephone call from a NATO official who told him that an attack on RTS in Belgrade was under way and that he should tell CNN's people to get out of there. [...]

[24] John Simpson, who was based in Belgrade for the BBC during the war, was among the foreign correspondents who received warnings from his headquarters to avoid RTS after the aborted attack. [...]

[25] UK Prime Minister Tony Blair blames Yugoslav officials for not evacuating the building. "They could have moved those people out of the building. They knew it was a target and they didn't. And I don't know, it was probably for, you know, very clear propaganda reasons ... There's no point-I mean there's no way of waging war in a pretty way. It's ugly. It's an ugly business."

[26] Amnesty International does not consider the statement against official Serbian media made by Air Commodore Wilby two weeks before the attack to be an effective warning to civilians, especially in light of other, contradictory statements by NATO officials and alliance members. As noted above, Western journalists have reported that they were warned by their employers to stay away from the television station before the attack, and it would also appear that some Yugoslav officials may have expected that the building was about to be attacked. However, there was no warning from NATO that a specific attack on RTS headquarters was imminent. NATO officials in Brussels told Amnesty International that they did not give a specific warning as it would have endangered the pilots.

[27] Some accounts in the press have suggested that the decision to bomb RTS was made by the US government over the objections of other NATO members. According to the writer Michael Ignatieff, "within NATO command allies were at loggerheads: with British lawyers arguing that the Geneva Conventions prohibit the targeting of journalists and television stations, and

the US side arguing that the supposed 'hate speech' broadcast by the station foreclosed its legal immunity under the conventions." [...]

[28] [...] However, if in fact the UK or other countries did object and abstain from participating in this attack, they may not be absolved of their responsibility under international law as members of an alliance that deliberately launched a direct attack on a civilian object. [...]

B. ICTY, Prosecutor's Report on the NATO Bombing Campaign

[**Source:** ICTY Prosecutor's office, *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, The Hague, 13 June 2000; available on http://www.un.org/icty/pressreal/nato061300.htm]

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia [...]

IV. Assessment

VI. General Assessment of the Bombing Campaign

54. During the bombing campaign, NATO aircraft flew 38,400 sorties, including 10,484 strike sorties. During these sorties, 23,614 air munitions were released (figures from NATO). As indicated in the preceding paragraph, it appears that approximately 500 civilians were killed during the campaign. These figures do not indicate that NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally.

55. [...] All targets must meet the criteria for military objectives [...]. If they do not do so, they are unlawful. [...] The media as such is not a traditional target category. To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective. As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.

56. The committee agrees there is nothing inherently unlawful about flying above the height which can be reached by enemy air defences. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of

modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.

Specific Incidents [...]

i) The Attack on a Civilian Passenger Train at the Grdelica Gorge on 12/4/99

58. On 12 April 1999, a NATO aircraft launched two laser guided bombs at the Leskovac railway bridge over the Grdelica gorge and Juzna Morava river, in [south-] eastern Serbia. A 5-carriage passenger train, travelling from Belgrade to Ristovac on the Macedonian border, was crossing the bridge at the time, and was struck by both missiles. [...] At least ten people were killed in this incident and at least 15 individuals were injured. The designated target was the railway bridge, which was claimed to be part of a re-supply route being used for Serb forces in Kosovo. After launching the first bomb, the person controlling the weapon, at the last instant before impact, sighted movement on the bridge. The controller was unable to dump the bomb at that stage and it hit the train, the impact of the bomb cutting the second of the passenger coaches in half. Realising the bridge was still intact, the controller picked a second aim point on the bridge at the opposite end from where the train had come and launched the second bomb. In the meantime the train had slid forward as a result of the original impact and parts of the train were also hit by the second bomb.

59. It does not appear that the train was targeted deliberately. [...] The substantive part of the explanation, both for the failure to detect the approach of the passenger train and for firing a second missile once it had been hit by the first, was given by General Wesley Clark, NATO's Supreme Allied Commander for Europe and is here reprinted in full:

[Read this citation in the Amnesty International report, *see* document A (1) and (2), p. 2077.] [...]

General Clark then showed the cockpit video of the plane which fired on the bridge:

> "The pilot in the aircraft is looking at about a 5-inch screen, he is seeing about this much and in here you can see this is the railroad bridge which is a much better view than he actually had, you can see the tracks running this way.
>
> Look very intently at the aim point, concentrate right there and you can see how, if you were focused right on your job as a pilot, suddenly that train appeared. It was really unfortunate.
>
> Here, he came back around to try to strike a different point on the bridge because he was trying to do a job to take the bridge down. Look at this aim point - you can see smoke and other obscuration there - he couldn't tell what this was exactly.
>
> Focus intently right at the centre of the cross. He is bringing these two crosses together and suddenly he recognises at the very last instant that the train that was struck here has moved on across the bridge and

so the engine apparently was struck by the second bomb." (Press Conference, NATO HQ, Brussels, 13 April).

60. Some doubt has since been cast on this version of events by a comprehensive technical report submitted by a German national, Mr Ekkehard Wenz, which queries the actual speed at which the events took place in relation to that suggested by the video footage of the incident released by NATO. The effect of this report is to suggest that the reaction time available to the person controlling the bombs was in fact considerably greater than that alleged by NATO. Mr. Wenz also suggests the aircraft involved was an F15E Strike Eagle with a crew of two and with the weapons being controlled by a Weapons Systems Officer (WSO) not the pilot.

61. The committee has reviewed both the material provided by NATO and the report of Mr. Wenz with considerable care. It is the opinion of the committee that it is irrelevant whether the person controlling the bomb was the pilot or the WSO. Either person would have been travelling in a high speed aircraft and likely performing several tasks simultaneously, including endeavouring to keep the aircraft in the air and safe from surrounding threats in a combat environment. If the committee accepts Mr. Wenz's estimate of the reaction time available, the person controlling the bombs still had a very short period of time, less than 7 or 8 seconds in all probability, to react. Although Mr Wenz is of the view that the WSO intentionally targeted the train, the committee's review of the frames used in the report indicates another interpretation is equally available. The cross hairs remain fixed on the bridge throughout, and it is clear from this footage that the train can be seen moving toward the bridge only as the bomb is in flight: it is only in the course of the bomb's trajectory that the image of the train becomes visible. At a point where the bomb is within a few seconds of impact, a very slight change to the bomb aiming point can be observed, in that it drops a couple of feet. This sequence regarding the bomb sights indicates that it is unlikely that the WSO was targeting the train, but instead suggests that the target was a point on the span of the bridge before the train appeared.

62. It is the opinion of the committee that the bridge was a legitimate military objective. The passenger train was not deliberately targeted. The person controlling the bombs, pilot or WSO, targeted the bridge and, over a very short period of time, failed to recognize the arrival of the train while the first bomb was in flight. The train was on the bridge when the bridge was targeted a second time and the bridge length has been estimated at 50 meters. [...] It is the opinion of the committee that the information in relation to the attack with the first bomb does not provide a sufficient basis to initiate an investigation. The committee has divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness in the conduct of the pilot or WSO. Despite this, the committee is in agreement that, based on the criteria for initiating an investigation [...], this incident should not be investigated. In relation to whether there is information warranting consideration of command responsibility, the committee is of the view that there is no information from which to conclude

that an investigation is necessary into the criminal responsibility of persons higher in the chain of command. Based on the information available to it, it is the opinion of the committee that the attack on the train at Grdelica Gorge should not be investigated by the OTP. [...]

iii) The Bombing of the RTS (Serbian TV and Radio Station) in Belgrade on 23/4/99

71. On 23 April 1999, at 0220, NATO intentionally bombed the central studio of the RTS [...] the centre of Belgrade. [...] While there is some doubt over exact casualty figures, between 10 and 17 people are estimated to have been killed.

72. The bombing of the TV studio was part of a planned attack aimed at disrupting and degrading the C3 (Command, Control and Communications) network. In co-ordinated attacks, on the same night, radio relay buildings and towers were hit along with electrical power transformer stations. At a press conference on 27 April 1999, NATO officials justified this attack in terms of the dual military and civilian use to which the FRY communication system was routinely put [...].

73. At a [...] press conference on 23 April 1999, NATO officials reported that the TV building also housed a large multi-purpose communications satellite antenna dish, and that "radio relay control buildings and towers were targeted in the ongoing campaign to degrade the FRY's command, control and communications network". In a communication of 17 April 1999 to Amnesty International, NATO claimed that the RTS facilities were being used "as radio relay stations and transmitters to support the activities of the FRY military and special police forces, and therefore they represent legitimate military targets" (Amnesty International Report, [...] [*See* document A (10), p. 2079.].)

74. Of the electrical power transformer stations targeted, one transformer station supplied power to the air defence co-ordination network while the other supplied power to the northern-sector operations centre. Both these facilities were key control elements in the FRY integrated air-defence system. In this regard, NATO indicated that

> "we are not targeting the Serb people as we repeatedly have stated nor do we target President Milosevic personally, we are attacking the control system that is used to manipulate the military and security forces."

More controversially, however, the bombing was also justified on the basis of the propaganda purpose to which it was employed:

> "[We need to] directly strike at the very central nerve system of Milosevic's regime. This of course are those assets which are used to plan and direct and to create the political environment of tolerance in Yugoslavia in which these brutalities can not only be accepted but even condoned. [...] Strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosevic's control mechanism."

In a similar statement, British Prime Minister Tony Blair was reported as saying in The Times that the media "is the apparatus that keeps him [Milosevic] in power and we are entirely justified as NATO allies in damaging and taking on those targets" (24 April, 1999). In a statement of 8 April 1999, NATO also indicated that the TV studios would be targeted unless they broadcast 6 hours per day of Western media reports: "If President Milosevic would provide equal time for Western news broadcasts in its programmes without censorship 3 hours a day between noon and 1800 and 3 hours a day between 1800 and midnight, then his TV could be an acceptable instrument of public information."

75. NATO intentionally bombed the Radio and TV station and the persons killed or injured were civilians. The questions are: was the station a legitimate military objective and; if it was, were the civilian casualties disproportionate to the military advantage gained by the attack? For the station to be a military objective within the definition in Article 52 of Protocol I: a) its nature, purpose or use must make an effective contribution to military action and b) its total or partial destruction must offer a definite military advantage in the circumstances ruling at the time. The 1956 ICRC list of military objectives, drafted before the Additional Protocols, included the installations of broadcasting and television stations of fundamental military importance as military objectives [...]. The list prepared by Major General Rogers included broadcasting and television stations if they meet the military objective criteria [...]. As indicated in paras. 72 and 73 above, the attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milosevic in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.

76. If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the "effective contribution to military action" and "definite military advantage" criteria required by the Additional Protocols [...]. The ICRC Commentary on the Additional Protocols interprets the expression "definite military advantage anticipated" to exclude "an attack which only offers potential or indeterminate advantages" and interprets the expression "concrete and direct" as intended to show that the advantage concerned should be substantial and relatively close rather than hardly perceptible and likely to appear only in the long term (ICRC Commentary on the Additional Protocols of 8 June 1977, para. 2209 [Available on http://icrc.org.].). While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the "concrete and

direct" military advantage necessary to make them a legitimate military objective. NATO believed that Yugoslav broadcast facilities were "used entirely to incite hatred and propaganda" and alleged that the Yugoslav government had put all private TV and radio stations in Serbia under military control (NATO press conferences of 28 and 30 April1999). However, it was not claimed that they were being used to incite violence akin to *Radio Milles Collines* during the Rwandan genocide, which might have justified their destruction [...]. At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort: a circumstance which does not, in and of itself, amount to a war crime (see in this regard the judgment of the International Military Tribunal in Nuremberg in 1946 in the case of Hans Fritzsche, who served as a senior official in the Propaganda ministry alleged to have incited and encouraged the commission of crimes. The IMT held that although [Read this citation in the Amnesty International Report, see document A (16), p. 2080.]. The committee finds that if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law. It appears, however, that NATO's targeting of the RTS building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milosevic in power. In a press conference of 9 April 1999, NATO declared that TV transmitters were not targeted directly but that "in Yugoslavia military radio relay stations are often combined with TV transmitters [so] we attack the military target. If there is damage to the TV transmitters, it is a secondary effect but it is not [our] primary intention to do that." A NATO spokesperson, Jamie Shea, also wrote to the Brussels-based International Federation of Journalists on 12 April [Read this citation in the Amnesty International Report, see document A (22), p. 2082.].

77. Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate.

Although NATO alleged that it made "every possible effort to avoid civilian casualties and collateral damage" (Amnesty International Report, [See document A (10), p. 2079.]), some doubts have been expressed as to the specificity of the warning given to civilians by NATO of its intended strike, and whether the notice would have constituted "effective warning of attacks which may affect the civililan population, unless circumstances do not permit" as required by Article 57(2) of Additional Protocol I. [...]

On the other hand, foreign media representatives were apparently forewarned of the attack (Amnesty International Report, [See document A (23) and (24) p. 2082.]). As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck. Consequently, UK Prime Minister Tony Blair blamed Yugoslav officials for not evacuating the building, claiming that [Read this citation in Amnesty International's Report, see document A (25), p. 2082.]. Although knowledge on the part of Yugoslav officials of the impending attack would not divest

NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.

78. Assuming the RTS building to be a legitimate military target, it appeared that NATO realised that attacking the RTS building would only interrupt broadcasting for a brief period. Indeed, broadcasting allegedly recommenced within hours of the strike, thus raising the issue of the importance of the military advantage gained by the attack vis-à-vis the civilian casualties incurred. The FRY command and control network was alleged by NATO to comprise a complex web and that could thus not be disabled in one strike. As noted by General Wesley Clark, NATO [Read this citation in Amnesty International's Report, see document A (20), p. 2081.] [...]The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident. [...] With regard to these goals, the strategic target of these attacks was the Yugoslav command and control network. The attack on the RTS building must therefore be seen as forming part of an integrated attack against numerous objects, including transmission towers and control buildings of the Yugoslav radio relay network which were "essential to Milosevic's ability to direct and control the repressive activities of his army and special police forces in Kosovo" (NATO press release, 1 May 1999) and which comprised "a key element in the Yugoslav air-defence network" (*ibid*, 1 May1999). Attacks were also aimed at electricity grids that fed the command and control structures of the Yugoslav Army (*ibid*, 3 May 1999). Other strategic targets included additional command and control assets such as the radio and TV relay sites at Novi Pazar, Kosovaka and Krusevac (*ibid*) and command posts (*ibid*, 30 April). Of the electrical power transformer stations targeted, one transformer station supplied power to the air-defence coordination network while the other supplied power to the northern sector operations centre. Both these facilities were key control elements in the FRY integrated air-defence system (*ibid*, 23 April 1999). [...] Not only were these targets central to the Federal Republic of Yugoslavia's governing apparatus, but formed, from a military point of view, an integral part of the strategic communications network which enabled both the military and national command authorities to direct the repression and atrocities taking place in Kosovo (*ibid*, 21 April 1999).

79. On the basis of the above analysis and on the information currently available to it, the committee recommends that the OTP not commence an investigation related to the bombing of the Serbian TV and Radio Station. [...]

V. Recommendations

90. The committee has conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences and public documents produced by the FRY. It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given. The

committee must note, however, that when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents. The committee has not spoken to those involved in directing or carrying out the bombing campaign. The committee has also assigned substantial weight to the factual assertions made by Human Rights Watch as its investigators did spend a limited amount of time on the ground in the FRY. Further, the committee has noted that Human Rights Watch found the two volume compilation of the FRY Ministry of Foreign Affairs entitled *NATO Crimes in Yugoslavia* generally reliable and the committee has tended to rely on the casualty figures for specific incidents in this compilation. If one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity. Further, in the particular incidents reviewed by the committee with particular care [...] the committee has not assessed any particular incidents as justifying the commencement of an investigation by the OTP. NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences. [...]

DISCUSSION

1. a. How would you qualify the conflict between the Kosovo Liberation Army (UCK) and the forces of the Federal Republic of Yugoslavia (FRY)? Was it an international or a non-international armed conflict? A case of internal violence? A war of national liberation? And the conflict between the North Atlantic Treaty Organisation (NATO) and FRY? (*Cf.* Art. 2 common to the Conventions; Art. 1 of Protocol I and Art. 1 of Protocol II.)

   b. If the conflict between the UCK and FRY was a non-international armed conflict, did NATO's intervention against FRY internationalise it? If yes, why? Does this change the nature of the relations between FRY and the UCK?

   c. Would the conflict have become international if NATO had intervened against the UCK? Why? Does this mean that the applicable law varies according to whether a third State intervenes alongside a State or against a State?

   d. Since NATO is not a party to the Geneva Conventions and their Additional Protocols, is it nevertheless bound by International Humanitarian Law (IHL)? If yes, why? Since all NATO members are not bound by the same IHL

instruments, how is it possible to determine which ones are applicable to NATO? Is NATO only bound by IHL rules applicable to all its members? Or is NATO, as an international organisation, only bound by customary IHL?

2. Does the legal or illegal nature of NATO's intervention in regard to *ius ad bellum* have an influence on the IHL that is applicable? Are all acts committed during an illegal operation automatically illegal under IHL? Or are these two separate sets of rules? (*Cf.* Paragraph 5 of the preamble of Protocol I.)

3. a. In regard to IHL, what do you make of NATO's use of high altitude aerial attacks during its intervention in FRY? Is it in itself prohibited? Does it allow for the respect of the fundamental principles of IHL such as proportionality and the distinction between civilian objects and military objectives? Is it sufficient, as stated in the ICTY's Prosecutor's Report, that "the obligation to distinguish was effectively carried out *in the vast majority of cases*" (Our emphasis, *Cf.* document B (56).)? (*Cf.* Arts. 51 (4) (b)-(c) and 57 (2) (a) (ii) of Protocol I.)

   b. Can a bridge be a military objective? Under what conditions? How would you define the notion of military objective? Does the Prosecutor's Report seem to accept the fact that it was a military objective? What criteria is he or she using to reach a decision? Are NATO's declarations alone sufficient to establish the legitimacy of a military target under IHL? (*Cf.* Art. 52 (2) Protocol I.)

   c. If a civilian train is hit during an attack while it "was not deliberately targeted" (*Cf.* document B (62).) does this constitute a violation of IHL? A war crime? "Collateral damage"? How would you define collateral damage? Is it damage caused to civilians or civilian property during an attack that otherwise respects the principle of proportionality? Is the latter respected when the military objective destroyed is a bridge and the "collateral damage" is civilians? Even if it is due to "an uncanny accident" (*Cf.* document A (2).)? (*Cf.* Art. 57 Protocol I.)

   d. According to the information available to you, do you believe that the attack on Grdelica bridge was in accordance with IHL? Only the first attack, if it was conducted in the ignorance that a train was arriving on the bridge? Did NATO respect the principle of precaution? What other precautions could NATO have taken? In case it could have taken more measures, under IHL should it have? Is your reply different for the first and second attack? What do you think of the conclusion of the committee on this event explained in paragraph 62 *in fine* of document B? (*Cf.* Arts. 51 (5) (b) and 57 (2) (b) of Protocol I.)

4. a. According to IHL, did the Serb radio-television buildings (RTS) in Belgrade constitute a military objective? Does it constitute a military objective as soon as it is not "an acceptable instrument of public information", thereby meaning that it does not allow "equal time for uncensored Western news broadcasts for two periods of three hours a day" (*Cf.* document A (21).)? If we accept this position, does it mean that the FRY forces could have considered a television station from a NATO member State as a military objective and destroyed its buildings for the same reasons? (*Cf.* Art. 52 of Protocol I.)

b. Was the RTS a military objective if it was used as "as radio relay station [...] and transmitter [...] to support the activities of the FRY military [...] forces" (*Cf.* document B (73).)? If it was used for propaganda? As an instrument to instigate hatred and violence as did Radio Mille Collines in Rwanda? (*Cf.* Art. 52 of Protocol I.)

c. The Prosecutor's Report estimates that the number of victims "does not appear to be clearly disproportionate" to the "concrete and direct military advantage" obtained by the bombing. On what criteria do you think this balance should be judged? In this regard what responsibility lies with the military commanders? (*Cf.* Arts. 51 (5) (b) and 52 of Protocol I.)

d. Was the principle of precaution respected by NATO forces in the bombing of RTS? (*Cf.* Art. 57 (2) (c) of Protocol I.) Is the warning that NATO supposedly gave sufficient under Art. 57 of Protocol I? Even if it was only given to the foreign journalists?

5. Do journalists benefit from a special status in IHL? Do they have the status of protected persons? Is this status relevant in this case? Even if they contribute to the war effort by broadcasting "hate speech" (*Cf.* document A (27).)? (See **Case No. 24**, Protection of Journalists. p. 672.)

6. a. What do you think of the Report's conclusion (*Cf.* document B (90).)? Where is the law "not sufficiently clear"? In relation to which specific incidents? Is it not the role of a tribunal such as the ICTY to clarify the law? Indicate for all the incidents in the case, whether it was the law, the facts or both which were not clear enough. Why would investigations probably not produce sufficient results?

b. Would the ICTY have had jurisdiction to judge the alleged authors of war crimes committed by NATO forces? Why did it not do it? Is the choice made by the ICTY to concentrate upon the worst criminals justified? (*Cf.* Statute of the ICTY, Art. 1. see **Case No. 179**, p. 1791.)

Case No. 194, ECHR, Bankovic and Others v. Belgium and 16 other States

THE CASE

[**Source:** European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001, available on http://hudoc.echr.coe.int]

The European Court of Human Rights, Grand Chamber

Decision as to the admissibility of Application no. 52207/99

by Vlastimir and Borka BANKOVIC, Zivana STOJANOVIC, Mirjana STOIMENOVSKI, Dragana JOKSIMOVIC and Dragan SUKOVIC

against

Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom [...]

THE FACTS [...]

A. The circumstances of the case [...]

2. The bombing of Radio Televizije Srbije ("RTS")

9. Three television channels and four radio stations operated from the RTS facilities in Belgrade. The main production facilities were housed in three buildings at Takovska Street. The master control room was housed on the first floor of one of the buildings and was staffed mainly by technical staff.

10. On 23 April 1999, just after 2.00 am approximately, one of the RTS buildings at Takovska Street was hit by a missile launched from a NATO forces' aircraft. Two of the four floors of the building collapsed and the master control room was destroyed.

11. The daughter of the first and second applicants, the sons of the third and fourth applicants and the husband of the fifth applicant were killed and the sixth applicant was injured. Sixteen persons were killed and another sixteen were seriously injured in the bombing of the RTS. Twenty-four targets were hit in the [the Federal Republic of Yugoslavia] FRY that night, including three in Belgrade. [...]

COMPLAINTS

28. The applicants complain about the bombing of the RTS building on 23 April 1999 by NATO forces and they invoke the following provisions of the Convention: Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy).

THE LAW [...]

30. As to the admissibility of the case, the applicants submit that the application is compatible *ratione loci* with the provisions of the Convention because the impugned acts of the respondent States, which were either in the FRY or on their own territories but producing effects in the FRY, brought them and their deceased relatives within the jurisdiction of those States. They also suggest that the respondent States are severally liable for the strike despite its having been carried out by NATO forces, and that they had no effective remedies to exhaust.

31. The Governments dispute the admissibility of the case. They mainly contend that the application is incompatible *ratione personae* with the provisions of the Convention because the applicants did not fall within the jurisdiction of the respondent States within the meaning of Article 1 of the Convention. [...]

32. The French Government further argue that the bombardment was not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States. The Turkish Government made certain submissions as regards their view of the position in northern Cyprus. [...]

A. Whether the applicants and their deceased relatives came within the "jurisdiction" of the respondent States within the meaning of Article 1 of the Convention

34. This is the principal basis upon which the Governments contest the admissibility of the application and the Court will consider first this question. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention." [...]

1. The submissions of the respondent Governments [...]

37. They maintain that they are supported in this respect by the jurisprudence of the Court which has applied this notion of jurisdiction to confirm that certain individuals affected by acts of a respondent State outside of its territory can be considered to fall within its jurisdiction because there was an exercise of some form of legal authority by the relevant State over them. The arrest and detention of the applicants outside of the territory of the respondent State in the *Issa and Öalan* cases (*Issa and Others v. Turkey*, (dec.), no. 31821/96, 30 May 2000, unreported and *Öcalan v. Turkey*, (dec.), no. 46221/99, 14 December 2000, unreported) constituted, according to the Governments, a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil. Jurisdiction in the *Xhavara* case which concerned the alleged deliberate striking of an Albanian ship by an Italian naval vessel 35 nautical miles off the coast of Italy (*Xhavara and Others v. Italy and Albania*, (dec.), no. 39473/98, 11 January 2001,

unreported) was shared by written agreement between the respondent States. [...]

38. The Governments conclude that it is clear that the conduct of which the applicants complain could not be described as the exercise of such legal authority or competence. [...]

2. The submissions of the applicants [...]

52. Alternatively, the applicants argue that, given the size of the air operation and the relatively few air casualties, NATO's control over the airspace was nearly as complete as Turkey's control over the territory of northern Cyprus. While it was a control limited in scope (airspace only), the Article 1 positive obligation could be similarly limited. They consider that the concepts of "effective control" and "jurisdiction" must be flexible enough to take account of the availability and use of modern precision weapons which allow extra-territorial action of great precision and impact without the need for ground troops. Given such modern advances, reliance on the difference between air attacks and ground troops has become unrealistic. [...]

3. The Court's assessment [...]

(d) Were the present applicants therefore capable of coming within the "jurisdiction" of the respondent States?

74. The applicants maintain that the bombing of RTS by the respondent States constitutes yet a further example of an extra-territorial act which can be accommodated by the notion of "jurisdiction" in Article 1 of the Convention, and are thereby proposing a further specification of the ordinary meaning of the term "jurisdiction" in Article 1 of the Convention. The Court must be satisfied that equally exceptional circumstances exist in the present case which could amount to the extra-territorial exercise of jurisdiction by a Contracting State.

75. In the first place, the applicants suggest a specific application of the "effective control" criteria developed in the northern Cyprus cases. They claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a "cause-and-effect" notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction". Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the

commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants' approach does not explain the application of the words "within their jurisdiction" in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 [...].

4. The Court's conclusion

82. The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question. [...]

For these reasons, the Court unanimously

Declares the application inadmissible.

Paul MAHONEY, Registrar

Luzius WILDHABER, President

DISCUSSION

[N.B.: The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") is available on http://conventions.coe.int]

1. a. Did the Court declare the application inadmissible because the applicants could not assert their human rights vis-à-vis the defendant States, or because it simply did not have jurisdiction to take cognizance of any violation of these rights?

   b. Did the defendant States have human rights obligations vis-à-vis the applicants? Did they have obligations as regards international humanitarian law (IHL) vis-à-vis the applicants?

2. a. Who is protected *ratione personae* by the ECHR against a State Party?

   b. Who is protected *ratione personae* by IHL against a State party to the IHL treaties? (*Cf.* Art. 4 of Convention III; Art. 4 of Convention IV; Arts. 49 (2), 50 and 51 of Protocol I.)

   c. Is Art. 1 common to the Conventions and of Protocol I concerned with the scope of IHL? Does it have an influence on the scope of protection *ratione personae*?

3. a. Is France's argument that the bombing attacks were attributable to NATO, not the member States (which carried them out), tenable as regards human rights? As regards IHL?

   b. If Belgrade had been occupied in the course of the war, would the conduct of the occupation troops have been attributable to all NATO member States? Only to those States that sent occupation troops? Only to the State that sent the troops whose conduct was at issue? Only to NATO itself?

   c. Is NATO bound by IHL?

4. a. Would the application have been admissible if the defendant States had carried out the bombing attacks within their own territories? If Yugoslavia had been party to the ECHR? In that case, could the application have been lodged against Yugoslavia?

   b. If the application had been admissible, would the Court have applied IHL? On what grounds? Is it competent to do so?

   (Art. 2 of the ECHR guarantees the right to life and Art. 15 provides that
   "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
   2. No derogation from Article 2 [protecting the right to life], except in respect of deaths resulting from lawful acts of war [...], shall be made under this provision. [...]")

   c. Is it likely that the Court would have found a violation of the Convention if it had found the application admissible? By reason only of the fact that civilians were killed? Owing to the fact that the principle of proportionality was not respected? Or that precautionary measures were not taken? Or that the target of the attack was not a military objective? Can a radio station be a military objective? If it incites the population and the armed forces to war? If it incites genocide? If it is used for military communications? (*Cf.* Arts. 49 (2), 50, 51, 52 (2) and 57 of Protocol I; *see* **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention. p. 2077.)

   d. Could the Court have jurisdiction to rule on the lawfulness of air strikes in time of armed conflict? How could it have established the necessary facts in order to issue a ruling? Is the ECHR the appropriate instrument for such a ruling? Is a Court ruling a possible and appropriate means for protecting victims of bombing attacks in time of armed conflict? What other courts might offer recourse to the victims?

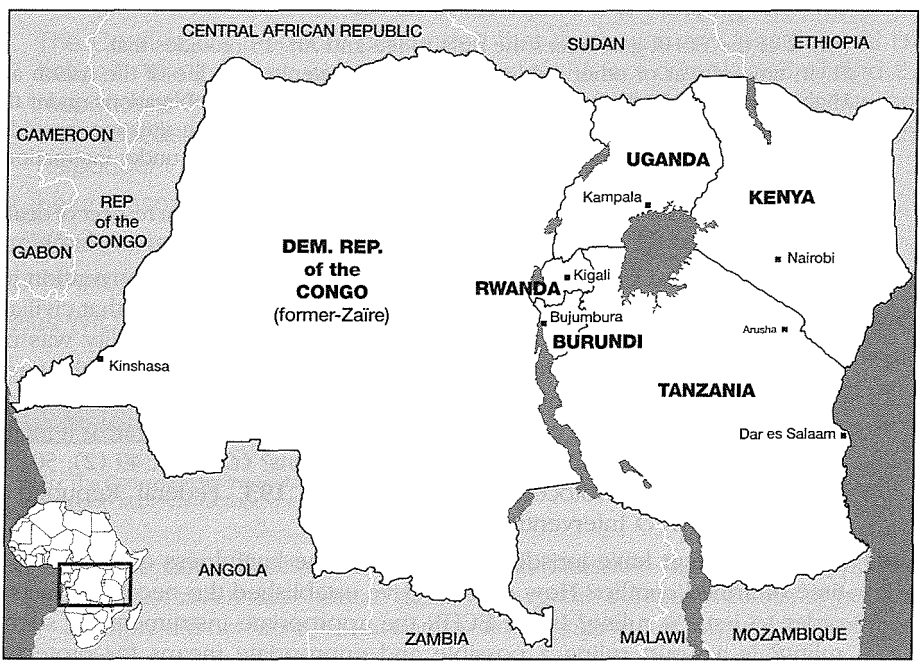
XXVIII. CONFLICTS IN THE GREAT LAKES REGION

(*See also supra* Chapter X Congo. p. 1122.)

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region

THE CASE

[N.B.: This case study was prepared by Thomas de Saint Maurice for the French edition of this book. It is based exclusively on public documents and it partially uses the Case study prepared by Lina Milner and published in the first edition of this book.]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

STRUCTURE OF THE CASE STUDY

1. Genocide in Rwanda

A. The Genocide

1) The genesis of the genocide
2) ICRC, Press release 21 April 1994

B. The United Nations Assistance Mission for Rwanda (UNAMIR)

C. "Operation Turquoise"

1) Security Council Resolution 929 (1994)
2) ICRC, June 1994 Memorandum

D. UN, 1997 Report on the issue of refugees

E. International repression: ICTR

F. National repression in Rwanda:

1) Gacaca, gambling with justice
2) Problems of detention

2. Civil war in Burundi

A. The "villagisation" phenomenon in Burundi

B. The armed conflict

3. The conflicts in the Democratic Republic of Congo

A. The qualification of the conflicts on the territory of the Democratic Republic of Congo: multiple actors

1) The African first world war.
2) UN, Report on the Situation of Human Rights in the Democratic Republic of Congo

B. The Lusaka Peace Agreements of 1999

C. Violations of international humanitarian law

1) UN, Report on Human Rights in the Democratic Republic of Congo
2) The May 2002 Massacre of Kisangani
3) UN, Press Release of 18 June 2002

D. The United Nations Mission in the Democratic Republic of Congo (MONUC)

1) MONUC's mandate
2) Security Council Resolution 1592 (2005)

Abbreviations

Rwanda

FAR:	Forces armées rwandaises (Rwandese Armed Forces, i.e., armed forces of the former Hutu-led government))
FPR:	Front patriotique rwandais (Rwandese Patriotic Front)
MRBD:	Mouvement révolutionnaire national pour le développement (National Revolutionary Movement for Development)
UNAMIR:	United Nations Assistance Mission for Rwanda.

Burundi

CNDD:	Conseil national pour la défense de la démocratie (National Council for the Defence of Democracy)
FDD:	Forces pour la défense de la Démocratie (Forces for the Defence of Democracy)
FROLINA:	Front pour la libération nationale (Front for National Liberation)
PALIPEHUTU:	Parti pour la liberation du people hutu (Party for the Liberation of the Hutu People)

Democratic Republic of Congo

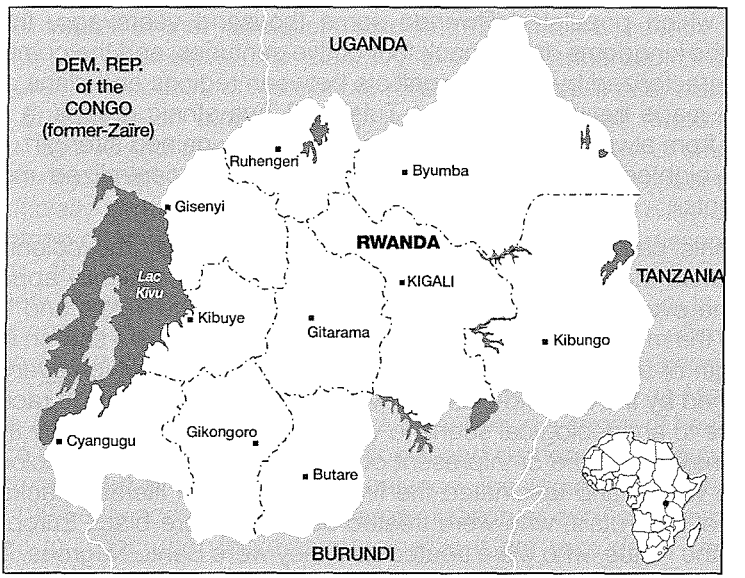
DRC:	Democratic Republic of Congo
FAC:	Forces armées congolaises (Congolese Armed Forces)
RCD:	Rassemblement congolais pour le démocratie (Congolese Rally for Democracy)
SADC:	South African Development Conference

Angola

UNITA:	National Union for the Total Independence of Angola

1. Genocide in Rwanda

[*See also* **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu, p. 2171; **Case No. 205**, Switzerland, The Niyonteze Case, p. 2233, and **Case No. 201**, ICTR, The Media Case, p. 2194.]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

A. The Genocide

[N.B.: For a description of the acts of genocide, refer to DES FORGES Alison and HRW-FIDH, *Aucun témoin ne doit survivre*, Paris, Karthala, 1999, 911 pp; PRUNIER Gerard, *The Rwanda Crisis, 1959-1994: history of a Genocide*, London, Hurst, 389 pp. See also the facts reported in the ICTR cases, available on http://www.ictr.org]

1) The Genesis of the Genocide

[**Source:** "Hearing of Jean-Pierre CHRÉTIEN", in *Fact-finding mission on Rwanda. Minutes of the hearings from 24 March 1998 to 5 May 1998, French National Assembly, Paris*, http://www.assemblee-nationale.fr/dossiers/rwanda.asp. Original in French, unofficial translation.]

Hearing of Mr Jean-Pierre CHRÉTIEN
Director of Research at the CNRS

(Session held on 7 April 1998)
Chaired by Mr Paul Quilès, Chairman of the Defence Committee

The Chairman, Mr Paul Quilès, welcomed the historian Mr Jean-Pierre Chrétien, who is Director of Research at the CNRS. [...] He added that Mr Jean-Pierre Chrétien adhered to the school of thought which holds to the view that the rift between Hutu and Tutsi is essentially a post-colonial creation. He therefore suggested that Jean-Pierre Chrétien explain the mission to gather information about the conflicts between that school of thought and other views. [...]

Mr Jean-Pierre Chrétien began by showing the specific nature of the ethnic problem in Rwanda, pointing out that the Hutu-Tutsi issue in the region of the Great Lakes represented a particular kind of ethnic problem as the Hutus and the Tutsis are not heterogeneous peoples gathered within artificial borders. A clear distinction therefore needed to be made between historical periods: the waves of migration which populated Rwanda some thousand years ago, the political history of the kingdoms dating back four or five centuries, and the complex social history characterized by various conflicts between regions and clans and by the distinction made between the Hutu, Tutsi and Twa ethnic groups, a distinction which, far from always having existed, progressively gained strength, especially since the eighteenth century with the ascent of the centralized monarchical governments.

These ethnic categories were not therefore invented by the colonizers; they existed before the latter arrived on the scene. It is consequently appropriate to analyse the evolution over time of relations between the Tutsis and the Hutus. Taking up the myth of the great Tutsi invasion, the colonial era saw an increase in the strength of a Gobineau-type mythology, according to which everything can be explained by the age-old clash between the Bantu and Hamitic racial groups. It gave rise to an ideological scenario with scientific pretensions. Mr Jean-Pierre Chrétien insisted on the omnipresent obsession with race under colonial rule: it suited the whites and fascinated the first generation of literate blacks, swelling the pride of the Tutsis, who were treated as if they were black Europeans, and annoying the Hutus, who were treated as if they were Bantu Negroes. To support his thesis, Mr Jean-Pierre Chrétien cited, in particular, the German Count von Goetzen who, in 1895, talked about "*large invasions from Abyssinia*" [...] and the *Journal of former pupils of Astrida (Bulletin des anciens éléves d'Astrida)* which claimed in 1948 that *"being of Caucasian origin like the Semites and Indo-Europeans, the Hamitic peoples originally had nothing in common with Negroes. The preponderance of the Caucasian type has remained clearly evident among the Batutsi ... their height - rarely less than 1.80 m - ... their fine facial features imbued with an intelligent expression, everything helps to justify the title bestowed on them by the explorers: aristocratic Negroes"*. Mr Jean-Pierre Chrétien thus showed that, far from pursuing a simple policy of "divide and rule", colonial rule was social management based on an ideology of racial inequality which pitted the Tutsis, who were treated as virtual aristocrats, against the Hutus, who were considered victims of a kind of scientifically legitimized human erosion. The colonizers therefore introduced racial discrimination into the heart of Rwandan society, in which social categories already existed. [...]

Turning next to the study of post-colonial Rwanda until 1990, Mr Jean-Pierre Chrétien stressed the specific nature of the Rwandan "democratic" project, which was based on a methodological mix of the numerical dominance of the Hutu masses, who were perceived as a homogeneous community, and the indigenous nature of its members, defined as the only "true Rwandans". When, with the coming of independence, the so-called "social" revolution erupted between 1959 and 1961, it thus targeted the whole Tutsi contingent, designating it collectively as being synonymous with a "*feudal*" system backed by the colonizing power. A model was then introduced into both the reality and the

thinking of the day; backed and endorsed by the Belgian Christian democracy and the missionary Church, it referred to democracy and defined the Tutsi minority as both feudal and foreign from one generation to another. It was 1789 in reverse, with the hereditary orders not being suppressed but simply changed. A large number of quotations reveal this line of thought: for example, Grégoire Kayibanda, leader of that revolution, said in 1959 that the country had to be "*restored to its proprietors, the Bahutu*"; in 1960 Parmehutu declared that "*Rwanda [was] the country of the Bahutu (Bantu) and of all those, black or white, of Tutsi, European or other origins, who will shake off feudal-colonialist objectives" and invited the Tutsis who did not share that way of seeing things to "return to Abyssinia*"; [...] Behind the democratic language, the priority of ethnic identity, officially shown on identity cards, was imposed willy-nilly: democracy was a doctrine of ethnic majority in disguise. The propaganda disseminated by Parmehutu, the sole political party which became the MRND [National Revolutionary Movement for Development] in 1973, did not change. In July 1972, "*Ingingo z'ingenzi mu mateka y'Urwanda*", the Parmehutu creed, affirmed, "*Tutsi domination is the source of all the ills suffered by the Hutus since the world began.*" [...] That official discrimination - "*respectable racism*", as Marie-France Cros of the *La Libre Belgique* called it - was steeped in a sense of having a clear conscience and was endorsed both by social and democratic language and by the Church. Instead of redressing the balance, the regime in power between 1959 and 1994 only accentuated the marginalization or exclusion of the minority and tended to reflect the desire to marginalize if not exclude it. The problem cannot be tackled as if it were a regional matter with federal repercussions, nor as if it were a genuine social issue, since there were rich and poor people in both categories. Under those conditions, the binary nature of the relation makes it particularly explosive.

[...] Since prophecies of victimization can be said to justify preventive self-defence, fear was frequently exploited and, against the aforementioned background, played a key role in the crises in the region of the Great Lakes. From 1959 onwards, it was the essential tactical force driving popular mobilization during the massacres. Hence, at Christmas 1963, following an attack by Tutsi refugees, four soldiers were killed. By way of reprisal the Government sent ministers to organize "*popular self-defence*" in the pre-fectures. In September 1964, 10,000 Tutsis were massacred in the Gikongoro prefecture.

The cloud of genocide weighs heavily on Rwanda and that swiftly covered-up crisis foreshadowed by 30 years the programme of massacres and the genocide that occurred in 1994. The phenomenon recurred before that, in 1973, these crises thus constituting a legacy of experience and memories, fears and suspicions.

Mr Jean-Pierre Chrétien then turned to the end of the Habyarimana regime. In the late 1980s, the unchanging political regime was faced with economic and social difficulties that were both structural and cyclical in nature - economic deadlock, structural adjustment, a sense of hopelessness among young people, the rise of the opposition, aspirations to pluralism of expression - to which was added the invasion by the Rwandan Patriotic Front (FPR) on 1 October 1990,

followed by a simulated attack on Kigali on 4 and 5 October. The response to those events was twofold and contradictory: an opening-up to democracy and ethnic mobilization. Between 1990 and 1994, a race against the clock was truly on - the opponents being the logic of democratization and peace and the logic of war and racism.

Under pressure from the domestic opposition and from foreign powers, the logic of democratization led to greater willingness on the part of the government to consider the issue of public liberties and to the acceptance of political pluralism in June 1991. From 1992 onwards, the shape of Rwandan political strategy was determined by three poles: the Habyarimana sphere of influence, supposedly represented by Akazu (the "household" from the north-west, headed, in particular, by the family of "*Mrs President*", Ms Habyarimana); the domestic opposition, which was primarily Hutu; and finally, the armed opposition of the FPR, which was primarily Tutsi. Following meetings between the FPR and the Rwandan authorities, the signature of a cease-fire in July 1992 appeared to be a sign that things were moving beyond ethnic antagonism, which was a far too simplified a view.

Mr Jean-Pierre Chrétien emphasized how his meetings with the Hutu opposition had helped him to appreciate the situation before going on to stress that the resumption of anti-Tutsi killings had in no way been inevitable. He pointed out that the extremist reaction which embodied the logic of genocide had simultaneously assumed a violent form based on the racist propaganda and a more subtle form aimed at disrupting the opposition within the country. [...]

It was against that background that, in May 1990, the newspaper *Kangura* was founded with the help of Akazu finances, its task being to spread the racist "gospel", and that, in April-July 1993, the "free" radio station "Radio-Télévision Libre des Mille Collines" (RTLMC), was launched under the leadership of Ferdinand Nahimana, an extremist who had been dismissed from his position as director of the Rwandan National Information Office (ORINFOR) by the opposition for having incited the pogroms in Bugesera. [...] [*See* **Case No. 201**, ICTR, The Media Case. p. 2194.]

This is how a climate of violence developed that was denounced by various players both in Rwanda and abroad [...]. Mr Jean-Pierre Chrétien pointed out that in March 1993 he himself had referred to "*a tragic slide into genocide*".

Hence, a far-reaching political debate was then going on in Rwanda, setting the government's ethnically oriented line against the democratic line adopted by the opposition. Moreover, those debates are mentioned in a whole series of texts, which no one could be unaware of. Those same texts provide evidence of the emergence, at the end of 1992, of a current close to the government and prepared for anything. [...] [Jean-Pierre Chrétien] recalled what had been said by President Habyarimana, who, in November 1992, referred to the Arusha agreement as a "piece of trash", and by Professor Mugesera, an influential member of the MRND, who called for the Tutsis to be eliminated. [...]

Tackling the course taken by the genocide itself, Mr Jean-Pierre Chrétien drew attention to the great many inquiries and testimonies providing evidence

of the reality and the "normality" of the genocide. The propaganda employed in the press and on the radio during the events was part of an ongoing political culture that went back for more than thirty years and which revolved around three major topics: the priority of ethnic Hutu or Tutsi origins; the legitimization of a genuine racial conflict which condemned some while taking a totalitarian approach to defining the power of the others; and finally, the normalization of a culture of violence. It would admittedly have been difficult to conceive of the scale and the atrocity of the genocide in advance, but it was surprising that the international community took so long to notice it and to condemn it. [...]

2) ICRC, Press Release of 21 April 1994

[**Source:** ICRC Press Release, no. 1771, 21 April 1994]

Human tragedy in Rwanda

Geneva (ICRC) - Tens, maybe hundreds of thousands killed: the exact number of victims of the massacres that have swept Rwanda over the last two weeks will never be known. Terrified inhabitants have been fleeing the centre of the country and several hundred thousand displaced people are massed in the south and the north. The human tragedy in Rwanda is on a scale that the International Committee of the Red Cross (ICRC) has rarely witnessed.

In the hospitals in the capital, Kigali, surgeons have managed to save hundreds of lives. However, the wounded can no longer be taken to medical centres for fear that they will be killed before they arrive, and those that have been saved cannot leave hospital because to do so would mean certain death.

The need for humanitarian aid is also immense in outlying areas of the country, where hundreds of thousands of people, some of them wounded, have sought refuge. The displaced, who lack food and medical care, will be assisted by Rwandese medical staff as soon as security conditions allow. In addition, sanitation systems must be installed to minimize the risk of epidemics.

Since the start of the violence, about 30 ICRC delegates, the French team of Médecins sans Frontières and Rwandese Red Cross volunteers have risked their lives to preserve a measure of humanity in the midst of the carnage. What they have done is vital, but is no more than a drop in the ocean.

ICRC delegates on the spot are in constant contact with ail parties concerned and are broadcasting messages on local radio stations, calling for an end to the atrocities and demanding that civilians, the wounded and any people taken prisoner be spared.

B. United Nations Assistance Mission for Rwanda (UNAMIR)

[**Source:** United Nations, Letter dated 15 December 1999 from the Secretary-General addressed to the President of the Security Council, S/1999/1257, 16 December 1999, "Enclosure: Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda"; available on http://www.un.org]

Enclosure
Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda
15 December 1999

I. INTRODUCTION

Approximately 800,000 people were killed during the 1994 genocide in Rwanda. The systematic slaughter of men, women and children which took place over the course of about 100 days between April and July of 1994 will forever be remembered as one of the most abhorrent events of the twentieth century. Rwandans killed Rwandans, brutally decimating the Tutsi population of the country, but also targeting moderate Hutus. Appalling atrocities were committed, by militia and the armed forces, but also by civilians against other civilians.

The international community did not prevent the genocide, nor did it stop the killing once the genocide had begun. This failure has left deep wounds with Rwandan Society, and in the relationship between Rwanda and the international community, in particular the United Nations. These are wounds which need to be healed, for the sake of the people of Rwanda and for the sake of the United Nations. Establishing the truth is necessary for Rwanda, for the United Nations and also for all those, wherever they may live, who are at risk of becoming victims of genocide in the future

[...] The Inquiry has analysed the role of the various actors and organs of the United Nations system. Each part of that system, in particular the Secretary-General, the Secretariat, the Security Council and the Member States of the organisation, must assume and acknowledge their respective parts of the responsibility for the failure of the international community in Rwanda. Acknowledgement of responsibility must also be accompanied by a will for change: a commitment to ensure that catastrophes such as the genocide in Rwanda never occur anywhere in the future.

The failure by the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole. The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there. There was a persistent lack of political will by Member States to act, or to act with enough assertiveness. This lack of political will affected the response by the Secretariat and decision-making by the Security Council, but was also evident in the recurrent difficulties to get the necessary troops for the United Nations Assistance Mission for Rwanda (UNAMIR). Finally, although UNAMIR suffered from a chronic lack of resources and political priority, it must also be said that serious mistakes were made with those resources which were at the disposal of the United Nations. [...]

II. DESCRIPTION OF KEY EVENTS

Arusha Peace Agreement [...]

Only a week after the signing of the Agreement, the United Nations published a report which gave an ominously serious picture of the human rights situation in Rwanda. The report described the visit to Rwanda by the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions. Mr Waly Bacre Ndiaye, from 8 to 17 April 1993. Ndiaye determined that massacres and a plethora of other serious human rights violations were taking place in Rwanda. The targeting of the Tutsi population led Ndiaye to discuss whether the term genocide might be applicable. He stated that he could not pass judgment at that stage, but citing the Genocide Convention, went on to say that the cases of intercommunal violence brought to his attention indicated "very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group and for no other objective reason." Although Ndiaye - in addition to pointing out the serious risk of genocide in Rwanda - recommended a series of steps to prevent further massacres and other abuses, his report seems to have been largely ignored by the key actors within the United Nations system.

In order to follow up on the Arusha Agreement, the Secretary-General dispatched a reconnaissance mission to the region from 19 to 31 August 1993. [...] The mission was led by Brigadier-General Romeo A. Dallaire, Canada, at the time Chief Military Observer of the United Nations Observer Mission Uganda-Rwanda (UNOMUR). [...]

On 15 September, a joint Government-RPF delegation met with the Secretary-General in New York. The delegation argued in favour of the rapid deployment of the international force and the rapid establishment of the transitional institutions. Warning that any delay might lead to the collapse of the peace process, the delegation expressed the wish for a force numbering 4,260. The Secretary-General gave the delegation a sobering message: that even if the Council were to approve a force of that size, it would take at least 2-3 months for it to be deployed. The United Nations might be able to deploy some further observers in addition the 72 already sent, but even this would take weeks. Therefore the Rwandan people needed to be told that they had to rely on themselves during the interim period. The Government and the RPF had to make an effort to respect the cease-fire, the Secretary-General said, because it would be even more difficult to get troops if fighting were to resume. He also mentioned the enormous demands being made of the United Nations for troops, in particular in Somalia and Bosnia, and that the United Nations was going through a financial crisis.

The establishment of UNAMIR

On 24 September 1993, [...] the Secretary-General presented a report to the Security Council on the establishment of a peacekeeping operation in Rwanda (S/26488), based on the report from the reconnaissance mission. The report set out a deployment plan for a peacekeeping force of 2,548 military personnel. With operations divided into four phases, the Secretary-General proposed the immediate deployment of an advance party of about 25 military and 18 civilian

personnel, and 3 civilian police. The first phase was to last 3 months, until the establishment of the Broad-based Transitional Government (BBTG), during which the operation would prepare the establishment of a secure area in Kigali and monitor the cease-fire. By the end of phase 1, the report of the Secretary-General stated that the operation was to number 1,428 military personnel. [...]

On 5 October, the Council unanimously adopted resolution 872 (1993), which established UNAMIR. The Council did not approve all the elements of the mandate recommended by the Secretary-General, but instead decided on a more limited mandate. [...]

Dallaire was appointed Force Commander of the new mission. He arrived in Kigali on 22 October. He was joined by an advance party of 21 military personnel on 27 October. The Secretary-General subsequently appointed a former Foreign Minister of Cameroon, Mr Jacques-Roger Booh Booh, as his Special Representative in Rwanda. Booh Booh arrived in Kigali on 23 November 1993.

On 23 November 1993, Dallaire sent Headquarters a draft set of Rules of Engagement (ROE) for UNAMIR, asking for the approval of the Secretariat. The draft included in paragraph 17 a rule specifically allowing the mission to act, and even to use force, in response to crimes against humanity and other abuses ("There may also be ethnically or politically motivated criminal acts committed during this mandate which will morally and legally require UNAMIR to use all available means to halt them. Examples are executions, attacks on displaced persons or refugees"). Headquarter never responded formally to the Force Commander's request for approval. [...]

The 11 January Cable

On 11 January 1994, Dallaire sent the Military Adviser to the Secretary-General, Major-General Maurice Baril, a telegram entitled "Request for Protection for Informant", which has come to figure prominently in the discussions about what knowledge was available to the United Nations about the risk of genocide. The telegram stated that Dallaire had been put into contact with an informant who was a top level trainer in the Interahamwe militia. The contact had been set up by a "very very important government politician" (who in later correspondence was identified as the Prime Minister Designate, Mr Faustin Twagiramungu). The cable contained a number of key pieces of information.

The first related to a strategy to provoke the killing of Belgian soldiers and the Belgian battalion's withdrawal. [...]

Secondly, the informant said that the Interahamwe had trained 1,700 men in the camps of the RGF, scattered in groups of 40 throughout Kigali. He had been ordered to register all Tutsi in Kigali, and suspected it was for their extermination. He said that his personnel was able to kill up to 1,000 Tutsi in 20 minutes.

Thirdly, the informant had told of a major weapons cache with at least 135 weapons (G3 and AK47). He was prepared to show UNAMIR the location if his family was given protection.

Having described the information received from the informant, Dallaire went on to inform the Secretariat that it was UNAMIR's intention to take action within the next

36 hours. He recommended that the informant be given protection and be evacuated, and - on this particular point, but not on the previous one - requested guidance from the Secretariat as to how to proceed. Finally, Dallaire admitted to having certain reservations about the reliability of the informant and said that the possibility of a trap was not fully excluded. As has often been quoted, the telegram nonetheless ended with a call for action: "Peux ce que veux. Allons-y." [...]

The first response from Headquarters to UNAMIR [...] ended "No reconnaissance or other action, including response to request for protection, should be taken by UNAMIR until clear guidance is received from Headquarters."

Booh Booh replied to Annan in a cable also dated 11 January. The Special Representative described a meeting which Dallaire and Booh Booh's political adviser, Dr Abdul Kabia, had had with the Prime Minister Designate, who expressed "total, repeat total, confidence in the veracity and true ambitions of the informant." Booh Booh emphasized that the informant only had 24 to 48 hours before he had to distribute the arms, and requested guidance on how to handle the situation, including the request for protection for the informant. The final paragraph of the telegram, para. 7, stated that Dallaire was "prepared to pursue the operation in accordance with military doctrine with reconnaissance, rehearsal and implementation using overwhelming force." [...]

Later the same day, Headquarters replied. Again, the cable was from Annan, signed by Riza, addressed this time to both Booh Booh and Dallaire. Headquarters stated that they could not agree to the operation contemplated in para. 7 of the cable from Booh Booh, as it in their view clearly went beyond the mandate entrusted to UNAMIR under resolution 872 (1993). Provided UNAMIR felt the informant was absolutely reliable, Booh Booh and Dallaire instead were instructed to request an urgent meeting with President Habyarimana and inform him that they had received apparently reliable information concerning the activities of the Interahamwe which represented a clear threat to the peace process. [...] If any violence occurred in Kigali, the information on the militia would have to be brought to the attention of the Security Council, investigate responsibility and make recommendations to the Council. [...]

The cable from Headquarters ended with the pointed statement that "the overriding consideration is the need to avoid entering into a course of action that might lead to the use of force and unanticipated repercussions." [...]

Political deadlock and a worsening of the security situation [...]

The conclusion drawn was that determined and selective deterrent operations were necessary, targeting confirmed arms caches and individuals known to have illegal weapons in their possession. [...] UNAMIR sought the guidance and approval of Headquarters to commence deterrent operations. [...]

On 14 February, [...] the Belgian Foreign Minister, Mr Willy Claes, wrote a letter to the Secretary-General, arguing in favour of a stronger mandate for UNAMIR. Unfortunately, this proposal does not appear to have been given serious attention within the Secretariat or among other interested countries.

Dallaire continued to press for permission to take a more active role in deterrent operations against arms caches in the KWSA. The Secretariat, however, maintained the interpretation of the mandate which was evident in their replies to Dallaire's cable, insisting that UNAMIR could only support the efforts of the gendarmerie. [...] Annan emphasized that public security was the responsibility of the authorities and must remain so." As you know, resolution 792 [sic] (1993) only authorized UNAMIR to 'contribute to the security of the city of Kigali, i.a., within a weapons secure area established by repeat by the parties?'" [...]

In a report on 23 February, Dallaire wrote that information regarding weapons distribution, death squad target lists, planning of civil unrest and demonstrations abounded. "Time does seem to be running out for political discussions, as any spark on the security side could have catastrophic consequences." [...]

The crash of the Presidential plane; genocide begins

On 6 April 1994, President Habyarimana and the President of Burundi, Cyprien Ntaryamira, flew back from a subregional summit. [...]

According to UNAMIR's report to Hedquarters, at approximately 20.30, the plane was shot down as it was coming in to land in Kigali. The plane exploded and everyone on board was killed. By 21.18, the Presidential Guard had set up the first of many roadblocks. Within hours, further road-blocks were set up by the Presidential Guards, the Interahamwe, sometimes members of the Rwandan Army, and the gendarmerie. UNAMIR was placed on red alert at about 21.30. [...]

After the crash, UNAMIR received a number of calls from ministers and other politicians asking for UNAMIR's protection. [...]

The tragic killing of the Belgian peacekeepers took place against a backdrop of an escalated confrontation with Rwandan soldiers outside the Prime Minister's house. [...] [I]n Camp Kigali, the United Nations peacekeepers were badly beaten, and later, after the Ghanaian peacekeepers and the Togolese had been led away, the Belgian soldiers were brutally killed. [...]

Describing the shortcomings and lack of resources of UNAMIR, Dallaire did not believe he had forces capable of conducting an intervention in favour of the Belgians: "The UNAMIR mission was a peacekeeping operation. It was not equipped, trained or staffed to conduct intervention operations." [...]

About 2,000 people had sought refuge at ETO [Ecole Technique Officielle], believing that the UNAMIR troops would be able to protect them. There were members of the Interahamwe and Rwandan soldiers outside the school complex. On 11 April, after the expatriates in ETO had been evacuated by French troops, the Belgian contingent at ETO left the school, leaving behind men, women and children, many of whom were massacred by the waiting soldiers and militia. [...]

Within a couple of days of the crash of the Presidential plane, national evacuation operations were mounted by Belgium, France, Italy and the United States. The operations were undertaken with the aim of evacuating expatriates. The Force Commander informed Headquarters of the arrival of the first three French aircraft during the early hours of the morning of 8 April. In a cable dated 9 April from Annan (Riza), Dallaire was requested to "cooperate with both the French and

Belgian commanders to facilitate the evacuation of their nationals, and other foreign nationals requesting evacuation. [...] This should not, repeat not, extend to participating in possible combat, except in self-defence."

Withdrawal of the Belgian contingent

The Secretary-General met the Foreign Minister of Belgium, Mr Willy Claes, in Bonn on 12 April. In the minutes of the United Nations from the conversation, Claes' message to the United Nations was describes as follows: "The requirements to pursue a peacekeeping operation in Rwanda were no longer met, the Arusha peace plan was dead, and there were not means for a dialogue between the parties; consequently, the UN should suspend UNAMIR. [...]

The Secretary-General informed the Security Council about the Belgian position in a letter on 13 April. The letter stated that it would be extremely difficult for UNAMIR to carry out its tasks effectively. The continued discharge by UNAMIR of its mandate would "become untenable" unless the Belgian contingent was replaced by an equally well equipped contingent or unless Belgium reconsidered its decision. [...] The Permanent Representative argued that since the implementation of the Arusha Peace Agreement was seriously jeopardized, the entire UNAMIR operation should be suspended. It is the understanding of the Inquiry that in addition to this and subsequent letters to the Council, the Belgian Government conducted a campaign of high level démarches with Council members in order to get the Council to withdraw UNAMIR.

The continued role of UNAMIR [...]

In a [...] cable on 14 April, Dallaire made clear the dire consequences of the Belgian withdrawal, which he described as a "terrible blow to the mission".

On 13 April, Nigeria had presented a draft resolution in the Security Council on behalf of the Non-Aligned Caucus advocating a strengthening of UNAMIR. [...]

[...] [T]he United States initially stated that if a decision were to be taken then, it would only accept a withdrawal of UNAMIR, as it believed there was no useful role for a peacekeeping operation in Rwanda under the prevailing circumstances". [...]

DPKO [the UN Department of Peacekeeping Operations] argued that since there did not seem to be any real prospects of a cease-fire in the coming days, it was their intention to report to the Council that a total withdrawal of UNAMIR needed to be envisaged. [...]

Dallaire responded on 19 April arguing in favour of keeping a force of 250 as a minimum presence, and against a total withdrawal: "a wholesale withdrawal of UNAMIR would most certainly be interpreted as leaving the scene if not even deserting the sinking ship." He also pointed to the risk of dangerous reactions against UNAMIR in the case of a withdrawal. [...]

On 21 April, the Council voted unanimously to reduce UNAMIR to about 270 and to change the mission's mandate. [...]

New proposals on the mandate of UNAMIR

By the end of April, however, the disastrous situation in Rwanda made the Secretary-General recommend a reversal of the decision to reduce the force level. Boutros-Ghali's letter to the Security Council of 29 April (S/1994/518) provided an important shift in emphasis - from viewing the role of the United Nations as that of neutral mediator in a civil war to recognising the need to bring to an end the massacres against civilians, which had by then been going on for three weeks and were estimated to have killed some 200,000 people. [...]

On 13 May, the Secretary-General formalized his recommendations in a report to the Security Council, which outlined the phased deployment of UNAMIR II up to a strength of 5,500, emphasizing the need for haste in getting the troops into the field. The United States proposals contained i.a. an explicit reference to the need for the parties' consent, the postponement of later phases of deployment pending further decisions in the Council and requirement that the Secretary-General return to the Council with a refined concept of operations, including among other elements the consent of the parties and available resources. [...]

UNAMIR II established

The Council adopted resolution 918 (1994) on 17 May 1994. The resolution included a decision to increase the number of troops in UNAMIR, and imposed an arms embargo on Rwanda. [...]

A few African countries signalled some willingness to contribute, provided they received financial and logistical assistance in order to do so. By 25 July, over two months after resolution 918 (1994) was adopted, UNAMIR still only had 550 troops, a tenth of the authorized strength. Thus the lack of political will to react firmly against the genocide when it began was compounded by a lack of commitment by the broader membership of the United Nations to provide the necessary troops in order to permit the United Nations to try to stop the killing. [...]

In order to follow-up resolution 918 (1994), the Secretary-General also sent Riza and Baril to Rwanda, among other things to try to move the parties towards a cease-fire and to discuss the implementation of resolution 918 (1994). The special mission to the region took place between 22 and 27 May. In a report to the Security Council dated 31 May, the Secretary-General presented his conclusions based on that mission. The report includes a vivid description of the horrors of the weeks since the beginning of the genocide, referring to a "frenzy of massacres" and an estimate that between 250,000 and 500,000 had been killed. Significantly, the report stated that the massacres and killings had been systematic, and that there was "little doubt" that what had happened constituted genocide. [...]

III. CONCLUSIONS

The Independent Inquiry finds that the response of the United Nations before and during the 1994 genocide in Rwanda failed in a number of fundamental respects. The responsibility for the failings of the United Nations to prevent and stop the genocide in Rwanda lies with a number of different actors, in particular the Secretary-General, the Secretariat, the Security Council, UNAMIR and the

broader membership of the United Nations. This international responsibility is one which warrants a clear apology by the Organization and by Member States concerned to the Rwandese people. As to the responsibility of those Rwandans who planned, incited and carried out the genocide against their countrymen, continued efforts must be made to bring them to justice - at the International Criminal Tribunal for Rwanda and nationally in Rwanda. [...]

1. The overriding failure

The overriding failure in the response of the United Nations before and during the genocide in Rwanda can be summarized as a lack of resources and a lack of will to take on the commitment which would have been necessary to prevent or to stop the genocide. UNAMIR, the main component of the United Nations presence in Rwanda, was not planned, dimensioned, deployed or instructed in a way which provided for a proactive and assertive role in dealing with a peace process in serious trouble. The mission was smaller than the original recommendations from the field suggested. It lacked well-trained troops and functioning materiel. The mission's mandate was based on an analysis of the peace process which proved erroneous, and which was never corrected despite the significant warning signs that the original mandate had become inadequate. By the time the genocide started, the mission was not functioning as a cohesive whole: in the real hours and days of deepest crisis, consistent testimony points to a lack of political leadership, lack of military capacity, severe problems of command and control and lack of coordination and discipline. [...]

2. The inadequacy of UNAMIR's mandate [...]

The responsibility for the limitations of the original mandate given to UNAMIR lies firstly with the United Nations Secretariat, the Secretary-General and responsible officials within the DPKO for the mistaken analysis which underpinned the recommendations to the Council, and for recommending that the mission be composed of fewer troops than the field mission had considered necessary. The Member States which exercised pressure upon the Secretariat to limit the proposed number of troops also bear part of the responsibility. Not least, the Security Council itself bears the responsibility for the hesitance to support new peacekeeping operations in the aftermath of Somalia, and specifically in this instance for having decided to limit the mandate of the mission in respect to the weapons secure areas. [...]

10. The lack of political will of Member States [...]

In sum, while criticisms can be levelled at the mistakes and limitations of the capacity of UNAMIR's troops, one should not forget the responsibility of the great majority of United Nations Member States, which were not prepared to send any troops or material at all to Rwanda. [...]

It has been stated repeatedly during the course of the interviews conducted by the Inquiry that the fact that Rwanda was not of strategic interest to third countries and that the international community exercised double standards when faced with the risk of a catastrophe there compared to action taken elsewhere. [...]

C. "Operation Turquoise"

1) Security Council Resolution 929 (1994)

[**Source:** United Nations, S/RES/929, 22 June 1994; available on http://www.un.org/documents/]

Resolution 929 (1994)
Adopted by the Security Council at its 3392nd session
22 June 1994

The Security Council:

Reaffirming all its previous resolutions on the situation in Rwanda, in particular its resolutions 912 (1994) of 21 April 1994, 918 (1994) of 17 May 1994 and 925 (1994) of 8 June 1994, which set out the mandate and force level of the United Nations Assistance Mission for Rwanda (UNAMIR),

Determined to contribute to the resumption of the process of political settlement under the Arusha Peace Agreement and encouraging the Secretary-General and his Special Representative for Rwanda to continue and redouble their efforts at the national, regional and international levels to promote these objectives, [...]

Noting the offer by Member States to cooperate with the Secretary-General towards the fulfilment of the objectives of the United Nations in Rwanda (S/1994/734), and stressing the strictly humanitarian character of this operation which shall be conducted in an impartial and neutral fashion, and shall not constitute an interposition force between the parties, [...]

Deeply concerned by the continuation of systematic and widespread killings of the civilian population in Rwanda, [...]

Recognizing that the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community,

Determining that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region,

1. *Welcomes* the Secretary-General's letter dated 19 June 1994 (S/1994/728) and agrees that a multinational operation may be set up for humanitarian purposes in Rwanda until UNAMIR is brought up to the necessary strength;
2. *Welcomes* also the offer by Member States (S/1994/734) to cooperate with the Secretary-General in order to achieve the objectives of the United Nations in Rwanda through the establishment of a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, on the understanding that the costs of implementing the offer will be borne by the Member States concerned;
3. *Acting* under Chapter VII of the Charter of the United Nations,

   authorizes the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in subparagraphs 4 (a) and (b) of resolution 925 (1994); [...]

[N.B.: These subparagraphs read as follows:

"(a) Contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas; and

(b) Provide security and support for the distribution of relief supplies and humanitarian relief operations;".]

9. *Demands* that all parties to the conflict and others concerned immediately bring to an end all killings of civilian populations in areas under their control and allow Member States cooperating with the Secretary-General to implement fully the mission set forth in paragraph 3 above; [...]

2) ICRC, Memorandum of June 1994

[**Source:** *Mémorandum sur le respect du droit international humanitaire*, ICRC, Geneva, 23 June 1994. Original: French, unofficial translation.]

Since the events of 6 April 1994, Rwanda has experienced an unleashing of violence and a humanitarian disaster that are without precedent in recent history and that are characterized by the systematic extermination of a large portion of the population. At the same time, the conflict between government forces and the Rwanda Patriotic Front (RPF) has resumed and has not ceased to escalate, also taking its toll in terms of victims, suffering and destruction.

In accordance with the terms of United Nations Security Council Resolution 929, member States were authorized to send armed troops to Rwanda with the option, in certain circumstances, of using force.

As the promoter and guardian of international humanitarian law, the International Committee of the Red Cross (ICRC) would like to draw attention to the following points. Any armed hostilities between foreign troops and armed forces or groups opposing them and the direct consequences thereof are governed by the principles and rules of international humanitarian law as contained, in particular, in the four Geneva Conventions of 1949 and in customary law relative to the conduct of military operations, reaffirmed in Articles 35 to 42 and 48 to 58 of Protocol I of 1977 additional to the Geneva Conventions.

All parties concerned must take the necessary steps to respect and ensure respect for international humanitarian law, especially:

I. PROTECTION OF PERSONS NOT - OR NO LONGER - TAKING PART IN THE HOSTILITIES

Persons who are not, or no longer, taking part in the hostilities, such as the wounded, the sick, prisoners and civilians, must be protected and spared in all circumstances:

- All the wounded and sick must be collected and cared for, without any distinction, in accordance with the basic provisions of the First and Fourth Geneva Conventions;
- Civilians who refrain from acts of hostility must be spared and treated humanely; in particular, attacks on their life, their physical integrity or

their personal dignity, hostage-taking and the passing of sentences without a fair trial are prohibited;
- Combatants and other persons taken captive and those who have laid down their arms are entitled to the same protection; they must be handed over to the immediately superior military officer and, in particular, must not be killed or ill-treated;
- Combatants and civilians who have been captured must also be treated humanely and in accordance with the provisions of the Third and Fourth Geneva Conventions respectively:
  - In particular, they must be detained in places where their security is ensured and which offer satisfactory material conditions with regard to hygiene, food and shelter:
  - Any form of torture or ill-treatment is strictly prohibited;
  - The right to receive ICRC visits must be respected and upheld.

II. CONDUCT OF MILITARY OPERATIONS

The armed forces do not have an unlimited right as to the choice of methods and means of warfare; a clear distinction must be made, in all circumstances, between, on the one hand, civilian objects and civilians who are not taking part in the hostilities and who refrain from acts of violence and, on the other, combatants and military objectives:

- Attacks against civilian persons or objects are prohibited;
- All feasible precautions must be taken to avoid injury to civilians, loss of civilian life and damage to civilian objects; in particular, civilians must be kept out of danger resulting from military operations and their evacuation must be organized or facilitated when security conditions so require and permit;
- Attacks that strike military objectives and civilians without distinction are prohibited, as are those that may be expected to cause incidental loss of life among the civilian population or damage to civilian property which would be excessive in relation to the concrete and direct military advantage anticipated;
- It is prohibited to use weapons or methods of warfare that cause unnecessary suffering to persons placed *hors de combat* or that render their death inevitable; it is prohibited to give orders to leave no survivors;
- Goods indispensable to the survival of the civilian population, such as food, crops, cattle and drinking water installations and supplies, must not be attacked, destroyed or put out of operation.

III. RESPECT FOR THE EMBLEM OF THE RED CROSS AND MEDICAL ACTIVITIES

Medical or religious staff, ambulances, hospitals and other medical units and means of medical transport must be protected and respected; the emblem of the red cross, which is the symbol of that protection, must be respected in all circumstances:

- The freedom of movement needed by all Red Cross staff and medical staff called upon to assist the civilian population and persons who are *hors de combat* must be ensured and the safety of that personnel guaranteed;
- Any misuse of the emblem of the red cross is prohibited and will be punished.

IV. RELIEF OPERATIONS

Relief operations for the civilian population that are solely humanitarian, impartial and non-discriminatory in nature must be facilitated and respected. The staff, vehicles and premises of relief agencies must be protected.

V. DISSEMINATION OF INTERNATIONAL HUMANITARIAN LAW

The parties concerned must ensure that all military and paramilitary forces and other militias acting under their responsibility know their obligations under international humanitarian law. It is essential that appropriate instructions to ensure respect for those obligations be issued repeatedly.

VI. ROLE OF THE ICRC

The ICRC, whose principal mandate is to protect and assist the victims of armed conflicts, stresses its desire to help ensure, in agreement with the parties concerned and insofar as its means allow, respect for the humanitarian rules and to carry out the tasks conferred upon it by international humanitarian law.

Geneva, 23 June 1994

D. UN 1997 Report on the Issue of Refugees

[**Source:** United Nations, E/CN.4/1997/61, 20 January 1997; available on http://www.unhchr.ch]

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994 [...]

III. THE PROBLEM OF THE RETURN OF REFUGEES

133. A durable solution to the problem of the return of Rwandan refugees, an ongoing concern of the international community, has eluded UNHCR, the OAU and the States of the Great Lakes region, despite the considerable efforts that they have made. The Rwandan refugee crisis has become increasingly more complicated and has degenerated into an armed conflict that threatens the security and stability of the Great Lakes region and involves the risk of causing an "implosion".

134. The truth is that the continued presence of Rwandan refugees in neighbouring countries has put all of UNHCR's strategies to the test and has created what is called the "eastern Zaire crisis". [...]

B. Failure of the strategies of the Office of the United Nations High Commissioner for Refugees

150. After the failure of two diplomatic attempts to settle the Rwandan refugee crisis at the Cairo (29-30 November 1995) and Tunis (18-19 March 1996) Conferences, organized under the auspices of the Carter Center in Atlanta, UNHCR adopted two sets of strategies. The first, which was to be selective, ended in failure and the second, which was new and was based on a comprehensive approach, also did not survive the crisis in Zaire.

1. The "selective" strategies

151. In order to deal with the obstruction of the Rwandan refugees' return, which was caused primarily by acts of intimidation in the camps, UNHCR adopted measures at the end of 1995, in cooperation with the host countries concerned, that turned out to be inadequate. Some were aimed directly at the intimidators, while others were designed to promote repatriation.

(a) Measures aimed at the intimidators

152. These measures were designed to separate the intimidators from the other refugees in order to enable the latter to decide freely whether or not they wanted to return to Rwanda.

153. Intimidators are refugees in the camps who spread propaganda for the non-return of refugees and/or exert physical or psychological pressure on them to force them to give up the idea of returning to Rwanda. The intimidators come mainly from the ranks of former FAR and militia members and persons linked to the former regime. According to an Amnesty International report (AFR/EFAI/2 January 1996), the intimidators operate mainly by means of tracts. One tract, distributed in the Mugunga camp in September 1995 and translated from Kinyarwanda, stated:

> "Of all those that UNHCR repatriated, not one is still alive ... The Tutsi have taken over the Hutus' belongings and those who dare speak out are massacred mercilessly ... UNHCR wants to repatriate the refugees as it usually does, illegally, knowing full well that they will be killed. Dear brother, we know you have problems, but suicide is no solution. Candidates for death can go home. They have been warned."

154. At the Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region held in Nairobi on 7 January 1995, it was decided that persons suspected of genocide and intimidators should be separated from genuine refugees. That strategy was integrated into the Plan of Action adopted by the Bujumbura Regional Conference on Refugees and Displaced Persons in the Great Lakes Region, held in February 1995. On the spot, however, it turned out to be difficult, if

not impossible, to identify the persons covered by these categories. Moreover, even if it had been possible to identify them, their separation or removal from the camps would have been dangerous. Thus, when the Zairian authorities arrested 12 refugees regarded as intimidators in the Mugunga camp on the basis of a list drawn up and provided by UNHCR, the refugees in the camp became aggressive towards UNHCR officials, going as far as to threaten them during the attempted census they had wanted to conduct.

155. The planned measures against the intimidators generally did not yield the expected results. Only a few dozen intimidators were arrested out of the tens of thousands operating in the camps. From mid-December 1995, when the implementation of these measures began in Zaire, until May 1996, UNHCR reported the arrests of 34 intimidators. The number was hardly more than 41 in September 1996, according to the latest report of the Special Rapporteur for Zaire (E/CN.4/1997/6/Add.1[available on http://www.unhchr.ch]). The failure of the strategy of removing the intimidators from the camps forced UNHCR to consider other measures to encourage the repatriation of Rwandan refugees.

(b) Measure to encourage repatriation

156. These measures, which relate mainly to information campaigns for repatriation, are either incentives or deterrents.

(i) Incentives

157. As part of its policy to encourage the voluntary repatriation of Rwandan refugees, UNHCR set up video information centres in March 1996 containing information on possibilities of assistance for returning to Rwanda. A document prepared by the UNHCR Public Information Section goes into considerable detail about the possibilities available to the refugees: "Five centres - named Ogata, Mandela, Nyerere, Martin Luther King and Gandhi - were inaugurated at Kibumba camp in the Goma region. Each of the centres - tarpaulin over wooden frames built for 300-400 people - is equipped with televideos, radios and public address systems. The project involves plans for 16 such centres in the Goma camps and others in the Bukavu and Uvira regions. On the whole, the films shown about life in several prefectures in Rwanda have been well received by the refugees, who come from these prefectures".

158. It must, however, be recognized that the strategy of visits organized by UNHCR in and to the camps has not yielded the expected results. Mistakes have sometimes been made that have not made UNHCR's task any easier. For example, one of the two refugees taken to Rwanda by UNHCR to check out the situation was arrested in May 1996, as soon as he arrived in his home commune, on charges of having taken part in the genocide. Such an incident could only have had a negative impact on the programme of incentives to return. Following this new failure, UNHCR undertook to implement deterrent measures.

(ii) Deterrent measures

159. These measures are intended to set up obstacles to the ongoing presence of refugees in the camps. As is known, most of the refugees have set up survival structures which are both commercial (restaurants, shops, transport, etc.) and social (schools, dispensaries, etc.). Some of these activities offer obvious advantages, if only because they reduce food and financial dependence and eliminate idleness, which leads to crime. However, as these activities prosper, they encourage the refugees to stay in the camps instead of returning to Rwanda. In order to remedy this situation, UNHCR undertook to dismantle these structures and decided to close the schools and shops operating in the camps. It also decided to reduce the daily food ration given to each refugee, lowering it from 2,000 to 1,500 calories.

160. These measures were not well received by the refugees and by a number of humanitarian organizations. The former denounced them, particularly through the Rassemblement pour le retour des réfugiés et la démocratie au Rwanda (Union for the Return of Refugees and Democracy to Rwanda) (RDR), calling them "disguised forced repatriation". The latter considered that these measures were serious violations of some fundamental human rights, particularly the right of children, including refugee children, to education. [...]

2. The comprehensive strategy

161. The new strategy, intended to be both comprehensive and integrated, was adopted at a meeting of the UNHCR Executive Committee on 11 October 1996. It proposes four sets of measures: concerted measures aimed at dealing with the present situation; measures applicable to each individual country; measures to be taken jointly with the International Tribunal for Rwanda; and measures to be applied by the international community.

(a) Measures to be applied in an integrated manner

162. These measures comprise four main elements:

(a) UNHCR encourages the selective and progressive closure of the camps for the Rwandan refugees and active assistance in their repatriation. These measures must be implemented in conjunction with the exclusion clause applicable to intimidators and other leaders in the camps;

(b) UNHCR is to assist the Governments of the host States in determining on a case-by-case basis the status of persons not wishing to return to Rwanda. In doing so, they will automatically exclude asylum for persons sought by the International Tribunal against whom there is sufficient evidence of participation in the genocide. Such persons will have to be transferred to other locations for interrogation;

(c) Those persons losing their refugee status will cease to enjoy the international protection of UNHCR;

(d) In accordance with the Bujumbura Integrated Plan of Action, the above measures should be applied through close cooperation between the country of origin, the host countries and the international community.

(b) Measures to be applied in each of the countries concerned

163. These measures concern the country of origin, Rwanda, and the two host countries, the United Republic of Tanzania and Zaire.

(i) Rwanda

164. The Rwandan Government is to: (a) continue to promote the repatriation and resettlement of the refugees, in particular through an appropriate information campaign and the implementation of measures to reassure the refugees, in conformity with the Arusha Accord; (b) ensure the prosecution of persons suspected of genocide, under the Genocide Act, in order to break with the tradition of impunity; and (c) continue to cooperate with the Human Rights Operation in Rwanda, whose presence must be reinforced.

165. For the large-scale return of the refugees, food stocks will have to be constituted with UNHCR assistance. Furthermore, UNHCR will have to: (a) draw the attention of the authorities to real-estate and land ownership disputes; and (b) in agreement with the donor community, give emphasis to aid for the returnees, including specific projects for vulnerable groups. This will apply particularly to women, for whom a comprehensive programme entitled "Initiative for Rwandan women" is due to start in 1997. This programme aims at promoting the economic power of women, strengthening social structures in the post-genocide society and facilitating the process of national reconciliation within the country.

(ii) United Republic of Tanzania

166. The Tanzanian Government is requested to: (a) initiate, with UNHCR assistance, the process of case-by-case consideration of requests from candidates for asylum, excluding those persons against who there is sufficient evidence of participation in genocide. A recently created separation camp will be available for this purpose; (b) tighten security around the camps because of the risks involved in such an exercise; and (c) afford protection to innocent persons with good reasons for not returning to Rwanda, not with a view to their integration, but for their eventual repatriation.

167. UNHCR, for its part, is committed to acting in concert with the international community to assist the United Republic of Tanzania in the rehabilitation of the environment and infrastructure destroyed by the presence of refugees in the part of its territory concerned.

(iii) Zaire

168. The Government of Zaire and UNHCR are requested to:

(a) Proceed with the selective and gradual closure of the camps. Those persons wishing to return to Rwanda will be given logistical support for

their return and reintegration; the others will have to be separated from them by a screening process, after which those eligible for international protection will continue to be protected by the Government, without this in any way entailing their local integration;

(b) Considering the dangers involved in implementing this strategy, provision has been made for a number of accompanying measures: the Government of Zaire is to increase and strengthen the Zairian contingent, initially set at a maximum of 2,500 soldiers, for security in the camps. International aid will be provided to expand the contingent and ensure its training and supervision. There will have to be a proportional number of international security advisers, with specific commitments from the Governments concerned;

(c) Interested Governments - with UNHCR assistance - should agree with the Zairian authorities on specific measures to deal with cases of the manipulation of the refugees by intimidators (for example, violent sabotage of census operations) and to ensure that aid is not diverted to former FAR members still militarily active in North Kivu and South Kivu. With the assistance of the international community, the Government of Zaire must be called upon to dissolve the so-called "banana plantation" headquarters of the former FAR members and dismantle its military facilities. Zaire will cooperate fully with the International Tribunal;

(d) UNHCR must immediately inform the refugees in the camps located in Zaire that violent sabotage of its recent attempt to count the refugee population is an intolerable affront to its mandate, confirming the bad faith of the camp leaders. A broad information campaign will have to be directed towards making the refugees aware of the fact that the blockage created by those leaders had led to a situation where food aid would be strictly controlled and reduced, especially to prevent it from being diverted. This measure will be linked stepwise to the gradual closure of the camps. UNHCR, with strong support from Governments, must seek the full cooperation of the Zairian Government in this regard;

(e) In order to respect the fundamental right of all children to education and to solve the problem of repatriation, the Government of Zaire will have to reopen primary schools for the refugee children and provide the means to protect them against manipulation and delinquency.

169. The Tripartite Commission (Rwanda/Zaire/UNHCR) will have to ensure greater coordination in the operation to close the camps. Lastly, in cooperation with donors and partners, UNHCR must endeavour to increase the assistance now being provided for the rehabilitation of the environment and infrastructure destroyed by the presence of the refugees in Zaire.

(c) Measures to be applied in cooperation with the International Tribunal

170. Together with the procedures to identify persons subject to the exclusion clause, every effort will have to be made to secure full support for reinforcing the activities of the International Tribunal to investigate and search for suspects.

171. In agreement with the Tribunal, UNHCR will determine the modalities for strengthening their cooperation. Governments have a central role to play in implementing the procedures aimed at separating and excluding persons suspected of genocide from international protection and bringing them before the Tribunal.

(d) Measures to be taken by the international community

172. The close link between the refugee crisis and peace in the Great Lakes region means that its problems have to be solved through the adoption of an integrated strategy encompassing the security, judicial, political and humanitarian dimensions. UNHCR intends to continue its close cooperation with the United Nations and the Organization of African Unity in this area. In addition to the financial aid expected from them, Governments must be requested to increase their assistance to Rwanda with a view to creating conditions of security there (for example, assistance in the administration of justice) and to provide incentives for the refugees to return. Governments will have to maintain a balance between the aid granted to refugees and assistance for the survivors of the genocide. They will have to bear in mind the major objective of national reconciliation.

173. Governments will also have to be requested to extend their full support to Rwanda, the United Republic of Tanzania and Zaire in the implementation of the measures described above and to take all necessary steps to deal with present tensions. They are invited to take care of the damage caused by the refugees to the environment and infrastructures in those three countries.

174. UNHCR had not yet begun implementing that ambitious programme when the crisis erupted in eastern Zaire. [...]

E. International Repression: the ICTR

[*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154; **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. p. 2171; **Case No. 201**, ICTR, The Media Case. p. 2194. *See also* generally the ICTR website, www.ictr.org]

[**Source:** International Crisis Group, *Rwanda Tribunal: The Countdown*, Press Release, Nairobi-Brussels, 1 August 2002; available on http://www.crisisweb.org]

Rwanda Tribunal: The Countdown Delays and Rwandan obstruction threaten ICTR independence and credibility

Nairobi/Brussels, 1 August 2002: The International Criminal Tribunal for Rwanda (ICTR) is about half way through its mandate, but at the current rate it has no chance of completing its work by the finishing date of 2008.

A new ICG report, The International Criminal Tribunal for Rwanda: The Countdown, [available on http://www.crisisweb.org] says that there are two main factors affecting the ability of the court to complete its work: the overly ambitious prosecution schedule and the lack of effective efforts to reform the Tribunal's processes and speed up hearings.

Five cases of utmost importance are still waiting to be heard - one dealing with the media, two involving the military including an alleged mastermind of the genocide, Theoneste Bagosora, and two involving former ministers and political party leaders. These trials are crucial to revealing important truths about the preparation, launch and execution of the Rwandan genocide in 1994. The media case is the only one that is actually underway. [*See* **Case No. 201**, ICTR, The Media Case. p. 2194.]

ICG Africa Program Co-Director Fabienne Hara said: "It is vital that the Tribunal rationalises the number of cases before it, concentrates on its core mandate, and implements reforms to speed up hearings. Without this, confusion and obstruction threaten the Tribunal's mission and will reduce its impact on the political reconstruction of Rwanda and the region to zero".

A crisis has also developed between the Tribunal and the government of Rwanda over investigations into crimes allegedly committed by members of the Rwandan Patriotic Army (RPA) in 1994. Authorities in Kigali have blocked all assistance to the ICTR in breach of their international obligations and have demanded the investigations be dropped. This tension is only likely to get worse and it is vital that the UN Security Council gives strong and unambiguous support to ensure the ICTR's credibility and independence. The Tribunal must not be seen as an instrument of victors' justice.

ICG Central Africa Program Director Francois Grignon said: "In this context it is unfortunate that the Security Council delegation did not visit the Tribunal in its annual trips to Central Africa in 2001 and 2002. This sends a dangerous signal of disinterest to Rwanda about the mission of the UN Tribunal and its role in ending the crises in Congo and in Burundi".

In the Congo war, the Rwandan government has long demanded the arrest of *génocidaires* on Congolese territory, so it is paradoxical that just as the DRC government agreed to open an office to assist ICTR investigations in Kinshasa, the Rwandan government is paralysing the work of the Tribunal. Both Kinshasa and Kigali have toyed with international justice. The only way to end this is to ensure that the Tribunal is reformed and credible - and to demand that both states respect their international obligations towards it.

F. National repression in Rwanda

1) The *Gacaca*: gambling with justice

[**Source:** Amnesty International, *Rwanda: Gacaca - gambling with justice*, Press Release 103/02, AI Index: AFR 47/003/2002, 19 June 2002; available on http://www.efai.org]

Rwanda: *Gacaca* - gambling with justice
Press Release 103/02
AI Index: AFR 47/003/2002- 19 June 2002

"*The gacaca system of community tribunals may represent an opportunity for genocide survivors, defendants and witnesses to present their cases in an open and participatory environment. This could be an important step towards national reconciliation and resolving Rwanda's prison crisis*," Amnesty International said today, in reaction to Rwanda's inauguration of a new community-based tribunal system designed to address the backlog of cases from the 1994 genocide.

"*However, the extrajudicial nature of gacaca and the inadequate preparation for its start, coupled with the present government's intolerance of dissent and unwillingness to address its own poor human rights record, risk subverting the new system," the organization added. "It is therefore imperative that both the Rwandese government and the international community take steps to ensure that gacaca complies with minimum international standards of fair trial.*"

The huge number of detainees charged with genocide-related offences has proved an impossible task for the country's formal judicial system. The new system, loosely based on a traditional mode of settling disagreements within local communities, will try tens of thousands of detainees accused of offences in categories 2, 3 and 4 of Rwanda's genocide legislation.

While Amnesty International sees the pressing need to bring to justice people accused of participation in the genocide, the organization fears that if key shortcomings in *gacaca* are not promptly addressed, the new system will fail to provide the justice, truth or reconciliation promised by the Rwandese government. "*Gacaca* may become a vehicle for summary and arbitrary justice that fails defendants and genocide survivors alike," it added.

Rwandese government leaders readily admit that *gacaca* is flawed but argue that there is no alternative. The international donor community, which is funding *gacaca*, has largely concurred with this assessment.

Amnesty International is principally concerned with the extrajudicial nature of the *gacaca* tribunals. The *gacaca* legislation does not incorporate international standards of fair trial. Defendants appearing before the tribunals are not afforded applicable judicial guarantees so as to ensure that the proceedings are fair, even though some could face maximum sentences of life imprisonment.

For the most part, those who will serve as *gacaca* magistrates have no legal or human rights background. The abbreviated training they have received is grossly inadequate to the task at hand, given the complex nature and context of the crimes committed during the genocide.

Amnesty International also questions whether there will be an open and free flow of information during the hearings, whether all parties will be heard impartially, and whether the presumption of innocence until proven guilty will be respected. Pre-*gacaca* trial sessions observed by Amnesty International delegates in 2001 were marked by intimidation and haranguing by officials of defendants, defence witnesses and local populations.

The recent human rights record of the Rwandese government is characterized by the denial of freedom of expression and association, arbitrary arrests, illegal detentions and other violations of human rights. "The Rwandese government's unwillingness to curb ongoing human rights violations, or investigate past abuses by its own state agents undermines the credibility of its pronouncements on the need for accountability, truth-telling and justice in relation to *gacaca*."

Implementing *gacaca* also entails huge logistical problems. Tens of thousands of detainees will have to be transferred from central prisons to their home communities for the *gacaca* hearings. The Rwandese government has not clarified how and in what conditions the detainees will be transported, accommodated, fed and treated at the local level. The government's failure to address these issues could deepen the cruel and inhumane conditions faced by Rwanda's prison population.

Recommendations

There is room for the Rwandese government and the international community to improve gacaca and establish accountability for all past and ongoing human rights abuses in Rwanda. For this to be achieved, the Rwandese government must:

- ensure that *gacaca* complies with internationally recognized fair trial standards, including the presumption of innocence and the right to adequate time and facilities to prepare a defence;
- ensure that *gacaca* defendants, especially those facing long terms of imprisonment, have the right to appeal to the formal court system;
- ensure that defendants are present when the *gacaca* magistrates categorize their offences;
- put in place an independent and effective program of monitoring the *gacaca* hearings, with the findings made public;
- provide adequate protection to magistrates, defendants and witnesses and promptly investigate any allegations of intimidation;
- provide assurances that conditions of detention will respect international minimum standards, including the right to human conditions of detention and freedom from torture; and
- open investigations into human rights violations committed by their own forces before and since coming to power.

Amnesty International is also calling on the international community to support the Rwandese government in establishing a monitoring program for gacaca, ensuring that it is independent, effective and transparent; to ensure that the Rwandese authorities take prompt action to address violations of fair trial standards arising during *gacaca*; and to provide all necessary support to enable the Rwandese government to meet its obligations under international standards regarding conditions of detention.

Background

As many as one million Rwandese were brutally killed by their fellow Rwandese during the 1994 genocide and its aftermath. These killings were accompanied by numerous acts of torture, including rape.

The *gacaca* system will try detainees accused of offences in categories 2 through 4 of Rwanda's genocide legislation. Category 2 includes alleged perpetrators of or accomplices to intentional homicides or serious assaults that led to death. Category 2 defendants who do not confess face maximum terms of imprisonment of between 25 years and life if convicted. Category 3 contains persons accused of other serious assaults against individuals. Category 4 covers persons who committed property crimes. Category 1 relates to the most serious genocide offences and includes individuals who allegedly organized, instigated, led or took a particularly zealous role in the violence. Category 1 defendants will continue to be tried by the formal court system.

The burdens faced by the post-genocide judicial system in Rwanda have proved insurmountable. Rwanda's special genocide chambers have tried less than six percent of those detained for suspected genocide offences. There are now approximately 110,000 Rwandese in the country's detention facilities, the vast majority of them still awaiting trial. Many were arbitrarily arrested and have been unlawfully held for years with minimal or no investigation of the accusations lodged against them. The overcrowding and unsanitary conditions within detention facilities amount to cruel, inhuman and degrading treatment with deaths resulting from preventable diseases, malnutrition and the debilitating effects of overcrowding.

Legislation establishing the *gacaca* tribunals was enacted in early 2001. In late 2001, 260,000 adults of "integrity, honesty and good conduct" were selected by local communities to serve as magistrates on the more than 10,000 *gacaca* tribunals. These magistrates received limited training in early 2002.

2) The issues of detention

[**Source:** ICRC, ICRC News 01/13, 5 April 2001, available on http://www.icrc.org/eng/]

Rwanda: Emergency aid in Rilima Prison

Over the last few days, the ICRC has stepped up its aid to Rilima prison, situated in the region of Bugesera, south-east Rwanda. The majority of the 7,400 inmates are being held awaiting trial, but deteriorating hygiene has killed dozens over the last few months. Poor detention conditions and lack of food are accentuating the effects of malaria (endemic in the region), typhus (diagnosis still to be confirmed) and diarrhoea.

A week ago, the ICRC initiated measures to increase the amount of water available at the prison, repairing a pump and installing additional storage tanks. The organization is currently arranging treatment for dozens of the most severely ill detainees, having already supplied the necessary medicines. The ICRC is also ready to assist the Rwandan authorities in fully disinfecting the prison, for which the materials required will be available in a few days. The health and interior ministries have been briefed on the seriousness of the situation in this prison.

The ICRC lacks the means to take over from the Rwandan authorities, and nor does it wish to do so; it is the authorities who are responsible for detainee health and prison hygiene in their country. The ICRC is encouraging the bodies responsible to devote the attention and resources to this problem that it requires, while fully aware that the Rwandan population at large does not necessarily live under hygienic conditions or have access to health care.

The ICRC delegation is maintaining contact with the Rwandan authorities, both locally and at the highest level, in an effort to improve the functioning of the bodies responsible for Rilima prison and all other places of detention in Rwanda. The aim is that preventive measures taken by the government should prevent any recurrence of a similar emergency in the coming months.

The ICRC makes regular visits to places of detention in Rwanda, meeting over half the food requirements of 92,000 detainees spread over 19 central prisons.

Rwanda is currently trying to deal with the problem of holding 115,000 detainees, most of them accused of involvement in the genocide of April to July 1994. Some 20,000 are being held in village lockups, of which three-quarters are in the provinces of Gitarama and Butare.

DISCUSSION

1. How do you distinguish genocide from other crimes? What is the difference between an act of genocide and a serious violation of International Humanitarian Law (IHL)? Between genocide and a crime against humanity? Do massacres carried out for political reasons come under the term genocide? (*See also* **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* B., Trial Chamber, Merits, paras. 618-654 and C., Appeals Chamber, Merits, paras. 238-249 and 271-304.] p. 1804; **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A., Trial Chamber, paras. 492-523.] p. 2171.)

2. How does IHL address acts of genocide? Are the provisions which deal with that term applicable no matter what the context? Legally? In practice? Is IHL applicable in situations that are not armed conflicts? What are the deficiencies in IHL when confronted by a situation of genocide? (*Cf.* for example Arts. 12 (2) and 50 of Convention I; Arts. 12 (2) and 51 of Convention II; Arts. 13 and 130 of Convention III; Arts. 32 and 147 of Convention IV and Art. 85 (2) of Protocol I.)

3. Who can be internationally held responsible for the genocide? The Rwandan State? Even if today, the Rwandan authorities are mainly made up of Tutsis? The whole international community? The United Nations? Specific third States (France, Belgium, the United States)? May the leaders of these States and of the United Nations be prosecuted for their inaction before the genocide, as they were aware of its preparation? For their inaction during the genocide? (*Cf.* **Case No. 15**, The International Criminal Court. [*Cf.* A., The Statute, Arts. 6 and 30.] p. 608.)

4. a. In what case is the UN obliged to intervene in a non-international armed conflict?
   b. Does Art. 1 common to the Geneva Conventions and Protocol I oblige States Parties to intervene militarily in a conflict in order to "ensure respect for IHL"? May it authorise such intervention? Does it oblige States Parties to try to obtain the necessary mandate to intervene from the Security Council?

5. How do you balance reacting to serious violations of human rights and respect of State sovereignty?

6. How is IHL applicable to UN forces? To foreign forces intervening in accordance with a Security Council resolution? (*See* **Document No. 42**, UN, Guidelines for UN Forces. p. 861 and **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696.)

7. Could the intervention of these forces be seen as a means for implementing IHL?

8. Is it possible to make a clear distinction between the role these forces can have on the one hand in resolving a conflict and on the other hand in protecting humanitarian assistance?

9. a. How do the Conventions and their Additional Protocols protect refugees present in an area where hostilities erupt? Are the provisions the same in the context of international armed conflict and non-international armed conflict? What are the consequences of and reasons for the lack of reference to refugees in IHL relating to non-international armed conflicts? (*Cf.* Art. 3 common to the Conventions; Art. 70 (2) of Convention IV; Art. 73 of Protocol I; See also the 1951 Convention Relating to the Status of Refugees, available on http://www.unhcr.ch and **Document No. 17**, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. p. 639.)

   b. Putting aside the classification of the conflict, what is the status of a refugee in an area where hostilities break out between the State from which he is fleeing and the State in which he has taken refuge? (*Cf.* Art. 73 of Protocol I.)

10. a. Do the measures to conduct forced repatriation taken by the UNHCR with respect to the Rwandan refugees contravene Art. 45 of Convention IV?

   b. Moreover, should the repatriation of refugees be accompanied simultaneously by guarantees of adequate security and genuine reception facilities in their country of origin? Does the international community have an important role to play at that level?

11. a. May an armed combatant enjoy refugee status? And the protection of IHL? Can an unarmed member of the former Rwandan Armed Forces who took part in the genocide of the Tutsis enjoy refugee status? And the protection of IHL? (*Cf.* Arts. 3, 4 and 5 of Convention IV; 1951 Convention Relating to the Status of Refugees, Art. 1. F (a) and Art. 32 (1), available on http://www.unhcr.ch)

   b. Is the responsibility for separating the armed individuals from unarmed refugees incumbent upon the HCR? The international community? The country of origin? The country of refuge? The ICRC? On which bases?

   c. On which bases could armed refugees be prosecuted for offences committed inside the camps themselves?

   d. Does the principle of "non-refoulement" also apply to armed refugees? And to those presumed to have committed the genocide in Rwanda in 1994? (*Cf.* 1951 Convention Relating to the Status of Refugees, Art. 33 (1), available on http://www.unhcr.ch)

12. a. With respect to those refugees suspected of having committed war crimes during the genocide in Rwanda, should a distinction be made between those who have supposedly laid down their arms and those who have not?

Between those who are said to have committed war crimes, crimes against humanity, ordinary law crimes, and those who are simply former combatants?

b. In accordance with your reply, when may a refugee be considered as having committed crimes? Is it sufficient that he belonged to the armed forces which committed the crime? Or that he still belongs to those armed forces?

13. May a humanitarian organisation also feed those guilty of genocide? Even if they have not laid down their arms? Does such an organisation lose its status as a humanitarian organisation if it feeds those guilty of genocide? What if that is the only way to feed innocent refugees?

14. What rules of international law are contravened by a State which supplies arms to armed refugees? And, in particular, if the recipient belonged to an armed group which has committed the crime of genocide?

15. Does Rwanda have an obligation to prosecute the perpetrators of the genocide which occurred in its territory? According to the 1948 Convention on genocide? According to the Conventions and their Protocols? (*Cf.* Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, available on http://www.unhchr.ch; Arts. 49/50/129/146 respectively of the four Conventions and Art. 85 (1) of Protocol I.)

16. Why does Protocol II contain no provisions criminalizing actions in the context of non-international armed conflicts? Does Protocol II, on the contrary, impel the authorities in power to grant the perpetrators impunity when it calls on them "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"? (*Cf.* Art. 6 (5) Protocol II.)

17. Does universal jurisdiction exist to prosecute those responsible? Can it be exercised within the context both of international armed conflict and non-international armed conflicts? In regard to the perpetrators of genocide, is the 1948 Convention on Genocide explicit on this matter?

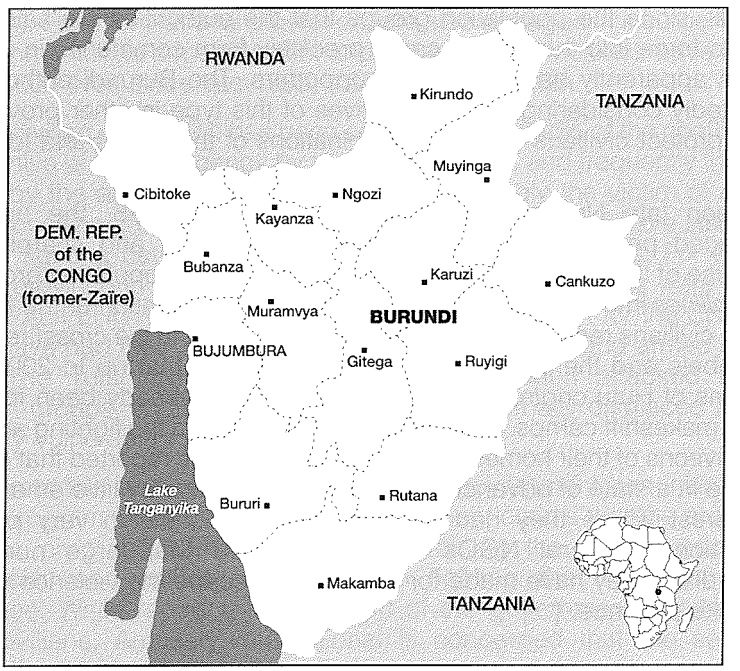
18. a. Are the prison conditions described above compatible with IHL? May those who have committed serious breaches of IHL invoke the guarantees relating to treatment contained in IHL? (*Cf.* Art. 146 (4) of Convention IV; Art. 75 of Protocol I; Arts. 2 (2), 4 and 5 of Protocol II.)

b. Does the *Gacaca* system appear to respect minimum guarantees relating to the institution of independent and impartial criminal proceedings? How can the lack of judicial guarantees in the Rwandan legal system be redressed while simultaneously accelerating the completion of criminal proceedings?

c. How could the international community mobilise in order to put an end to this deplorable situation?

19. Could the ICTR take charge of the criminal proceedings of some of the 110,000 accused in Rwandan prisons? How ? Why does international justice only consider the cases of individuals who planned and prepared or perpetrated genocide? Is the ICTR only charged with judging perpetrators of genocide? Does it also have jurisdiction to judge crimes committed during the armed conflict between the former government of Rwanda and the RPF?

2. Civil war in Burundi



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

A. Phenomenon of "Villagisation" in Burundi

[**Source:** United Nations, E/CN.4/1997/12, 10 February 1997; available on http://www.unhchr.ch]

Second report on the human rights situation in Burundi submitted by the Special Rapporteur, Mr. Paulo Sérgio Pinheiro, in accordance with Commission resolution 1996/1

II. OBSERVATIONS ON THE HUMAN RIGHTS SITUATION [...]

C. Obstacles to the right to freedom of movement and freedom to choose one's residence [...]

56. [...] [A]larming is the policy of forcibly herding people into camps; this is being done by the *de facto* Government in several provinces with the self-confessed aim of keeping tighter control over the population groups and cutting the rebels off from their supply and recruitment bases. During December 1996, a large number of *collines* in the provinces of Karuzi, Bubanza, Cibitoke and Ruyigi have reportedly been emptied of their inhabitants. It is reported that persons refusing to submit to this policy find themselves rapidly accused of complicity with the rebels and treated as enemies. Yet, agreeing to go to the camps set up for them would mean

losing the confidence of the rebels and their supporters. The situation in Karuzi province during the second half of December was particularly difficult, since the population groups that the authorities are said to have tried to force into the camps came precisely from communes in which the rebels apparently had numerous supporters. The Burundi authorities are reportedly considering further initiatives of this type in other provinces, so as to protect civilians from the machinations of the rebels and identify the latter.

57. Between late November and early December 1996, the number of displaced persons in Burundi increased suddenly and sharply, mainly because of the authorities' policy of moving certain population groups from the *collines* into camps and because of the intensification of the fighting in which civilians reportedly found themselves caught in the crossfire between the rebels and the army. Some sources suggest that up to 200,000 Burundians of Hutu origin, or even more, may have already been forced into these makeshift camps. In addition, people flee from the fighting and hide in the environs of their homes. In Rural Bujumbura, it is reported that dozens of people in a state of advanced malnutrition have little by little emerged from the forest where they had been hiding for months in very precarious conditions. Several NGOs have suggested that large numbers of Burundians may have made for Rwanda to escape the violence sweeping Cibitoke province. [...]

B. The Armed Conflict

[**Source:** Amnesty International, *Burundi Insurgency and Counter-Insurgency Perpetuate Human Rights Abuses*, AI Index: AFR 16/034/1998, 19 November 1998; available on http://www.amnesty.org]

I. INTRODUCTION

Between December 1997 and September 1998 hundreds of people - many of them unarmed civilians - were killed in Burundi. Thousands more have been forced to leave their homes and are internally displaced or have fled to neighbouring countries, joining the hundreds of thousands of others who are already in exile or are displaced inside Burundi. Soldiers of the Burundian army have deliberately and arbitrarily killed hundreds of civilians - virtually all of them Hutu. Scores of other killings of unarmed civilians have been committed by members of the various armed opposition groups and other militia active in Burundi. Few of those responsible have been arrested and brought to justice. [...]

II. THE CONTEXT OF ARMED CONFLICT

Since late 1994, the *Forces pour la défense de la démocratie* (FDD), Forces for the Defence of Democracy, the armed wing of the Hutu-dominated *Conseil National pour la défense de la démocratie* (CNDD), National Council for the Defence of Democracy, have been leading an insurgency against the Tutsi-dominated government forces. The armed wings of other Hutu opposition

parties, the *Parti pour la libération du peuple hutu* (PALIPEHUTU), Party for the Liberation of the Hutu People, and the *Front pour la libération nationale* (FROLINA), Front for National Liberation, are also engaged in insurgency against the government. The armed conflict and other political violence have claimed at least 150,000 lives since late 1993, most of them civilian.

The Hutu civilian population has been caught in the middle of the conflict: viewed as supportive of the insurgency by the armed forces, and frequently the victim of reprisals by the armed forces, as well as increasingly the victim of attacks by armed opposition groups. Since the conflict started, civilians have also been the victims of fighting between different armed opposition groups. For example in Bubanza province in July 1997 up to 500 mainly Hutu civilians were reportedly killed by PALIPEHUTU because of their perceived support for the CNDD. Many civilians have had their property looted by both the army and armed opposition groups. The Tutsi civilian population has also been attacked by armed opposition groups, and those in camps for the internally displaced have been particularly vulnerable to abuses. [...]

In addition to the increased conscription, the government has initiated a self-defence program for all civilians. The government claims that the program is to encourage civic responsibility, including training the civilian population to support civil and military authorities in fighting the insurgency through surveillance. While recognizing the right of the government to take steps to protect civilians, Amnesty International is concerned that the self-defence program in itself may lead to further human rights abuses. Although government officials have on several occasions denied that the program involves providing the population with arms, at least in certain areas, including Bujumbura and Bururi Province, the Tutsi civilian population has been trained and armed by the government. In April 1998, the Governor of Rural Bujumbura province admitted that some of the local population had been given guns and grenades. [...]

In addition to the internal armed conflict, the Burundian army and armed opposition groups are also reported to be involved in the armed conflict in the neighbouring Democratic Republic of Congo (DRC) which broke out in August 1998. Although the government of Burundi has repeatedly denied involvement in the conflict, numerous sources in Burundi and in the DRC have reported that Burundian troops participated in the capture of Uvira, Kalemie and other towns in eastern DRC, assisting the Congolese armed opposition group, the *Rassemblement congolais pour la démocratie* (RCD), Congolese Rally for Democracy. The Burundian government is also reported to have lent other support to Rwandese and Ugandan troops, who also support the RCD, including by allowing troops and equipment to transit through Burundi. Amnesty International has received detailed information on hundreds of killings of unarmed civilians, mainly women and children, since the start of the conflict in DRC including by the RCD, the Rwandese security forces and allied groups. [...] The government of Burundi has alleged that Burundian armed opposition groups are involved in the conflict in the DRC, in return for the promise of support by President Laurent Désiré Kabila. [...]

III. HUMAN RIGHTS VIOLATIONS COMMITTED BY THE SECURITY FORCES

Extrajudicial executions and deliberate killings

Large scale killings of unarmed civilians, primarily by government forces, have continued throughout 1998 in violation of international humanitarian law and obligations of the Burundi government under international treaties it has ratified. The killing of persons taking no active part in the conflict in Burundi is in violation of common Article 3 of the 1949 Geneva Conventions which clearly prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" of all non-combatants. By ratifying Protocol II Additional to the Geneva Conventions, the Burundi government has undertaken obligations to respect and protect certain fundamental guarantees during non-international armed conflicts. These guarantees include the right of all persons not taking a direct part or who have ceased to take part in the hostilities to be treated humanely. Protocol II prohibits violence to life, torture and other human rights violations against such persons. In addition, the killings of unarmed civilians is in violation of the guarantee to the right to life enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter), treaties which Burundi voluntarily ratified.

Amnesty International has received numerous reports of killings from the southern provinces of Makamba and Bururi, and from the province of Rural Bujumbura. The majority of killings have taken place in areas of armed conflict, making access to and verification of information particularly difficult. However, several clear patterns emerge.

Most killings by government soldiers of Hutu civilians, appear to take place in reprisal for insurgent activity or killings of soldiers or Tutsi civilians by Hutu-dominated armed opposition groups.

Unarmed civilians have been targeted and killed on the pretext that they were believed to be armed combatants. Scores of unarmed civilians have also been killed because members of the security forces have failed to isolate combatants from civilians. In the majority of cases reported to Amnesty International, it appears that little, if any, attempt is made to make the distinction. They include young children, who were killed individually in circumstances where it was clear that they posed no threat to the lives of soldiers or other civilians.

Scores of other civilians have been killed by government soldiers accusing them of failing to provide information on armed opposition groups, or having in some way protected or colluded with them. In some instances, it appears that soldiers were alerted by the local population to the presence of armed opposition groups but were unable or unwilling to engage in direct combat and resorted instead to reprisal attacks on civilians after the combatants had left.

Other civilians have been extrajudicially executed or have "disappeared" and are presumed to have been killed shortly after their arrest by members of the armed forces.

In the majority of cases, members of the security forces who have committed such killings remain unpunished. (*See* the document Burundi: Justice on Trial (index AFR 16/013/1998) [available on http://www.amnesty.org])

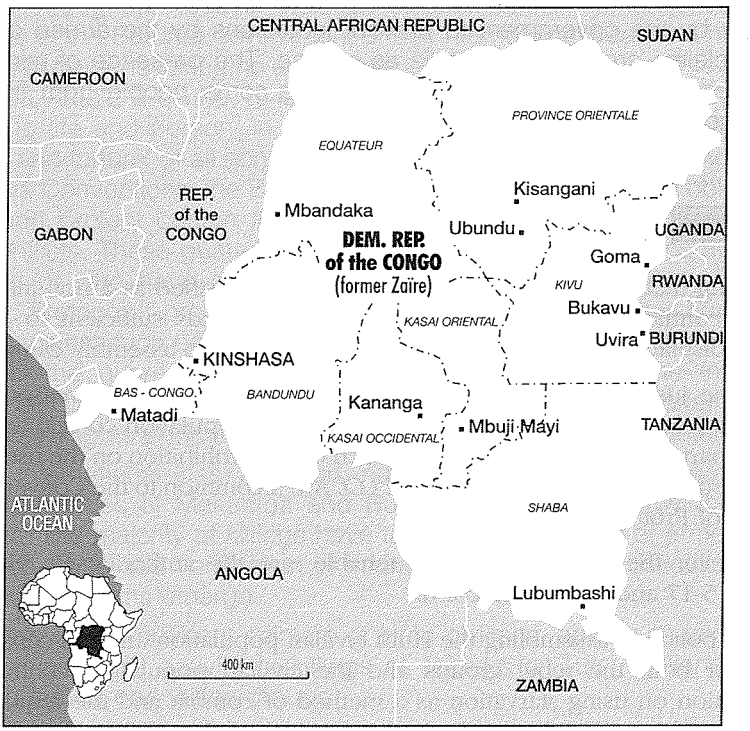
Scores of civilians have also been killed or maimed because of the use of indiscriminate weapons such as anti-personnel mines. Government soldiers and combatants of armed opposition groups have also been killed and injured. All parties to the conflict are reported to have used anti-personnel and/or anti-tank mines. [...] The border between Tanzania and Burundi is now heavily mined apparently by the government to prevent incursions by the armed opposition groups it claims are using Tanzania as a base. The presence of mines in the border area also has the effect of preventing some people from fleeing the country and seeking asylum elsewhere. [...]

DISCUSSION

1. Assuming that the situation in Burundi may be classified as a non-international armed conflict, may the government invoke grounds sufficient to justify the forced displacement of the Hutu civilian population to assembly camps?
2. Does the justification of those actions for imperative military reasons and on grounds relating to the protection of the civilian population constitute an abuse on the part of the authorities and a breach of the prohibition on the use of forced displacement as a method of warfare? (*Cf.* Art. 3 common to the Conventions and Art. 17 of Protocol II.)
3. If however their justifications are tenable, are the authorities in violation of Arts. 4, 5-17 and 18 of Protocol II?
4. Do the policy of assembling the Hutu civilian population and the consequences of it for both the rebel groups and the civilian population contravene the prohibition on using starvation as a method of combat and the requirement to preserve objects indispensable to the survival of the civilian population? (*Cf.* Art. 14 of Protocol II.)
5. Is IHL applicable to civilian self-defence militias? Are their members still "civilians" despite carrying weapons? (*Cf.* Art. 3 common to the Conventions and Art. 13 (3) of Protocol II.)
6. Are reprisal attacks prohibited by the IHL of non-international armed conflicts? By customary IHL? Is the concept of reprisals in a non-international armed conflict conceivable? Are attacks on villages where armed rebels allegedly hide lawful under the IHL of non international armed conflicts? Under what conditions? Do the principles of proportionality and distinction apply to non-international armed conflicts?

3. Armed Conflicts in the Democratic Republic of Congo

[N.B.: See also ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* available on http://www.icj-cij.org]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

A. Qualifying the Conflict on the Territory of the Democratic Republic of Congo: many actors

1) Africa's First World War

[**Source:** BRAECKMAN Colette, "La première guerre mondiale africaine", in *Le Soir*, Brussels, 20 January 2001; Original in French, unofficial translation.]

Africa's First World War

The Democratic Republic of Congo (DRC) is the scene of "Africa's First World War", the first conflict involving the armies of six different countries on the "dark continent". As President Kabila is now dead, what is driving the different forces and what are they each aiming to achieve?

1. *Rwanda.* To justify the presence of its army in Congo, Kigali has consistently referred to its security needs, the necessity of tracking down the Hutu perpetrators of genocide and other "negative forces". In fact, it is being driven by other compulsions: its desire to exploit the resources in eastern Congo, a

dream of territorial expansion and, in any case, the desire to install a friendly if not submissive government in Kinshasa. It is to that end that the Rwandans are supporting the "Rally for Congolese Democracy" (RCD) that they would like to put in power in Kinshasa - by force or by negotiation. Moreover, having fought for Kabila, the Rwandans feel betrayed by their former ally; they are angry at him for having allowed Tutsis to be hounded in August 1998, with many of them being killed in Kinshasa, Lubumbashi and elsewhere. [...]

2. *Uganda.* Like Kagame, President Museveni feels that he was betrayed by his ally Kabila, whom he had helped to put in power. In fact, Kabila had opposed the Ugandan army's systematic exploitation of the resources in the north-east of the country and did not intend to submit to the advice about political governance forced upon him by Museveni, who was behaving like the self-proclaimed patron of the region. Allied to Rwanda as much to put Kabila in power as to attempt to depose him, Uganda has distanced itself, however, from Kigali for two basic reasons: the first has to do with competition to exploit the mineral wealth in the east (illustrated by the three Kisangani wars); the second is political. In fact, while the Rwandans dream of pulling the strings of those who govern Congo, the Ugandans, whose security constraints are less strong, would like to put an autonomous, competent Congolese power in place and, to that end, they are supporting Jean-Pierre Bemba and train his army.

3. *Burundi.* The Burundian army admits to its presence in the DRC but it restricts its activities - which have to do with security - to the shores of Lake Tanganyika, on the South Kivu border: it operates on the other side of the border to track down Hutu rebels who are part of Kabila's military machine. [...]

4. *Zimbabwe.* Zimbabwe is the most visible of Kabila's allies, maintaining a force of 12,000 men in Congo, but it is not the most determinative element. Weakened by internal disputes and by the economic crisis resulting from poor management as well as from the fact that the international creditors are penalizing his country because of its involvement in Congo, President Mugabe is trying to pull out [...]. However, having entered the DRC in order to uphold the Kabila regime and, even more importantly, Congo's territorial integrity and the sovereignty of Kinshasa, Zimbabwe cannot simply let go of a country in which it has invested a great deal; it is committed to continuing its assistance.

5. *Namibia.* Namibia maintains 2,500 men in Congo as part of its involvement in DRC under the SADC (South African Development Conference) agreements. Its objective is more to show its solidarity with Angola and Zimbabwe than to support the Kabila regime itself [...].

6. *Angola.* Rich and equipped with a seasoned army, Angola has given assistance to Kinshasa for straightforward reasons: to implement the solidarity agreements between the SADC countries and, in particular, to prevent UNITA from establishing a rearguard base in the DRC. [...] With a watchful eye on their security and their borders, the Angolans would not be willing to tolerate RCD rebels and Rwandans pushing forward to

Lubumbashi or Mbuji Mayi because, in their view, this could restore the opposition Angolan army headed by Jonas Savimbi to power. In fact, they suspect Kigali of having served as a centre for deliveries of weapons and of having collaborated with UNITA in military matters.

The toughest protagonists are Kigali and Luanda. On the other hand, only an agreement between these two capitals would be capable of securing lasting peace. Angola, which is currently ensuring security in Kinshasa and is supporting the Katangans in government, is being put in the position - whether it likes it nor not - of being the real backer of the post-Kabila government.

2) Report on Human Rights in the Democratic Republic of Congo

[**Source:** United Nations, E/CN.4/2000/42, 18 January 2000, available on http://www.ohchr.org/english/]

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission on Human Rights resolution 1999/56 [...]

II. THE ARMED CONFLICT

13. On 2 August 1998, war broke out in the Democratic Republic of the Congo, six days after President Kabila's expulsion of his former ally, the Rwandan Patriotic Army (APR), from the country. An unknown party, later known as the Congolese Rally for Democracy (RCD), attacked the Democratic Republic of the Congo with the support of Rwanda, Uganda and Burundi. Rwanda and Uganda have openly acknowledged their support, while Burundi continues to deny its involvement. In November 1998, another armed group, the Congolese Liberation Movement (Mouvement pour la libération du Congo - MLC), began to operate. By 31 August 1999, these groups had occupied 60 per cent of the territory. RCD split into two factions, one based in Goma (RCD/Goma) and the other in Kisangani, though it later moved to Bunia and changed its name to Congolese Rally for Democracy/ Liberation Movement (RCD/ML), better known as RCD/Bunia. Both factions signed the Lusaka Peace Agreement, despite strong internal disagreements, on 31 August. [...] A new rebel group, the Congolese Liberation Front (Front de libération du Congo - FLC) emerged in Bandundu, and is apparently supported by the National Union for the Total Independence of Angola (UNITA).

14. Invoking the inherent right of individual or collective self-defence, as set out in Article 51 of the Charter of the United Nations, and as recalled in Security Council resolution 1234 (1999) of 9 April 1999, troops from Angola, Namibia, the Sudan, Chad and Zimbabwe intervened in the conflict in support of the Congolese Armed Forces (FAC). In addition to the nine national armies, there are at least 16 irregular armed groups.

15. Throughout the country, both within and outside the occupied zone, the war is perceived as foreign aggression intended to lead to the secession of part of the country or its annexation by Rwanda. [...]
16. The violence has been extreme, especially in the east. The activities of the foreign-backed rebels have been countered by the terrorism of the Mai-Mai nationalist guerrilla fighters, who are supported by the population, with the commendable exception of human rights advocates who continue to oppose violence of any kind. [...]

Categorization of the conflict

20. In paragraph 41 of his report (E/CN.4/1999/31) [available on http://www.ohchr.org/english/], the Special Rapporteur categorized the conflict in the Democratic Republic of the Congo as an internal conflict with the participation of foreign armed forces. Various facts make it necessary to reconsider this viewpoint. Foreign armies, including those who responded to the appeal by President Kabila to intervene in accordance with Article 51 of the Charter of the United Nations and those described by the Security Council as "uninvited" countries, have exchanged prisoners in accordance with the provisions of the Third Geneva Convention of 1949; prisoners have been visited and exchanged in territories of the "uninvited" countries; there have been clashes typical of any war between foreign national forces in Congolese territory; and "uninvited" States have signed the Lusaka Ceasefire Agreement, which specifically refers to prisoners of war and the mixed nature of the conflict. The Special Rapporteur therefore believes that there is in fact a combination of internal conflicts (RCD against the Kinshasa Government and MLC against Kinshasa) and international conflicts, such as the conflict between Rwanda and Uganda in Congolese territory, clashes between the Rwandan and Ugandan armies and FAC. In the international conflicts, respect for the four Geneva Conventions is required, while, in the internal conflicts, the provisions of article 3 common to the four Conventions are applicable. [...]

B. Lusaka Ceasefire agreement July 1999

[**Source:** *United Nations, Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council,* S/1999/815, (Annex: Ceasefire Agreement); available on http://www.un.org]

Letter dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council [...]

Annex
Ceasefire Agreement

Preamble

We the Parties to this Agreement; [...]

Determined to ensure the respect, by all Parties signatory to this Agreement, for the Geneva Conventions of 1949 and the Additional Protocols of 1977, and the

Convention on the Prevention and Punishment of the Crime of Genocide of 1948, as reiterated at the Entebbe regional Summit of 25 March, 1998:

Determined further to put to an immediate halt to any assistance, collaboration or giving of sanctuary to negative forces bent on destabilising neighbouring countries;

Emphasising the need to ensure that the principles of good neighbourliness and non-interference in the internal affaires of other countries are respected;

Concerned about the conflict in the Democratic Republic of Congo and its negative impact on the country and other countries in the Great Lakes region; [...]

Recognising that the conflict in the DRC has both internal and external dimensions that require intra-Congolese political negotiations and commitment of the Parties to the implementation of this Agreement to resolve;

Taking note of the commitment of the Congolese Government, the RCD, the MLC and all other Congolese political and civil organisations to hold an all inclusive National Dialogue aimed at realising national reconciliation and a new political dispensation in the DRC;

Hereby agree as follows:

Article I: The Cease-fire

1. The Parties agree to a cease-fire among all their forces in the DRC. [...]

Article III: Principles of the agreement [...]

7. On the coming into force of the Agreement, the Parties shall release persons detained or taken hostage and shall give them the latitude to relocate to any provinces within the RDC or country where their security will be guaranteed.

8. The Parties to the Agreement commit themselves to exchange prisoners of war and release any other persons detained as a result of the war.

9. The Parties shall allow immediate and unhindered access to the International Committee of the Red Cross (ICRC) and Red Crescent for the purpose of arranging the release of prisoners of war and other persons detained as a result of the war as well as the recovery of the dead and the treatment of the wounded.

10. The Parties shall facilitate humanitarian assistance through the opening up of humanitarian corridors and creation of conditions conducive to the provision of urgent humanitarian assistance to displaced persons, refugees and other affected persons.

11. a. The United Nations Security Council, acting under Chapter VII of the UN Charter and in collaboration with the OAU, shall be requested to constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this Agreement, and taking into account the peculiar situation of the DRC, mandate the peacekeeping force to track down all armed groups in the DRC. In this respect, the UN Security Council shall provide the requisite mandate for the peace-keeping force. [...]

13. The laying of mines of whatever type shall be prohibited. [...]

22. There shall be a mechanism for disarming militias and armed groups, including the genocidal forces. In this context, all Parties commit themselves to the process of locating, identifying, disarming and assembling all members of armed groups in the DRC. Countries of origin of members of the armed groups, commit themselves to taking all necessary measures to facilitate their repatriation. Such measures may include the granting of amnesty in countries where such a measure has been deemed beneficial. It shall, however, not apply in the case of suspects of the crime of genocide. The Parties assume full responsibility of ensuring that armed groups operating alongside their troops or on the territory under their control, comply with the processes leading to the dismantling of those groups in particular. [...]

Representatives of the Parties have signed the Agreement [...]

For the Republic of Angola

For the Democratic Republic of Congo

For the Republic of Namibia

For the Republic of Rwanda

For the Republic of Uganda

For the Republic of Zimbabwe.

As witnesses

For the Republic of Zambia

For the Organisation of African Unity

For the United Nations

For the Southern African Development Community.

Annex 'A' to the Cease-fire Agreement Modalities for the Implementation of the Cease-fire Agreement in the Democratic Republic of Congo [...]

Chapter 9: Disarmament of Armed Groups

9.1 The JMC [Joint Military Commission] with the assistance of the UN/OAU shall work out mechanisms for the tracking, disarming, cantoning and documenting of all the armed groups in the DCR, including ex-FAR, ADF, LRA, UNRFH, Interahamwe, FUNA, FDD, WNBF, UNITA and put in place measures for:

a. handing over to the UN International Tribunal and national courts, mass killers and perpetrators of crimes against humanity; and

b. handling of other war criminals. [...]

C. Violations of International Humanitarian Law

1) Report on Human Rights in the Democratic Republic of Congo

[**Source:** United Nations, E/CN.4/2000/42, 18 January 2000; available on http://www.unhchr.ch]

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission on Human Rights resolution 1999/56

V. VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

A. By the Kinshasa Government

108. The principal violations of the law on armed conflicts by the forces of the Kinshasa regime and their allies were as follows:

Attacks on the civilian population

109. Especially the bombing of Kisangani and pillaging in the city in January (17 dead); the bombing of Zongo (120), Libenge (200), Goma (between 30 and 65 dead) and Uvira (3) in May; and the atrocities perpetrated by Chadian soldiers in Bunga and Gemena. In addition, the Zimbabwean army's bombing of rebel-occupied towns claimed many victims.

Murders in the north-east

110. In Mobe, some 300 civilians were killed, apparently during an unsuccessful search for rebels (second week of January 1999).

Sexual violence against women

111. While many general charges have been made, the most specific information relates to the flight of FAC soldiers from Equateur at the beginning of the year, when, in addition to committing robberies, they raped women.

B. By RCD and MLC forces

Attacks on the civilian population

112. The cruellest and most violent actions, committed without heed for the laws of war, were attacks on the civilian population, as reprisals for acts committed by Mai-Mai [...] Many of these massacres were carried out using machetes, knives or guns, and houses were usually set on fire at the same time. RCD claims that these incidents were provoked by the Interahamwe or the Mai-Mai, but these groups have no reason to commit massacres against the Congolese population or Hutu refugees, who account for most of the victims. These incidents [...] were denied by RCD, before finally being

acknowledged as unfortunate mistakes. [...] A feature common to all these incidents is the attempt to cover up all traces immediately. Ugandan troops carried out similar massacres in Beni on 14 November, with an unconfirmed death toll of 60 civilians. [...]

Arson and destruction

114. In incidents mostly, though not always, unconnected to the massacres, RCD forces have set fire to and destroyed many villages.

Deportations

115. Mai-Mai and other persons have been arrested during military operations and transported to Rwanda and Uganda, where they usually disappear without a trace.

Mutilation

116. The Special Rapporteur received many reports of mutilation [...]. During his mission in February, he met an 18-year-old man, arrested along with another young man by Rwandan soldiers in a village in South Kivu on suspicion of collaborating with the Mai-Mai. The first man's genitals were cut off completely and he was abandoned in the jungle, from where he was later rescued, although he was left with irreparable physical damage. His comrade died when his heart was torn out.

Rape of women as a means of warfare

117. The Special Rapporteur received reports of rapes of women in Kabamba, Katana, Lwege, Karinsimbi and Kalehe. There were also reports of women being raped by Ugandan soldiers in towns in Orientale province. [...]

2) The Kisangani massacre of May 2002

[**Source:** ZAJTMAN Arnaud, "Massacre in Kisangani", in *Libération*, Paris, 30 May 2002; unofficial translation.]

Massacre in Kisangani

[...] Incident or premeditated crime? One thing is sure: at least 200 Congolese were massacred in cold blood on 14 and 15 May, some of them in appalling circumstances, at Kisangani in the eastern part of Congo-Kinshasa. For the last four years, the country's third-largest town has been in the hands of the rebel *Rassemblement congolais pour la démocratie* (RCD-Goma), an unpopular Rwandan-controlled organization. They are the ones who exercise de facto control over the region, [...] not President Joseph Kabila back in Kinshasa.

It all started at dawn on 14 May, when a group of mutineers hostile to the Rwandan occupation seized control of the local radio station. "If you're a Congolese soldier, grab a weapon. If you're a civilian, grab a stone. If you're a boxer, a wrestler or a karate expert, a wizard or a fetish-man, bring your knowledge, your power. The hour has come to throw out the Rwandans," announced the station, listing the names of buildings where Rwandans were living.

The 800,000 inhabitants of Kisangani were ready and waiting for a chance to rise up against the Rwandans and their Congolese supporters. Hopes of a quick return to normality had been dashed by the failure of the peace negotiations that ended last month in South Africa. The radio announcement fell on willing ears. Gradually, thousands of people congregated in the centre of the town, which lies between the Congo and the Tshopo rivers.

Jean-Paul is a foreigner of mixed race. He stayed indoors, terrified. "They were going to kill the Rwandans. Who'd be next? The genocide in Rwanda all started with the radio." The crowd responded to the broadcast. Five Rwandans were killed, including three civilians. Shot, stoned or burned alive.

[...] Suddenly, a group of "loyal rebel" soldiers took over the radio station. They stormed into the building, ordered the mutineers to leave and told the population to go home. They fired into the air in the streets of the town. The crowd broke up and it could all have ended there. But towards the end of the morning a group of "Zulus" arrived by plane from Goma, the headquarters of the RCD and of the Rwandan forces stationed in Congo-Kinshasa, in the extreme east of the country. The 120-strong unit of unknown origin was commanded by Rwandans. One group of "Zulus" plundered an alcohol warehouse, another drank beer near a church, a third was seen with the RCD's Kisangani commander of military operations, Laurent Kunda, who offered them whisky. Calm had returned, but these men had their orders, and they intended to carry them out.

A Belgian priest Guy Verhaegen heard the first shots. Shortly after, he saw the "Zulus" moving through the area. He stayed in his church compound and hid behind a wall, from which he could see some of what happened. "There were about fifteen of them on the back of a pickup. They were firing bursts from automatic weapons. I didn't hear anyone firing back. From time to time the vehicle stopped and the soldiers went into the houses. I don't know what they did there." Tenda Tangwa lives in the same area. He does know what the soldiers did. "They burst into the house and one of them went to the room of my 21 - year - old son. He begged him not to shoot. The soldier replied: "It's God you need to pray to, not me," and executed him." The soldiers left the area in the middle of the afternoon. According to Father Verhaegen, 40 to 50 people were killed.

No mandate. The UN has a contingent of over 500 soldiers in Kisangani - Uruguayans and Moroccans. They are there to observe the "ceasefire". They did nothing. The Blue Helmets of the United Nations Observer Mission in the Democratic Republic of the Congo (MONUC) were armed ... but had no mandate to intervene. Kisangani is supposed to have been demilitarized two years ago under a Security Council resolution that has never been applied.

Meanwhile, the massacre continued. A large number of soldiers and policemen, affiliated with the RCD rebels but whose loyalty was less than certain in the eyes of the Rwandans, were arrested in various parts of town. In particular, these included policemen about to start training organized by the UN, the symbol of waning rebel power in the town. At least four were tied up and taken away to an unknown destination. There is still no news of them. At the end of the day a number of vehicles commandeered by the "Zulus" arrived at high speed, stopping on the iron bridge over the Tshopo. They sealed off an area between

the bridge, suspended above a hydro-electric dam, and a beach, a few hundred metres downstream.

Hands tied. "They were Rwandan soldiers. It was easy to recognize them. They had radios and they were speaking their language [Kinyarwanda, Ed.]," reported one local inhabitant. Local people heard shots coming from the beach all that afternoon and evening. Next day, the dam staff went back to work. The sluices had been closed the day before on account of the incident. Now they opened them, allowing the river to flow again. Which was when the truth emerged. "The fishermen were the first to see the corpses. They told us straight away. Dozens of bodies were appearing," reports one inhabitant, under condition of anonymity. "The bodies had been mutilated. Their stomachs had been cut open and stones had been put inside." "Some of them had been decapitated," adds another. Most of the victims had their hands tied together and were wearing military uniforms. The International Committee of the Red Cross was able to organize the recovery of the bodies. According to humanitarian personnel, between 50 and 150 corpses were fished out of the river. "If those soldiers had known Kisangani, they would never have committed their crime here. Everyone knows there's a counter-current," explained one local. Despite the large numbers already killed, executions continued in the bush around Kisangani.

A MONUC employee claims to have witnessed the execution of around 60 people at Kisangani airport on the afternoon of 15 May. Most of them were policemen or soldiers. "They were buried in a mass grave at the end of the runway," said the man, who wished to remain anonymous. The people of Kisangani are angry with the Rwandans and the rebels, of course, but also with the Blue Helmets: "These aren't peace-keeping observers. They're observers of Congolese corpses," fumes one woman. "We are in darkness." The heart of darkness.

3) UN, Press Release of 18 June 2002

[**Source:** United Nations, Press Release, GG/SM/8277, 18 June 2002; available on http://www.un.org]

SECRETARY-GENERAL STRONGLY CONDEMNS ACTS OF INTIMIDATION AGAINST UN MISSION IN DEMOCRATIC REPUBLIC OF CONGO

The following statement on the Democratic Republic of the Congo was issued today by the Spokesman for Secretary-General Kofi Annan:

Yesterday, a Rally for Congolese Democracy-Goma (RCD-Goma) commander, accompanied by a team of armed elements, forcibly entered the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) facilities at the Onatra port in Kisangani. They manhandled the MONUC guard on duty, and abducted two MONUC staff members, who were taken to an RCD facility at the far end of the compound. They were released after about 20 minutes during which they were assaulted and sustained injuries to the face. This incident was followed by two subsequent forcible entries into MONUC facilities by RCD-Goma, later yesterday afternoon and again this morning.

The Secretary-General strongly condemns these acts of intimidation against MONUC. The Secretary-General reminds the RCD-Goma leadership that MONUC is deployed in the Democratic Republic of the Congo to assist in the peace process. It can only do so with the full cooperation of the parties, who are responsible for ensuring the security of United Nations staff. The Secretary-General wishes to remind the RCD-Goma of its obligations in this regard, and calls on it to comply with relevant Security Council resolutions.

D. MONUC

1) The mandate

[**Source:** *Democratic Republic of the Congo - MONUC - Mandate*, available on the MONUC official site, http://www.monuc.org]

According to Security Council Resolution 1291 (2000) of 24 February 2000:

MONUC had an authorized strength of up to 5,537 military personnel, including up to 500 observers, or more, provided that the Secretary General determined that there was a need and that it could be accommodated within the overall force size and structure, and appropriate civilian support staff in the areas, inter alia, of human rights, humanitarian affairs, public information, child protection, political affairs, medical and administrative support. MONUC, in cooperation with the joint Military Commission (JMC), had the following mandate

- To monitor the implementation of the Ceasefire Agreement and investigate violations of the ceasefire;
- To establish and maintain continuous liaison with the headquarters off all the parties military forces;
- To develop, within 45 days of adoption of resolution 1291, an action plan for the overall implementation of the Ceasefire Agreement by all concerned with particular emphasis on the following key objectives: the collection and verification of military information on the parties forces, the maintenance of the cessation of hostilities and the disengagement and redeployment of the parties' forces, the comprehensive disarmament, demobilization, resettlement and reintegration of all members of all armed groups referred to in Annex A, Chapter 9.1 of the Ceasefire Agreement, and the orderly withdrawal of all foreign forces;
- To work with the parties to obtain the release of all prisoners of war, military captives and remains in cooperation with international humanitarian agencies;
- To supervise and verify the disengagement and redeployment of the parties' forces.
- Within its capabilities and areas of deployment, to monitor compliance with the provision of the Ceasefire Agreement on the supply of ammunition, weaponry and other war-related materiel to the field, including to all armed groups referred to in Annex A, Chapter 9.1;
- To facilitate humanitarian assistance and human rights monitoring, with particular attention to vulnerable groups including women, children and demobilized child soldiers, as MONUC deems within its capabilities and under acceptable security conditions, in close cooperation with other United Nations agencies, related organizations and non-governmental organizations;

- To cooperate closely with the Facilitator of the National Dialogue, provide support and technical assistance to him, and coordinate other United nations agencies' activities to this effect;
- To deploy mine action experts to asses the scope of the mine and unexploded ordnance problems, coordinate the initiation of the mine action activities, develop a mine action plan, and carry out emergency mine action activities as required in support of its mandate.

Acting under chapter VII of the Charter of the United Nations, the Security Council also decided that MONUC may take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to protect United Nations and co-located JMC personnel, facilities, installations and equipment, ensure the security and freedom of movement of its personnel, and protect civilians under imminent threat of physical violence.

Further by its resolution 1565 (2004) of 1 October 2004,

the Security Council revised the mandate of MONUC and authorized the increase of MONUC's strength by 5,900 personnel*, including up to 341 civilian police personnel, as well as the deployment of appropriate civilian personnel, appropriate and proportionate air mobility assets and other force enablers, and expresses its determination to keep MONUC's strength and structure under regular review, taking into account the evolution of the situation on the ground.

The Council decided that MONUC will have the following mandate

- to deploy and maintain a presence in the key areas of potential volatility in order to promote the re-establishment of confidence, to discourage violence, in particular by deterring the use of force to threaten the political process, and to allow United Nations personnel to operate freely, particularly in the Eastern part of the Democratic Republic of the Congo,
- to ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence,
- to ensure the protection of United Nations personnel, facilities, installations and equipment,
- to ensure the security and freedom of movement of its personnel,
- to establish the necessary operational links with the United Nations Operation in Burundi (ONUB), and with the Governments of the Democratic Republic of the Congo and Burundi, in order to coordinate efforts towards monitoring and discouraging cross-border movements of combatants between the two countries, [...]
- without notice, the cargo of aircraft and of any transport vehicle using the ports, airports, airfields, military bases and border crossings in North and South Kivu and in Ituri,
- to seize or collect, as appropriate, arms and any related materiel whose presence in the territory of the Democratic Republic of the Congo violates the measures imposed by paragraph 20 of resolution 1493, and dispose of such arms and related materiel as appropriate,

* As of 1 October 2004, the total authorized strength of uniformed personnel stood at 17,175. This number included earlier increases of the Mission's strength to 8,700 and 10,800 by Security Council resolutions S/RES/1445 of 4 December 2002 and S/RES/1493 of 28 July 2003 respectively.

- to observe and report in a timely manner, on the position of armed movements and groups, and the presence of foreign military forces in the key areas of volatility, especially by monitoring the use of landing strips and the borders, in particular on the lakes.

The Council decided that MONUC will also have the following mandate, in support of the Government of National Unity and Transition

- to contribute to arrangements taken for the security of the institutions and the protection of officials of the Transition in Kinshasa until the integrated police unit for Kinshasa is ready to take on this responsibility and assist the Congolese authorities in the maintenance of order in other strategic areas, as recommended in paragraph 103 (c) of the Secretary-General's third special report,
- to contribute to the improvement of the security conditions in which humanitarian assistance is provided, and assist in the voluntary return of refugees and internally displaced persons,
- to support operations to disarm foreign combatants led by the Armed Forces of the Democratic Republic of the Congo, including by undertaking the steps listed in paragraph 75, subparagraphs (b), (c), (d) and (e) of the Secretary-General's third special report,
- to facilitate the demobilization and voluntary repatriation of the disarmed foreign combatants and their dependants,
- to contribute to the disarmament portion of the national programme of disarmament, demobilization and reintegration (DDR) of Congolese combatants and their dependants, in monitoring the process and providing as appropriate security in some sensitive locations,
- to contribute to the successful completion of the electoral process stipulated in the Global and All Inclusive Agreement, by assisting in the establishment of a secure environment for free, transparent and peaceful elections to take place,
- to assist in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigate human rights violations to put an end to impunity, and continue to cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations.

The Council authorized MONUC to use all necessary means, within its capacity and in the areas where its armed units are deployed, to carry out the above tasks

The Council further decided that MONUC will also have the mandate, within its capacity and without prejudice to carrying out the above tasks, to provide advice and assistance to the transitional government and authorities, in accordance with the commitments of the Global and All Inclusive Agreement, including by supporting the three joint commissions outlined in paragraph 62 of the Secretary-General's third special report, in order to contribute to their efforts, with a view to take forward

- Essential legislation, including the future constitution,
- Security sector reform, including the integration of national defence and internal security forces together with disarmament, demobilization and reintegration and, in particular, the training and monitoring of the police, while ensuring that they are democratic and fully respect human rights and fundamental freedoms,
- The electoral process.

2) Security Council Resolution 1592 (2005)

[**Source:** United Nations, S/RES/1592 (2005), 30 March 2005, available on http://www.un.org]

Resolution 1592 (2005)
Adopted by the Security Council
at its 5155th meeting, on 30 March 2005

The Security Council,

[...]

Reaffirming its commitment to respect the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo as well as of all States in the region, and its support for the process of the Global and All-Inclusive Agreement on the Transition in the Democratic Republic of the Congo, signed in Pretoria on 17 December 2002, and calling on all the Congolese parties to honour their commitments in this regard, in particular so that free, fair and peaceful elections can take place,

Reiterating its serious concern regarding the continuation of hostilities by armed groups and militias in the eastern part of the Democratic Republic of the Congo, particularly in the provinces of North and South Kivu and in the Ituri district, and by the grave violations of human rights and of international humanitarian law that accompany them, calling on the Government of National Unity and Transition to bring the perpetrators to justice without delay, and *recognizing* that the continuing presence of ex-Forces armées rwandaises and Interahamwe elements remains a threat for the local civilian population and an impediment to good-neighbourly relations between the Democratic Republic of the Congo and Rwanda,

Welcoming in this regard the African Union's support for efforts to further peace in the eastern part of the Democratic Republic of the Congo, and calling on the African Union to work closely with MONUC in defining its role in the region,

Recalling its condemnation of the attack by one of these militias against members of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), on 25 February 2005, and welcoming the first steps taken to date to bring them to justice, in particular the arrests of militia leaders suspected of bearing responsibility for human rights abuses,

Reiterating its call on the Congolese parties, when selecting individuals for key posts in the Government of National Unity and Transition, including the Armed Forces and National Police, to take into account the record and commitment of those individuals with regard to respect for international humanitarian law and human rights,

Recalling that all the parties bear responsibility for ensuring security with respect to civilian populations, in particular women, children and other vulnerable persons, and *expressing concern* at the continuing levels of sexual violence,

[...]

Recalling the link between the illicit exploitation and trade of natural resources in certain regions and the fuelling of armed conflicts, *condemning categorically* the illegal exploitation of natural resources and other sources of wealth of the Democratic Republic of the Congo, and *urging* all States, especially those in the

region including the Democratic Republic of the Congo itself, to take appropriate steps in order to end these illegal activities,

[...]

Noting that the situation in the Democratic Republic of the Congo continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to extend the mandate of MONUC, as contained in resolution 1565, until 1 October 2005, with the intention to renew it for further periods;
2. *Reaffirms its demand* that all parties cooperate fully with the operations of MONUC and that they ensure the safety of, as well as unhindered and immediate access for, United Nations and associated personnel in carrying out their mandate, throughout the territory of the Democratic Republic of the Congo, and in particular that all parties provide full access to MONUC military observers, including to all ports, airports, airfields, military bases and border crossings, and *requests* the Secretary-General to report without delay any failure to comply with these demands;
3. *Urges* the Government of National Unity and Transition to do its utmost to ensure the security of civilians, including humanitarian personnel, by effectively extending State authority, throughout the territory of the Democratic Republic of the Congo and in particular in North and South Kivu and in Ituri;
4. *Calls on* the Government of National Unity and Transition to carry out reform of the security sector, through the expeditious integration of the Armed Forces and of the National Police of the Democratic Republic of the Congo and in particular by ensuring adequate payment and logistical support for their personnel, and *stresses the need* in this regard to implement without delay the national disarmament, demobilization and reinsertion programme for Congolese combatants;
5. *Further calls* on the Government of National Unity and Transition to develop with MONUC a joint concept of operations for the disarmament of foreign combatants by the Armed Forces of the Democratic Republic of the Congo, with the assistance of MONUC, within its mandate and capabilities;
6. *Calls on* the donor community, as a matter of urgency, to continue to engage firmly in the provision of assistance needed for the integration, training and equipping of the Armed Forces and of the National Police of the Democratic Republic of the Congo, and urges the Government of National Unity and Transition to promote all possible means to facilitate and expedite cooperation to this end;
7. *Emphasizing* that MONUC is authorized to use all necessary means, within its capabilities and in the areas where its armed units are deployed, to deter any attempt at the use of force to threaten the political process and to ensure the protection of civilians under imminent threat of physical violence, from any armed group, foreign or Congolese, in particular the ex-FAR and Interahamwé, encourages MONUC in this regard to continue to make full use of its mandate under resolution 1565 in the eastern part of the Democratic Republic of the Congo, and stresses that, in accordance with its mandate, MONUC may use cordon and search tactics to prevent attacks on

civilians and disrupt the military capability of illegal armed groups that continue to use violence in those areas;

8. *Calls on* all the parties to the Transition in the Democratic Republic of the Congo to make concrete progress towards the holding of elections, as provided for by the Global and All-Inclusive Agreement, in particular in furthering the early adoption of the constitution and of the electoral law, as well as the registration of voters;
9. *Demands* that the Governments of Uganda, Rwanda, as well as the Democratic Republic of the Congo put a stop to the use of their respective territories in support of violations of the arms embargo imposed by resolution 1493 of 28 July 2003 or of activities of armed groups operating in the region;
10. *Further urges* all States neighbouring the Democratic Republic of the Congo to impede any kind of support to the illegal exploitation of Congolese natural resources, particularly by preventing the flow of such resources through their respective territories;
11. *Reaffirms its concern* regarding acts of sexual exploitation and abuse committed by United Nations personnel against the local population, and requests the Secretary-General to ensure compliance with the zero tolerance policy he has defined and with the measures put in place to prevent and investigate all forms of misconduct, discipline those found responsible and provide support to the victims, and to pursue active training and awareness-raising of all MONUC personnel, and further requests the Secretary-General to keep the Council regularly informed of the measures implemented and their effectiveness;
12. *Urges* troop-contributing countries carefully to review the Secretary-General's letter of 24 March 2005 (A/59/710) and to take appropriate action to prevent sexual exploitation and abuse by their personnel in MONUC, including the conduct of pre-deployment awareness-training, and to take disciplinary action and other action to ensure full accountability in cases of such misconduct involving their personnel;
13. *Decides* to remain actively seized of the matter.

DISCUSSION

1. a. Is the conflict in the Democratic Republic of the Congo (DRC) international or non-international in nature? In order to determine the legal nature of the conflict, is it necessary to distinguish the fighting taking place between government and rebel forces and the fighting in which foreign powers are involved? (*Cf.* Arts. 2 and 3 common to the Conventions.)

   b. What is the nature of the conflict between the governmental *Forces armées congolaises* (FAC) and the forces of the *Congolese Rally for Democracy* (RCD), for example? Between the governmental *Rwandan Patriotic Front* (RPF) and the (Rwandan rebel) *Interahamwe* militias, on Congolese territory, for example?

   c. Does foreign intervention automatically internationalize a conflict? Is a conflict classified the same way when Zimbabwean forces (together with the FAC)

fight against the RCD, and when the (Rwandan governmental) RPF battles the FAC or other non-State armed groups allied to the Congolese government?

d. Can a conflict situation be divided into as many bilateral relationships as there are internal and external parties to the conflict, so that the scope of applicable international humanitarian law (IHL) varies according to the parties confronting each other? For example, is the scope of applicable IHL in the conflict between the FAC and the RCD narrower than in that between the FAC and the RPF? Even if the RCD is supported by the RPF?

e. What provisions are applicable as far as non-international armed conflict is concerned? As the DRC was not, at the time, party to Protocol II, was only Art. 3 common to the Geneva Conventions applicable? Were the conditions met for applying Protocol II? Is IHL enforceable against non-State armed groups? What about the application of IHL between the parties to a non-international armed conflict if they are "[d]etermined to ensure the respect [...] for the Geneva Conventions of 1949 and the Additional Protocols of 1977" (Preamble to the Lusaka Agreement)? Isn't this provision of the preamble valid only between States party to the agreement? Is this a recognition of the applicability of Protocol II even to States that have not ratified it?

2. a. According to IHL, when is a territory considered occupied? (*Cf.* Art. 42 of the Hague Regulations.) Are Congolese territories controlled by Rwanda or Uganda occupied territories within the meaning of IHL? What are the obligations of an occupying power under IHL?

b. Are occupying powers entitled to exploit the natural resources of the territories they occupy? To what extent? Which provisions of IHL govern these questions? Does exploitation of this kind amount to requisition? If so, do the requisitions comply with IHL? What difference is there between seizing and requisitioning property? What is an occupier allowed to seize? What is an occupier allowed to requisition? Does IHL contain rules that are detailed enough to regulate both activities? What are the necessary conditions for seizure to comply with Art. 53 of the Hague Regulations? Are these conditions stipulated explicitly or implicitly in the provision? Is an occupying power responsible for private companies exploiting mineral resources? (*Cf.* Art. 33 (2) of Convention IV, Arts. 23 (g), 46 (2), 47, 52 and 53 of the Hague Regulations (*Cf.* **Document 1**), and **Case No. 89**, Singapore, Bataafsche Petroleum v. The War Damage Commission. p. 1071; **Case No. 110**, Israel, Ayub v. Minister of Defence. p. 1218, and **Case No. 112**, Israel, Al Nawar v. Minister of Defence. p. 1232.)

c. Are the authorities of an occupying power obliged to comply with the rules of the Fourth Geneva Convention applicable to occupied territories? As regards the Congolese? As regards Rwandan nationals, in occupied territory for example? (*Cf.* Arts. 4, 13, 25, 26, 29, 45, 47 and 70 of Convention IV, Art. 73 of Protocol I and **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* C., Appeals Chamber, Merits, paras. 163-169.] p. 1804.) Are they entitled to arrest Congolese nationals in Congolese territory and transfer them to their own territory? (*Cf.* Art. 49 of Convention IV.) Can Rwandan or Ugandan authorities arrest rebel Rwandan nationals in Congolese territory and transfer them to Rwanda or Uganda, respectively? (*Cf.* Arts. 4, 49 and 70 (2) of Convention IV,

Art. 73 of Protocol I, and **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* C., Appeals Chamber, Merits, paras. 163-169.] p. 1804.) Is the practice of forced disappearances prohibited by IHL? Does IHL take up the issue of missing persons? (*Cf.* Arts. 26 and 137 of Convention IV, Arts. 32 and 33 of Protocol I, Arts. 7 (1) (i) and 7 (2) (i) of the ICC Statute, **Case No. 15**, p. 608.)

d. Are Congolese territories allegedly controlled by States allied to the Congolese authorities (Angola and Zimbabwe in particular) occupied territories? Even if they are controlled with the consent of the "host" State? Even if it is in the form of mine concessions? And if the allied States have been authorized to pursue a rebel movement on Congolese territory (the Angolan army against UNITA, for example)?

3. Can the ICRC deal with "the recovery of the dead and the treatment of the wounded" (Art. 9 of the Lusaka Agreement) or "organize the recovery of the bodies" (Document 3.C.2 above)? On what conditions? Must it identify the bodies before burying them? Is this the mandate of the ICRC? Are the parties obliged to accept the ICRC's services? (*Cf.* Arts. 9, 17 and 18 of Convention I; Arts. 10 and 140 of Convention IV and Art. 33 of Protocol I.)

4. a. What is the role of UN forces in the DRC? Are they authorized to use force to prevent massacres? Is the UN liable to be held responsible if they do not do so? Or the UN member States? Should the UN base its actions on the investigation report on UNAMIR so as not to repeat in the DRC the mistakes made in Rwanda? Are the situations comparable?

b. Does IHL prohibit attacks against UN forces? Are non-State groups bound by this prohibition? (*Cf.* Arts 8.2 (b) (iii) and 8.2 (e) (iii) of the ICC Statute, **Case No. 15**, p. 608; *see also* **Case No. 14**, Convention on the Safety of UN Personnel. [*Cf.* Art. 9.] p. 602.)

c. Since the DRC is party to the Statute of the International Criminal Court, has this Court jurisdiction over those responsible for such attacks? Those responsible for other violations of IHL? Does the ICTR have jurisdiction over the perpetrators of violations of IHL in the framework of the conflict in the DRC? At least for the aspects of the conflict that are extensions of the Rwandan conflict in Congolese territory (for example, the fighting in the DRC between the Rwandan Patriotic Army and the Interahamwe militias)? (*Cf.* **Case No. 15**, The International Criminal Court. p. 608, and **Case No. 196**, UN, Statute of the ICTR. p. 2154.)

5. How do the Conventions and the Protocols guarantee the right of the victims to assistance and protection? Are the guarantees identical in the framework of international and non-international armed conflict? Are the provisions of Protocol II on access to humanitarian aid more restrictive than those of the IHL of international armed conflict? (*Cf.* Arts. 9/9/9/10 common to the Conventions, Arts. 23, 30, 55, 59-62 and 148 of Convention IV, Arts. 68-71 of Protocol I and Arts. 5 and 18 of Protocol II.)

6. Is UN personnel bound by IHL? Should it be? Assuming that it is, how should the sexual exploitation and abuses committed by some of its forces be considered? Who would have the responsibility to prosecute these crimes?

1. Reactions by the International Community

Case No. 196, UN, Statute of the ICTR

THE CASE

A. The Statute

[**Source:** UN Doc. S/RES/955 (November 8, 1994).]

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

The Security Council,

[...]

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of July 1, 1994 (S/1994/879 and S/1994/906), and having taken note of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of October 1, 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of

international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects, [...]

Acting under Chapter VII of the Charter of the United Nations,

1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

3. Considers that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute; [...]

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
   (a) Killing members of the group;
   (b) Causing serious bodily or mental harm to members of the group;
   (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   (d) Imposing measures intended to prevent births within the group;
   (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
   (a) Genocide;
   (b) Conspiracy to commit genocide;
   (c) Direct and public incitement to commit genocide;
   (d) Attempt to commit genocide;
   (e) Complicity in genocide.

Article 3: Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims, and of

Additional Protocol II thereto of June 8, 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 5: Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual criminal responsibility

[corresponds, except for the articles to which it refers, to Article 7 of the ICTY Statute, *see* **Case No. 179**, UN, Statute of the ICTY. p. 1791.]

Article 7: Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on January 1, 1994 and ending on December 31, 1994.

Article 8: Concurrent jurisdiction

[corresponds, *mutatis mutandis*, to Article 9 of the ICTY Statute, *see* **Case No. 179**, UN, Statute of the ICTY. p. 1791.]

Article 9: Non bis in idem

[corresponds, except for the reference to Rwanda, to Article 10 of the ICTY Statute, *see supra,* **Case No. 179**, UN, Statute of the ICTY. p. 1791.]

Article 10: Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) A Registry.

Article 11: Composition of the Chambers
[as modified by Security Council Resolution 1512 (2003)]

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine ad litem independent judges appointed in accordance with article 12 ter, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of six ad litem judges shall be members of each Trial Chamber. Each Trial Chamber to which ad litem judges are assigned may be divided into sections of three judges each, composed of both permanent and ad litem judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules. [...]

Article 14: Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

[Articles 15 to 25 correspond except for the reference to Rwanda, to Articles 16 to 26, respectively, of the ICTY Statute, *see supra,* **Case No. 179**, UN, Statute of the ICTY. p. 1791.]

[...]

Article 26: Enforcement of sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

[Articles 27 to 32 correspond except for the reference to Rwanda, to Articles 28 to 30 and 32 to 34 respectively of the ICTY Statute, *see supra,* **Case No. 179**, UN, Statute of the ICTY. p. 1791.]

B. Security Council Resolution 1534 (2004)

[**Source:** S/RES/1534 (2004), Resolution 1534 (2004), Adopted by the Security Council at its 4935th meeting, on 26 March 2004.]

The Security Council, [...]

Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21) endorsing the ICTY's completion strategy and its resolution 1503 (2003) of 28 August 2003,

Recalling that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies), and requested the Presidents and Prosecutors of the ICTY and ICTR, in their annual reports to the Council, to explain their plans to implement the Completion Strategies, [...]

Acting under Chapter VII of the Charter of the United Nations, [...]

4. *Calls on* the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;
5. *Calls on* each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003); [...]
9. *Recalls that* the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular; [...]

DISCUSSION

1. a. Does the Statute qualify the situation in Rwanda in 1994?
   b. What is the difference between a genocide and an armed conflict? Can an armed conflict be an act of genocide? Is every genocide an armed conflict to which at least Art. 3 common to the Conventions is applicable? Why does IHL not explicitly prohibit acts of genocide? Can the same act fall under Arts. 2, 3, and 4 of the Statute?
   c. Which acts enumerated in Arts. 2 and 3 of the Statute are not necessarily covered by Protocol II?

2. a. Were the genocide and the armed conflict in Rwanda, though non-international, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the establishment of a tribunal to prosecute violations of IHL a proper measure to stop that threat? Can we today say whether it contributed to the restoration of peace in Rwanda? Does that (the end result) actually matter? Does the prosecution of (former) leaders not make peace and reconciliation more difficult?
   b. Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Could the same be said of gross violations of human rights outside armed conflicts?

3. a. May the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a "court established by law"? Is the creation of a tribunal competent to try acts committed before it was established itself violating the prohibition (in IHL and International Human Rights Law) of retroactive penal legislation?

b. How else than by a resolution of the Security Council could the ICTR have been established? What are the advantages and disadvantages of those other methods?

4. Is the prosecution of serious violations of IHL of non-international armed conflicts prescribed by IHL? Is it compatible with IHL?

5. Are Arts. 2-4 penal legislation or simple rules of competence of the ICTR?

6. a. Is Art. 4 retroactive penal legislation, as neither Art. 3 common to the Conventions nor Protocol II foresee any individual penal responsibility for violations of the law of non-international armed conflicts? Were those acts prohibited under Rwandan laws (as Rwanda was a Party to Protocol II)? Would the fact that those acts were punishable under Rwandan legislation suffice to avoid a violation of the principle *nullum crimen sine lege*? Is that principle only respected if such legislation existed? Could Art. 3 common to the Conventions and Protocol II be considered as self-executing penal legislation?

b. Why does Art. 4 just copy Art. 4 (2) of Protocol II and no other provision of Protocol II? Has that any significance for the qualification of other violations of Protocol II as serious violations? Could you give some other examples of provisions of Protocol II the violation of which certainly falls under Article 4 of the Statute? Could you give some examples of provisions of Protocol II the violation of which does not fall under Article 4 of the Statute?

7. Is Article 9 compatible with IHL of non-international armed conflicts? (*Cf.* Art. 3 common to the Conventions and Art. 6 of Protocol II.)

8. a. Are those detained under the authority of the ICTR (pending trial or having been sentenced) protected by Arts. 5 and 6 of Protocol II? Are any provisions of the Statute incompatible with those guarantees of IHL?

b. Has the ICRC a right to visit an accused?

Case No. 197, UN, A Multinational Force to Facilitate Humanitarian Aid

THE CASE

[Source: UN Doc. S/RES/1080 (November 15, 1996).]

The Security Council,

[...],

Gravely concerned at the continuing deteriorating situation in the Great Lakes region, in particular eastern Zaire, [...],

Stressing the need for all States to respect the sovereignty and territorial integrity of the States in the region in accordance with their obligations under the Charter of the United Nations,

Underlining the obligation of all concerned strictly to respect the relevant provisions of international humanitarian law, [...],

Recognizing that the current situation in eastern Zaire demands an urgent response by the international community,

Reiterating the urgent need for an international conference on peace, security and development in the Great Lakes region under the auspices of the United Nations and the OAU to address the problems of the region in a comprehensive way,

Determining that the present situation in eastern Zaire constitutes a threat to international peace and security in the region,

Bearing in mind the humanitarian purposes of the multinational force as specified below,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reiterates* its condemnation of all acts of violence, and its call for an immediate ceasefire and a complete cessation of all hostilities in the region;

   [...],

3. *Welcomes* the offers made by Member States, in consultation with the States concerned in the region, concerning the establishment for humanitarian purposes of a temporary multinational force to facilitate the immediate return of humanitarian organizations and the effective delivery by civilian relief organizations of humanitarian aid to alleviate the immediate suffering of displaced persons, refugees and civilians at risk in eastern Zaire, and to facilitate the voluntary, orderly repatriation of refugees by the United Nations High Commissioner for Refugees as well as the voluntary return of displaced persons, and invites other interested States to offer to participate in these efforts; [...],

5. *Authorizes* the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 3 above to achieve, by using all necessary means, the humanitarian objectives set out therein;

6. *Calls upon* all concerned in the region to cooperate fully with the multinational force and humanitarian agencies and to ensure the security and freedom of movement of their personnel;

7. *Calls upon* the Member States participating in the multinational force to cooperate with the Secretary-General and to coordinate closely with the United Nations Coordinator for humanitarian assistance for eastern Zaire and the relevant humanitarian relief operations; [...],

12. *Expresses* its intention to authorize the establishment of a follow-on [sic] operation which would succeed the multinational force, and *requests* the Secretary-General to submit for its consideration a report, no later than 1 January 1997, containing his recommendations regarding the possible concept, mandate, structure, size and duration of such an operation, as well as its estimated costs; [...].

DISCUSSION

1. a. Is the situation here of such a magnitude to constitute a threat to peace justifying measures under Chapter VII of the UN Charter? Are violations of IHL themselves (specifically, the denial of access to humanitarian aid) threats to peace thus justifying measures under Chapter VII of the UN Charter? Even in non-international armed conflicts? Could the same be said of gross violations of human hights outside armed conflicts?

   b. Is the sending of a multinational protection force to facilitate humanitarian assistance a proper measure to stop this threat? Should military forces really fulfil this role? Can they do it? Is the UN mandate of the protection force the best solution for this situation, particularly when "all necessary means" may be used? Will it help restore law and order? Would the objective here be more accurately defined if called conflict resolution instead of humanitarian action?

   c. How should the roles between military forces and humanitarian organizations ideally be distributed?

2. a. What features distinguish humanitarian action from conflict resolution? Why should they remain distinct objectives?

   b. How is it possible to avoid the risk of entering the field of "interference" in the internal affairs of the State? Where is the dividing line between humanitarian intervention and political interference?

3. a. Is it possible to envisage the UN dispatch of military forces solely to enforce IHL while excluding any action in the resolution of the conflict?

   b. Which problems are confronted by a State, organization, or military force which wishes to intervene in the resolution of a conflict where it also wishes to enforce IHL or provide humanitarian aid?

4. Is the multinational force sent by the UN bound by IHL? Does the applicability of IHL depend upon whether the troops are considered to be under each individual State's authority? Does IHL apply to the international forces here? What do you think about the argument that IHL cannot formally apply to such operations, because they are not armed conflicts between equal partners but law enforcement actions, if not "police operations," by the international community, authorized by the Security Council reflecting international legal norms the aim of which is not to make war but to enforce "law and order"? (*Cf.* Art. 2 common to the Conventions.)

5. Have parties to international and non-international armed conflicts an obligation to accept humanitarian assistance to civilians in need? May humanitarian organizations or third States provide such assistance to civilians in need even without the agreement of the party to the conflict concerned? Can a UN Security Council Resolution replace such agreement? (*Cf.* Arts. 1, 2, 3 and 59-61 of Convention IV, Arts. 69, 70, 81 and 91 of Protocol I and Art. 18 of Protocol II.)

Case No. 198, Germany, Law on Cooperation with the ICTR

THE CASE

[**Source:** "Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Rwanda", in *BGBL* (Bundesgesetzblatt) 1998 I. p. 843; original in German, unofficial translation.]

§ 1. Obligation to Cooperate

(1) Pursuant to this Law, the Federal Republic of Germany shall fulfill its obligations to cooperate as stated in Resolution 955 (1994) adopted by the United Nations Security Council in accordance with Chapter VII of the United Nations Charter.

(2) For the purposes of this Law, the term "Tribunal" shall refer to the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda between January 1, 1994 and December 31, 1994 and for the Prosecution of Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States during the same period, established by Resolution 955 (1994), and shall include its Chambers, its prosecuting authorities and the members of that Tribunal and the prosecuting authorities.

§ 2. Status *vis-à-vis* criminal proceedings in the Federal Republic of Germany

(1) At the Tribunal's request, criminal proceedings involving offences which fall within its jurisdiction shall be transferred to the Tribunal at any stage. In the event that criminal proceedings which are so transferred have resulted in the imposition of a legally valid sentence, once the convicted party in question, pursuant to 3, paragraph 1, has been remanded to the custody of the Tribunal, the further enforcement of this sentence shall cease.

(2) Should a request pursuant to paragraph 1, sentence 1 be submitted, no proceedings may be conducted against any person for an offence falling within the jurisdiction of the Tribunal for which they are standing or have stood trial before that Tribunal.

(3) Insofar as the conditions stipulated in paragraph 1, sentence 1 have been satisfied, the decision to transfer proceedings to the Tribunal shall be taken by the competent court. That court shall also submit to the Tribunal the available evidence and the records of the investigations and proceedings conducted up to that point, as well as any judicial decisions that have already been handed down. [...]

(4) Subject to the proviso that the final decision shall be taken by the public prosecutor, where the proceedings in question are not yet pending before the court, paragraph 3, sentences 1 and 2 shall apply *mutatis mutandis*. [...]

(6) In those cases specified in paragraph 3, sentence 1, the court shall not rule on the costs of the proceedings incurred prior to their transfer to the Tribunal until such time as the Tribunal has brought the transferred proceedings in question to a legal conclusion. In this connection, the court shall predicate its decision upon the Tribunal's ruling on the issues of guilt and punishment. Following consultation with the parties involved, a decision shall be effected by a court order. Sentences 1 to 3 shall apply *mutatis mutandis* in respect of those decisions which are to be taken in accordance with the law on compensation for criminal proceedings.

§ 3. Transfer and conveyance of individuals

(1) For the purpose of prosecuting an offence falling within the jurisdiction of the Tribunal, or for the purpose of enforcing a punishment imposed for such an offence, at the request of the Tribunal, any persons residing within the area where this law is in effect shall be placed in confinement and committed to the custody of either the Tribunal or the country which has assumed responsibility for enforcing a sentence imposed by the Tribunal.

(2) [...] [T]he Law on International Mutual Assistance in Criminal Matters shall apply *mutatis mutandis* to such proceedings.

(3) For the purpose of prosecuting an offence falling within the jurisdiction of the Tribunal, or for the purpose of enforcing a sentence imposed for such an offence, at the request of the Tribunal, persons shall be conveyed through the area where this Law is in effect and held in custody for the purpose of ensuring their conveyance. [...]

§ 5. Mutual assistance by enforcement

(1) Mutual assistance may be rendered by the enforcement of a legally valid sentence of imprisonment imposed by the Tribunal.

(2) [...] [W]here the German enforcement authority deems the enforcement of a sentence to have been carried out, where a convicted prisoner escapes from custody prior to the conclusion of the enforcement of their sentence, where the enforcement of a sentence is no longer possible for other reasons, or in the event of the Tribunal's requesting a particular report, the competent authority, [...] shall advise and assist the Tribunal accordingly.

(3) Where, in the opinion of the relevant competent authority, a pardon should be considered, the competent authority, pursuant to 74a of the Law on International Mutual Assistance in Criminal Matters, shall advise the Tribunal accordingly so that it may rule on the issue of granting a pardon to the convicted party in question.

§ 6. Privileges and immunities

The judges, the director of the prosecuting authority and the President of the Tribunal shall be entitled to the privileges, immunities, exemptions and facilities which are accorded to diplomats under international law. Insofar as the efficient performance of the tasks of the Tribunal necessitates such an arrangement,

Article VI, Section 22 of the United Nations Convention on Privileges and Immunities of February 13, 1946 (Federal Law Gazette, 1980, II, p. 941) shall apply *mutatis mutandis* to other persons who, though not members of the Tribunal, are involved in proceedings conducted by that Tribunal.

§ 7. Entry into force

This Law shall enter into force on the day following its promulgation.

DISCUSSION

1. To what extent does Security Council Resolution 955 (*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154.) bind the international community to cooperate with the ICTR?
2. a. Do States have to enact a law on cooperation with the International Tribunal?
   b. Does this type of law clarify the jurisdictional scope of the ICTR?
   c. Why is the normal legislation on mutual assistance on criminal matters not sufficient to implement Resolution 955 (1994)? Or could Resolution 955 be considered as self-executing? Which obligations under Resolution 955 go beyond normal extradition and mutual judicial assistance treaties?
3. Do you think that conflicting interest(s) may appear between the ICTR and Germany over the fate of an accused?
4. Does this legislation entitle Germany to arrest a suspect and transfer him to the competent authorities of the ICTR? Could Germany decide not to transfer a suspect and try him under its national legislation?
5. Will this type of legislation deter suspects who decide to come to Germany to be immune from prosecution?

Case No. 199, Luxembourg, Law on Cooperation with the International Criminal Courts

THE CASE

[**Source:** *Luxembourg, Loi du 18 mai 1999 introduisant certaines mesures visant à faciliter la coopération avec le TPIY et le TPIR*, available in French on http://www.cicr.org/ihl-nat; unofficial translation.]

Law of 18 May 1999 introducing certain measures intended to facilitate cooperation with: [...]

2) the International Tribunal created by the United Nations Security Council in resolution 955 (8 November 1994) to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan

citizens responsible for genocide and other such acts or violations committed in the territory of neighbouring States, between 1 January and 31 December 1994.

We, JEAN, by the grace of God, Grand Duke of Luxembourg, Duke of Nassau;

Our Council of State having been heard;

The Chamber of Deputies having granted its approval;

Given the Chamber of Deputies' decision of 21 April 1999 and that of the Council of State of 27 April 1999 that a second vote is unwarranted;

have ordered and do order:

Art. 1

In application [...] of United Nations Security Council resolution 955 (8 November 1994) establishing an international tribunal to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such acts or violations committed in the territory of neighbouring States between 1 January and 31 December 1994, the Grand Duchy of Luxembourg shall take part in the repression of breaches and shall cooperate with [this tribunal] in accordance with the present law.

The following provisions shall apply to any person charged with crimes or other offences under Luxembourg law that constitute, under [...] Articles 2 to 4 of the Statute of the International Tribunal created by resolution 955, grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol II, signed in Geneva on 8 June 1977, violations of the laws and customs of war, genocide or crimes against humanity.

Section I: Jurisdiction and deferral from the Luxembourg courts

Subsection 1: Jurisdiction of the Luxembourg courts

Art. 2

Without prejudice to other specific legal provisions, those accused of the above-mentioned violations may be prosecuted and judged by Luxembourg courts if the accused or their accomplices are found in Luxembourg. These provisions also apply to any attempt to commit these violations wherever such an attempt is punishable.

The international tribunal shall be informed by the chief state prosecutor of any prosecution under way involving offenses that could come under its jurisdiction. A copy of that communication shall be simultaneously sent by the chief state prosecutor to the Minister of Justice.

No prosecution may take place before a national court for offences constituting grave violations of international humanitarian law in cases where the accused has already been judged by the international tribunal for the same offences.

Subsection 2: Deferral from the Luxembourg courts

Art. 3

The originals of requests from the international tribunal for deferral of cases from Luxembourg's investigative process or its courts shall be sent, accompanied by any documentary evidence, to the Minister of Justice, whose task shall be to ensure that they are properly constituted.

Art. 4

Depending on the circumstances, either the chief state prosecutor or the state prosecutor shall instruct the investigating magistrate, if an investigation is under way, or the court already dealing with the case on the basis of committal for trial or direct summons, to defer the case to the international tribunal.

The request for deferral shall be communicated to the other parties concerned. Any observations prompted by that communication must be made within eight days. The investigating magistrate or the court dealing with the case may also decide to take oral statements from the parties, who shall be summoned for this purpose by the registrar by means of a registered letter.

Art. 5

If the investigating magistrate or the court dealing with the case finds that the offences constituting the basis of the request for deferral are covered by Article 1 of the present law and that there is no apparent error, he/she shall defer the case and refer it to the international tribunal. No appeal may be made against any decision by the investigating magistrate or the court dealing with the case to defer it.

Art. 6

Once a case has been deferred, the case file shall be sent by the Minister of Justice to the international tribunal.

Art. 7

The deferral of a case from the national judicial system shall not affect the rights of any party claiming damages to apply the provisions of Article 3 of the code governing the investigation of criminal cases.

Where a case has been deferred from a court, that court - unless otherwise stipulated by the law and without prejudice to the ability of the international tribunal to order the restoration to their rightful owners of all property and resources acquired by illegal means - shall retain its ability, at the request of a victim who sued for damages before the criminal case was deferred, to rule on the civil action after the international tribunal has issued a judgement on the criminal proceedings.

Section II: Judicial cooperation

Subsection 1: International judicial assistance

Art. 8

The originals or certified copies of requests for judicial assistance from the international tribunal or its prosecutor must be addressed to the Minister of Justice, accompanied by any documentary evidence.

These documents shall be forwarded to the state prosecutor of the district court with territorial jurisdiction, who shall take all necessary steps.

In urgent cases these documents may be sent directly and by any means to the state prosecutor of the district court with territorial jurisdiction. They must be sent simultaneously in the forms specified in the preceding paragraphs.

Art. 9

Requests for assistance shall be dealt with, according to the circumstances, either by the state prosecutor of the district court with territorial jurisdiction or by the investigating magistrate of that court, and if appropriate in the presence of the prosecutor of the international tribunal.

Any provision of information requested by the international tribunal or its prosecutor and any warrant issued by those entities for enforcement on Luxembourg territory may be implemented only in compliance with national law and, in particular, in line with the powers assigned to the national authorities and in keeping with the code governing the investigation of criminal cases. The reports drawn up in the process of dealing with these requests shall be sent by the Minister of Justice to either the international tribunal or its prosecutor, depending on the circumstances.

In urgent cases, certified copies of these reports may be sent directly and by any means to the international tribunal.

Art. 10

Any conservatory measure to be taken regarding property situated on Luxembourg territory must receive prior approval from the Minister of Justice. The investigating magistrate of the district court with territorial jurisdiction shall order the search and seizure required for this purpose.

Subsection 2: Arrest and surrender

Art. 11

The originals of any requests by the international tribunal or its prosecutor for arrest and surrender must be sent, accompanied by any documentary evidence, to the Minister of Justice who, after ensuring that they are properly constituted, shall forward them to the state prosecutor of the district court in the place of residence of the person sought or the place where he/she can be found.

The state prosecutor shall apply to the chambers of the district court to have the international tribunal's request for arrest declared enforceable.

In urgent cases these documents may be sent directly and by any means to the state prosecutor of the district court with territorial jurisdiction. They must be sent simultaneously in the forms specified in the preceding paragraphs.

Art. 12

Any person who is on Luxembourg territory and accused of one of the offences listed in Article 1 and whose arrest and surrender has been properly requested by the international tribunal shall be arrested without delay upon presentation of such a request duly declared enforceable by the chambers of the district court at the request of the state prosecutor or, in urgent cases in which that person has been indicted by the international tribunal, upon presentation of an arrest warrant issued by the state prosecutor or the investigating magistrate of the district court following application by the state prosecutor. The person sought shall be immediately informed of the accusation against him/her.

The person sought shall be brought before the investigating magistrate at the latest within 24 hours of his/her arrest. The latter shall note any information and explanation that the person consents to provide.

The person sought may at any time apply to the chambers of the district court for release. The latter shall act in accordance with the provisions of Article 116 ff. of the code governing the investigation of criminal cases. However, the surrender of the person sought may not be delayed by such an application.

Art. 13

The chambers of the appeal court shall deal immediately with the matter. The person sought shall appear before the chambers at the latest 10 days after his/her arrest. The prosecuting authorities and the person sought, possibly accompanied by his/her counsel and, if need be, in the presence of an interpreter, shall have the opportunity to make a statement.

Art. 14

If the chambers finds that the offences constituting the grounds for requesting arrest and surrender come within the field of application of Article 1 and that the request contains no apparent error, they shall order that the person be surrendered.

The chambers shall also decide whether or not there are grounds for handing over to the international tribunal, in whole or in part, the papers and other objects seized. It shall order the return to the person sought of papers and other objects having no direct bearing on the offence of which he/she has been accused.

The chambers shall announce its decision in the form of an order issued at a public hearing within 10 days of the appearance before it of the person sought.

No appeal on points of law is possible in such cases.

Art. 15

The order issued by the chambers of the appeal court and, in certain cases, the place and date of surrender of the person sought and the length of detention awaiting surrender shall be communicated to the international tribunal by the Minister of Justice.

The person sought shall be surrendered within a month of the date on which the surrender order was issued. Failing this, the person's immediate release shall be ordered by the president of the chambers of the appeal court, unless the surrender has been delayed by circumstances beyond the authorities' control.

Release of the person sought shall preclude neither subsequent arrest nor a fresh decision to surrender him/her should the international tribunal present a new request to that end.

Art. 16

The provisions of the subsection are also applicable if the person sought is being prosecuted or has been convicted in Luxembourg on charges other than those serving as grounds for the international tribunal's request. However, in such cases the detainee is not entitled to release as provided for in Article 15.

The proceedings of the international tribunal shall have the effect, vis-à-vis the Luxembourg judicial and prison system as concerns the person sought, of suspending the time limit for bringing a prosecution and for enforcing a sentence.

Subsection 3: Enforcement of orders for return of property issued by the international tribunal

Art. 17

Decisions by the international tribunal to return property in application of Article 24(3) of its Statute [ICTY, corresponding to the Art. 23(3) of the ICTR Statute] may be implemented in Luxembourg only after being declared enforceable before Luxembourg's civil courts in accordance with the ordinary procedure for enforcement set out in Article 546 of the Civil Procedure Code.

We command and order that the present law be promulgated in the Official Gazette for execution and compliance by all those concerned.

Minister of Justice, [...]

Luc Frieden

For the Grand Duke: His Lieutenant-Representative,

Henri heir to the throne of the Grand Duke

DISCUSSION

1. To what extent does Security Council resolution 955 oblige States to cooperate with the ICTR? (*see* **Case No. 196**, UN, Statute of the ICTR. p. 2154.)
2. a. Must States adopt legislation regarding cooperation with the ICTR?
   b. Does this type of legislation serve to clarify the reach of the ICTR's jurisdiction?
   c. Why is the normal legislation on mutual cooperation in criminal matters between States not sufficient to implement resolution 955? Could that resolution be considered self-executing? Which of the obligations contained in resolution 955 go beyond the provisions of classic treaties on extradition and judicial cooperation?
3. Does this law oblige Luxembourg to arrest a suspect and hand him over to the ICTR? May Luxembourg decide not to hand over a suspect and, instead, to try him before its own courts?
4. Does this type of legislation dissuade suspects from going to Luxembourg for fear of facing prosecution?

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu

THE CASE

A. Trial Chamber

[**Source:** ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998; footnotes have not been reproduced; available on http://www.ictr.org]

THE PROSECUTOR
v.
JEAN-PAUL AKAYESU
Case No. ICTR-96-4-T

JUDGEMENT [...]

1. INTRODUCTION [...]

6. [...] "The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the Tribunal, charges:

JEAN PAUL AKAYESU
with GENOCIDE, CRIMES AGAINST HUMANITY and VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as set forth below:
[...]

The Accused

3. Jean Paul AKAYESU, born in 1953 in Murehe sector, Taba commune, served as bourgmestre of that commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, he was a teacher and school inspector in Taba.

4. As bourgmestre, Jean Paul AKAYESU was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

General Allegations

5. Unless otherwise specified, all acts and omissions set forth in this indictment took place between 1 January 1994 and 31 December 1994, in the commune of Taba, prefecture of Gitarama, territory of Rwanda.

6. In each paragraph charging genocide, a crime recognized by Article 2 of the Statute of the Tribunal, the alleged acts or omissions were committed with intent to destroy, in whole or in part, a national, ethnic or racial group.

7. The victims in each paragraph charging genocide were members of a national, ethnic, racial or religious group.

8. In each paragraph charging crimes against humanity, crimes recognized by Article 3 of the Tribunal Statute, the alleged acts or omissions were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds.

9. At all times relevant to this indictment, a state of internal armed conflict existed in Rwanda.

10. The victims referred to in this indictment were, at all relevant times, persons not taking an active part in the hostilities.

10A. In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity.

11. The accused is individually responsible for the crimes alleged in this indictment. Under Article 6(1) of the Statute of the Tribunal, individual criminal responsibility is attributable to one who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of any of the crimes referred to in Articles 2 to 4 of the Statute of the Tribunal.

Charges

12. As bourgmestre, Jean Paul AKAYESU was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgmestre, Jean Paul AKAYESU must have known about them. Although he had the authority and responsibility to do so, Jean Paul AKAYESU never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence.

12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

12B. Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities. [...]

19. On or about April 19, 1994, Jean Paul AKAYESU took 8 detained men from the Taba *bureau communal* and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by Jean Paul AKAYESU.

20. On or about April 19, 1994, Jean Paul AKAYESU ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene, Phoebe Uwineze and her fiance (whose name is unknown), Tharcisse Twizeyumuremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba *bureau communal.* [...]

Counts 7-8
(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation the murders of 8 detained men in front of the *bureau communal* as described in paragraph 19, Jean Paul AKAYESU committed:

COUNT 7: CRIMES AGAINST HUMANITY (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 8: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

Counts 9-10
(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the murders of 5 teachers in front of the bureau communal as described in paragraph 20, Jean Paul AKAYESU committed:

COUNT 9: CRIMES AGAINST HUMANITY (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 10: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal. [...]

Counts 13-15
(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the events at the bureau communal, as described in paragraphs 12(A) and 12(B), Jean Paul AKAYESU committed:

COUNT 13: CRIMES AGAINST HUMANITY (rape), punishable by Article 3(g) of the Statute of the Tribunal; and

COUNT 14: CRIMES AGAINST HUMANITY, (other inhumane acts), punishable by Article 3(i) of the Statute of the Tribunal; and

COUNT 15: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ARTICLE 4(2)(e) OF ADDITIONAL PROTOCOL 2, as incorporated by Article 4(e)(outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault) of the Statute of the Tribunal. [...]

6. THE LAW [...]

6.3. Genocide (Article 2 of the Statute)

6.3.1. Genocide

492. Article 2 of the Statute stipulates that the Tribunal shall have the power to prosecute persons responsible for genocide, complicity to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. [...]

Crime of Genocide, punishable under Article 2(3)(a) of the Statute

494. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"). It states:

> "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."

495. The Genocide Convention is undeniably considered part of customary international law, [...].

496. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

497. Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.

498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

499. Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group. Consequently, in order to clarify the constitutive elements of the crime of genocide, the Chamber will first state its findings on the acts provided for under Article 2(2)(a) through Article 2(2)(e) of the Statute, the groups protected by the Genocide Convention, and the special intent or *dolus specialis* necessary for genocide to take place.

Killing members of the group (paragraph (a)):

500. [...] It is accepted that there is murder when death has been caused with the intention to do so [...].

Causing serious bodily or mental harm to members of the group (paragraph b)

502. Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable. [...]

504. For purposes of interpreting Article 2 (2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paragraph c):

505. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.

506. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

Imposing measures intended to prevent births within the group (paragraph d):

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Forcibly transferring children of the group to another group (paragraph e)

509. With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.

510. Since the special intent to commit genocide lies in the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", it is necessary to consider a definition of the group as such. Article 2 of the Statute, just like the Genocide Convention, stipulates four types of victim groups, namely national, ethnical, racial or religious groups.

511. On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

512. [...] [T]he Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

513. An ethnic group is generally defined as a group whose members share a common language or culture.

514. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.

515. The religious group is one whose members share the same religion, denomination or mode of worship. [...]

517. As stated above, the crime of genocide is characterized by its dolus specialis, or special intent, which lies in the fact that the acts charged, listed in Article 2 (2) of the Statute, must have been "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

518. Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator. [...]

521. In concrete terms, for any of the acts charged under Article 2 (2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual. [...]

523. On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act. [...]

6.5. Violations of Common Article 3 and Additional Protocol II (Article 4 of the Statute) [...]

599. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: [*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154.] [...]

600. Prior to developing the elements for the above cited offences contained within Article 4 of the Statute, the Chamber deems it necessary to comment

upon the applicability of common Article 3 and Additional Protocol II as regards the situation which existed in Rwanda in 1994 at the time of the events contained in the Indictment.

Applicability of Common Article 3 and Additional Protocol II

601. The four 1949 Geneva Conventions and the 1977 Additional Protocol I thereto generally apply to international armed conflicts only, whereas Article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international conflict, a protection which was further developed and enhanced in the 1977 Additional Protocol II. In the field of international humanitarian law, a clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common Article 3 is applicable. Situations of internal disturbances are not covered by international humanitarian law.

602. The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively. Common Article 3 applies to "armed conflicts not of an international character", whereas for a conflict to fall within the ambit of Additional Protocol II, it must "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common Article 3 without modifying its conditions of application.

603. It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills their respective pre-determined criteria.

604. The Security Council, when delimiting the subject-matter jurisdiction of the ICTR, incorporated violations of international humanitarian law which may be committed in the context of both an international and an internal armed conflict:

"Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.

In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions."

605. Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the ICTY, by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibilty of the perpetrator of the crime, the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the ICTY, during which the UN Secretary General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are *beyond any doubt* part of customary law.

606. Notwithstanding the above, a possible approach would be for the Chamber not to look at the nature of the building blocks of Article 4 of the Statute nor for it to categorize the conflict as such but, rather, to look only at the relevant parts of Common Article 3 and Additional Protocol II in the context of this trial. Indeed, the Security Council has itself never explicitly determined how an armed conflict should be characterised. Yet it would appear that, in the case of the ICTY, the Security Council, by making reference to the four Geneva Conventions, considered that the conflict in the former Yugoslavia was an international armed conflict, although it did not suggest the criteria by which it reached this finding. Similarly, when the Security Council added Additional Protocol II to the subject matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus, it would not be necessary for the Chamber to determine the precise nature of the conflict, this having already been predetermined by the Security Council. Article 4 of the Statute would be

applicable irrespective of the Additional Protocol II question', so long as the conflict were covered, at the very least, by the customary norms of Common Article 3. Findings would thus be made on the basis of whether or not it were proved beyond a reasonable doubt that there has been a serious violation in the form of one or more of the acts enumerated in Article 4 of the Statute.

607. However, the Chamber recalls the way in which the Prosecutor has brought some of the counts against the accused, namely counts 6, 8, 10, 12 and 15. For the first four of these, there is mention only of Common Article 3 as the subject matter jurisdiction of the particular alleged offences, whereas count 15 makes an additional reference to Additional Protocol II. To so add Additional Protocol II should not, in the opinion of the Chamber, be dealt with as a mere expansive enunciation of a *ratione materiae* which has been pre-determined by the Security Council. Rather, the Chamber finds it necessary and reasonable to establish the applicability of both Common Article 3 and Additional Protocol II individually. Thus, if an offence, as per count 15, is charged under both Common Article 3 and Additional Protocol II, it will not suffice to apply Common Article 3 and take for granted that Article 4 of the Statute, hence Additional Protocol II, is therefore automatically applicable.

608. It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in the Tadic judgment that Article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by Articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope.

609. However, as aforesaid, Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law. The Appeals Chamber concurred with this view inasmuch as "[m]any provisions of this Protocol [II] can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law[ ]", but not all.

610. Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II. All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.

Individual Criminal Responsibility

611. For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 and parts of Article 4 of Additional Protocol II - which comprise the subject-matter jurisdiction of Article 4 of the Statute - form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.

612. As regards individual criminal responsibility for serious violations of Common Article 3, the ICTY has already affirmed this principle in the Tadic case. In the ICTY Appeals Chamber, the problem was posed thus:

> "Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such provisions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction."

613. Basing itself on rulings of the Nuremberg Tribunal, on "elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts", as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals Chamber reached the conclusion:

> "All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."

614. This was affirmed by the ICTY Trial Chamber when it rendered in the Tadic judgment.

615. The Chamber considers this finding of the ICTY Appeals Chamber convincing and dispositive of the issue, both with respect to serious violations of Common Article 3 and of Additional Protocol II.

616. It should be noted, moreover, that Article 4 of the ICTR Statute states that, "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations* of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977" (emphasis added). The Chamber understands the phrase "serious violation" to mean "a breach of a rule protecting important values [which] must involve grave consequences for the victim", in line with the above-mentioned

Appeals Chamber Decision in Tadic, paragraph 94. The list of *serious* violations which is provided in Article 4 of the Statute is taken from Common Article 3 - which contains fundamental prohibitions as a humanitarian minimum of protection for war victims - and Article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.

617. The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator. In addition to this argument from custom, there is the fact that the Geneva Conventions of 1949 (and thus Common Article 3) were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, and were therefore in force on the territory of Rwanda at the time of the alleged offences. Moreover, all the offences enumerated under Article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute.

The nature of the conflict

618. As aforesaid, it will not suffice to establish that as the criteria of Common Article 3 have been met, the whole of Article 4 of the Statute, hence Additional Protocol II, will be applicable. Where alleged offences are charged under both Common Article 3 and Additional Protocol II, which has a higher threshold, the Prosecutor will need to prove that the criteria of applicability of, on the one hand, Common Article 3 and, on the other, Additional Protocol II have been met. This is so because Additional Protocol II is a legal instrument the overall sole purpose of which is to afford protection to victims in conflicts not of an international character. Hence, the Chamber deems it reasonable and necessary that, prior to deciding if there have been serious violations of the provisions of Article 4 of the Statute, where a specific reference has been made to Additional Protocol II in counts against an accused, it must be shown that the conflict is such as to satisfy the requirements of Additional Protocol II.

Common Article 3

619. The norms set by Common Article 3 apply to a conflict as soon as it is an armed conflict not of an international character'. An inherent question follows such a description, namely, what constitutes an armed conflict? The Appeals Chamber in the Tadic decision on Jurisdiction held "that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of

hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached". Similarly, the Chamber notes that the ICRC commentary on Common Article 3 suggests useful criteria resulting from the various amendments discussed during the Diplomatic Conference of Geneva, 1949, *inter alia*:

- That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
- That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
  (a) That the *de jure* Government has recognized the insurgents as belligerents; or
  (b) that it has claimed for itself the rights of a belligerent; or
  (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
  (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.

620. The above reference' criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganized and short-lived insurrections. The term, armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.

621. Evidence presented in relation to paragraphs 5-11 of the Indictment, namely the testimony of Major-General Dallaire, has shown there to have been a civil war between two groups, being on the one side, the governmental forces, the FAR, and on the other side, the RPF. Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the Chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions.

Additional Protocol II

622. As stated above, Additional Protocol II applies to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to

enable them to carry out sustained and concerted military operations and to implement this Protocol".

623. Thus, the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

(i) an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
(ii) the dissident armed forces or other organized armed groups were under responsible command;
(iii) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
(iv) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.

624. As per Common Article 3, these criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. A number of precisions need to be made about the said criteria prior to the Chamber making a finding thereon.

625. The concept of armed conflict has already been discussed in the previous section pertaining to Common Article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, armed forces' of the High Contracting Party is to be defined broadly, so as to cover all armed forces as described within national legislations.

626. The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.

627. In the present case, evidence has been presented to the Chamber which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment. The Chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that

there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.

Ratione personae

628. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Additional Protocol II - the class of victims and the class of perpetrators.

The class of victims

629. Paragraph 10 of the Indictment reads, "The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities". This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of "persons taking no active part in the hostilities" (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, "all persons who do not take a direct part or who have ceased to take part in hostilities". These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous. Whether the victims referred to in the Indictment are *indeed* persons not taking an active part in the hostilities is a factual question, which has been considered in the Factual Findings on the General Allegations (paragraphs 5-11 of the Indictment).

The class of perpetrators

[N.B.: The Appeals Chamber reviewed the content of these paragraphs (*see* B., Appeals Chamber, paras. 430-446. p. 2187).] [...]

Ratione loci

635. There is no clear provision on applicability *ratione loci* either in Common Article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied "to all persons affected by an armed conflict as defined in Article 1". The commentary thereon specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common Article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict. This approach was followed by the Appeals Chamber in its decision on

jurisdiction in Tadic, wherein it was held that "the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations"

636. Thus the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the war front'. From this follows that it is not possible to apply rules in one part of the country (i.e. Common Article 3) and other rules in other parts of the country (i.e. Common Article 3 and Additional Protocol II). The aforesaid, however, is subject to the caveat that the crimes must not be committed by the perpetrator for purely personal motives.

Conclusion

637. The applicability of Common Article 3 and Additional Protocol II has been dealt with above and findings made thereon in the context of the temporal setting of events alleged in the Indictment. It remains for the Chamber to make its findings with regard the accused's culpability under Article 4 of the Statute. This will be dealt with in section 7 of the judgment.

7. LEGAL FINDINGS

7.1. Counts 6, 8, 10 and 12- Violations of Common Article 3 (murder and cruel treatment) and Count 15 - Violations of Common Article 3 and Additional Protocol II (outrages upon personal dignity, in particular rape...)

638. Counts 6, 8, 10, and 12 of the Indictment charge Akayesu with Violations of Common Article 3 of the 1949 Geneva Conventions, and Count 15 charges Akayesu of Violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto. All these counts are covered by Article 4 of the Statute.

639. It has already been proved beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF in 1994 at the time of the events alleged in the Indictment. The Chamber found the conflict to meet the requirements of Common Article 3 as well as Additional Protocol II. [...]

8. VERDICT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows: [...]

Count 7: Guilty of Crime against Humanity (Murder) [...]

Count 9: Guilty of Crime against Humanity (Murder) [...]

Count 13: Guilty of Crime against Humanity (Rape)

Count 14: Guilty of Crime against Humanity (Other Inhumane Acts) [...]

B. Appeals Chamber

[**Source:** ICTY, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Appeals Chamber, 1 June 2001; footnotes are only partially reproduced; available on http://www.ictr.org]

[N.B.: The definition of genocide set out in para. 492-523 of the judgement of Trial Chamber I was not revised in the present Appeals Chamber judgement.]

THE PROSECUTOR
v.
JEAN-PAUL AKAYESU

JUDGEMENT [...]

IV. PROSECUTION'S GROUNDS OF APPEAL

A. First and Second Grounds of Appeal: Article 4 of the Statute (violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II)

425. The Prosecution raises two grounds of appeal relating to the Trial Chamber's analysis of Article 4 of the Statute. Akayesu was charged with five counts under Article 4 of the Statute and was acquitted on each of the said counts. The first Ground of Appeal alleges that the Trial Chamber erred in law in applying a "public agent or government representative test" in determining who can be held responsible for Serious Violations of Common Article 3 and Additional Protocol II thereto ("the public agent test"). The second Ground of Appeal is raised as an alternative ground of appeal, with the Prosecution submitting that it will only be necessary for the Appeals Chamber to consider it if it rejects the Prosecution's first Ground of Appeal. The Prosecution's second ground, alleges that, having applied the public agent or government representative test, the Trial Chamber erred in fact in finding that Jean Akayesu was not a public agent or government representative who could incur responsibility under Article 4 of the Statute.

426. As for the remedy sought, the Prosecution moves that with respect to the first Ground of Appeal, the Appeals Chamber set aside the Trial Chamber's findings on this issue. With respect to the second Ground of Appeal, the Prosecution moves the Appeals Chamber to hold that the Trial Chamber erred in applying the public agent test in its factual findings in this case. [...]

2. Discussion

430. The Trial Chamber found as follows:

> 630. The four Geneva Conventions - as well as the two Additional Protocols - as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. *The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.*

631. Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. *The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts.* The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols. [footnote 794: Trial Jugement, para. 630 and 631 (emphasis added).]

431. Subsequently, having applied this finding to Akayesu's circumstance to determine whether he could be held individually responsible for the crimes charged under Article 4 of the Statute, the Trial Chamber held that:

640. For Akayesu to be held criminally responsible under Article 4 of the Statute, it is incumbent on the Prosecutor to prove beyond a reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective conflict objectives. As stipulated earlier in this judgment, this implies that Akayesu would incur individual criminal responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of, or is otherwise directly engaged in the conduct of hostilities. Hence, the Prosecutor will have to demonstrate to the Chamber and prove that Akayesu was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. Indeed, the Chamber recalls that Article 4 of the Statute also applies to civilians. [footnote 795: Trial Judgment, para. 640.]

432. In the opinion of the Appeals Chamber, there is no doubt that the Trial Chamber applied the public agent test in interpreting Article 4 of the Statute, to consider subsequently the particular circumstances of Akayesu's case. While pointing out that the Geneva Conventions and the Protocols have an "overall protective and humanitarian purpose" [footnote 796: *Ibid*, para. 631.] and consequently, "the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted" [footnote 797: *Ibid*, para. 631.], the Trial Chamber found that the category of persons likely to be held responsible for violations of Article 4 of the Statute includes "only [...] individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts". The Trial Chamber, held that this approach would allow application of ... [*sic*] in a fashion which "corresponds best with the underlying protective purpose of the Conventions and the Protocols". [footnote 798: *Ibid*, para. 631 (emphasis added).]

433. The issue here is whether this interpretation is consistent with the provisions of the Statute in particular and international humanitarian law in general. To that end, it is necessary, firstly, to review the relevant provisions of the Statute as interpreted by the case-law of the Tribunals and, secondly, the object and purpose of Common Article 3 to the Geneva Conventions. [footnote 799: Article 31(1) of the Vienna Convention on the Law of Treaties (1969) [available on http://www.walter.gehr.net/] provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".]

434. The Appeals Chamber shall firstly recall the provisions of Article 4 of the Statute: [*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154.] [...]

435. Article 4 makes no mention of a possible delimitation of classes of persons likely to be prosecuted under this provision. It provides only that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed" in particular, serious violations of Article 3 common to the Geneva Conventions. A reading of Article 4 together with Articles 1 and 5 of the Statute respectively relating to the Tribunal's overall competence and personal jurisdiction, sheds no further light on the class of persons likely to be prosecuted under these articles, in particular under, Article 4. [*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154.] [...]

436. Thus, there is no explicit provision in the Statute that individual criminal responsibility is restricted to a particular class of individuals. In actuality, articles of the Statute on individual criminal responsibility simply reflect the principle of individual criminal responsibility as articulated by the Nuremberg Tribunal. An analysis of the provisions of the Statute is therefore not conclusive. As a result, the Appeals Chamber must turn to the article which serves as a basis for Article 4, to wit, Article 3 Common to the Geneva Conventions [...].

437. It must be noted that Article 3 common to the Geneva Conventions does not identify clearly the persons covered by its provisions nor does it contain any explicit reference to the perpetrator's criminal liability for violation of its provisions. The chapeau of Common Article 3 only provides that "each party to the conflict shall be bound to apply, as a minimum, the following provisions". The primary object of this provision is to highlight the "unconditional" [footnote 802: ICRC Commentary [of Convention IV] [available on http://www.icrc.org/ihl], p. 38.] character of the duty imposed on each party to afford minimum protection to persons covered under Common Article 3. In the opinion of the Appeals Chamber, it does not follow that the perpetrator of a violation of Article 3 must of necessity have a specific link with one of the above-mentioned Parties.

438. Despite this absence of explicit reference in the common Article 3 [footnote 803: Tadic (Jurisdiction Decision), [*see* **Case No. 180**, [*Cf.* A. p. 1804.] para. 128.] ICTY Appeals Chamber nevertheless held that authors of violation of provisions of this article incur individual criminal responsibility. Furthermore, it developed a certain number of other tests for the application of article 3 which the Appeals Chamber can summarize here as follows:

- The offence (serious violation) must be committed within the context of an armed conflict;
- The armed conflict can be internal or international;
- The offence must be against persons who are not taking any active part in the hostilities;
- There must be a nexus between the violations and the armed conflict.

439. Although ICTY Appeals Chamber has, on several occasions, addressed the issue of the interpretation of common Article 3, it should be noted that it has never found it necessary to circumscribe the category of persons who may be prosecuted under Article 3. Therefore, no clarification has to date been provided on this point in the jurisprudence of the Tribunals, except for recent holdings by an ICTY Trial Chamber. The latter indeed found that "common Article 3 may also require some relationship to exist between a perpetrator and a party to the conflict." [footnote 808: *Kunarac* Judgment, para. 407.] However, the Appeals Chamber observes that this holding finds no support either in statute or in case law. In any case, the Kunarac Trial Chamber has not found it necessary to elaborate on this point in light of the circumstances of the case.

440. In this context, the Appeals Chamber deems it appropriate to analyze the object and purpose of common Article 3 in particular, and of the Geneva Conventions, in general, which object and purpose, in its view, are determinative in the interpretation of Article 4 of the Statute.

441. ICRC commentaries outline the principles underlying the adoption of common Article 3:

> "This Article is common to all four Geneva Conventions [...]. It marks a new step forward in the unceasing development of the idea on which the Red Cross is based, and in the embodiment of that idea in the form of international obligations. It is an almost unhoped for extension of Article 2 [...]. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle [the Red Cross] pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to all cases of armed conflicts, including those of an internal character". [footnote 811: ICRC Commentar[y of Convention IV], [available on http://www.icrc.org/ihl] p. 26.]

442. Thus, common Article 3 seeks to extend to non international armed conflicts, the protection contained in the provisions which apply to international armed conflicts. Its object and purpose is to broaden the application of the international humanitarian law by defining what constitutes minimum humane treatment and the rules applicable under all circumstances. Indeed, "[i]n the words of ICRC, the purpose of common Article 3 [is] to ensure respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself. These rules may thus be considered as the *quintessence* of humanitarian rules found

in the Geneva Conventions as a whole". [footnote 812: *Celebici* Appeal Judgment, para. 143.] *Protection of victims* is therefore the core notion of common Article 3.

443. The Appeals Chamber is of the view that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.

444. In paragraph 630 of the Judgment, the Trial Chamber found that the four Conventions "were adopted primarily to protect the victims as well as potential victims of armed conflicts". It went on to hold that "[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces". Such a finding is *prima facie* not without reason. In actuality authors of violations of common Article 3 will likely fall into one of these categories. This stems from the fact that common Article 3 requires a close nexus between violations and the armed conflict. This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute. In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute.

445. Accordingly, the Appeals Chamber finds that the Trial Chamber erred on a point of law in restricting the application of common Article 3 to a certain category of persons, as defined by the Trial Chamber.

446. For the foregoing reasons, the Appeals Chamber entertains this ground of appeal and finds further that it is therefore not necessary to pass on the Prosecution's alternative ground of appeal. [...]

V. DISPOSITION

For these reasons, The Appeals Chamber, [...]

Unanimously dismmisses [sic] each of the grounds of appeal raised by Jean-Paul Akayesu,

Affirms the verdict of guilty entered against Jean-Paul Akayesu of all the counts on which he was convicted and the sentence of life imprisonment handed down, [...]

Considers the First, Third and Fourth Grounds of Appeal of the Prosecutor and **Finds** that, with respect to the points of law in issue in the Prosecution's appeal, this Judgement sets out the relevant legal findings thereon.

Done in English and French, the French text being authoritative.

DISCUSSION

1. *(Trial Chamber, paras. 492-499)*
   a. In order to distinguish it from a crime against humanity, how would you define genocide?
   b. Is the obligation to sanction genocide an element of customary international law? Of customary International Humanitarian Law (IHL)? Does the ICTR have the jurisdiction to prosecute individuals who committed genocide by virtue of its mere Statute? Must the State of which the accused is a national be a Party to the Convention on Genocide? Must the State have included repression of this crime it its national legislation?
   c. Is the expression "in part" attached to the extent of the crimes actually committed or to the perpetrators intention? Do you agree with the Chamber when it rules that a crime committed with the intention to destroy part of a specific group constitutes genocide?
   d. What is the special intent (or *dolus specialis*) necessary for genocide to take place? How can we determine the existence of this special intent? (*Cf.* also paras. 517-523.)
2. *(Trial Chamber, paras. 510-523)*
   a. What do you think of the ICTR's definition of a protected group? Is the chamber using subjective or objective criteria? Is group membership not often due to "self-identification" by the members of the group or "stigmatisation" by the group's enemies, and therefore would subjective criteria not be more appropriate?
   b. What does the expression "stable group" mean? Are only national, ethnical, racial and religious groups "stable"? Would this mean that the extermination of other groups (such as handicapped people, some political groups and homosexuals by the Nazi regime) would be qualified as a crime against humanity but not as genocide? Is "cultural genocide" recognised in international law? Do you think it should be?
3. *(Trial Chamber, paras. 601-610, 619-627)*
   a. How does the ICTR qualify the conflict in Rwanda? Is Art. 3 common to the Conventions applicable? Is Protocol II applicable?
   b. What is the relevance of the qualification of the conflict upon the case?
   c. Is there a difference of applicability between Article 3 common to the Conventions and Protocol II?

4. Does Art. 4 of the Statute of the ICTR make certain acts criminal? Or does it give the ICTR jurisdiction over acts made criminal elsewhere? If so, where are those acts made criminal? (*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154.)

5. *(Trial Chamber, paras. 601-610)*
   a. What is the relevance, for the prosecution of the accused, of establishing whether the rules referred to in Art. 4 of the Statute were at the time of indictment part of customary international law?
   b. Why did the Court find it necessary to establish that Art. 3 common to the Conventions is part of customary international law? What were the conclusions of the Court concerning Protocol II?
   c. Was the conclusion of the Court correct to argue that at the time when Akayesu committed his crimes, Art. 4 was part of existing customary law?
   d. Is it necessary that a rule of Art. 3 common to the Conventions or of Protocol II is part of customary law for the ICTR to apply it under Art. 4 of its Statute? Why? Is it because of the principle of *nullum crimen sine lege*? Would the application of a purely conventional rule of Protocol II violate that principle? Although Rwanda was at the time of the crimes party to Protocol II? At least for those rules which are neither incorporated into Rwandan legislation nor self-executing?
   e. Did the Security Council not empower the ICTR through Art. 4 of its Statute to apply all rules of Protocol II? If so, does the Court consider that that this would have violated the principle of *nullum crimen sine lege*?
   f. Did the Chamber in the Tadic case (*See* **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction, paras. 89, 94 and 143.] p. 1804.) consider that the ICTY may only apply customary rules? If one accepts such an interpretation, should it also apply to the ICTR?

6. *(Trial Chamber, paras. 611- 617)*
   a. Why may the ICTR only prosecute violations of Art. 3 and Protocol II for which customary law foresees individual criminal responsibility? Is the same reasoning applicable as for the ICTY in the Tadic jurisdiction case? Do you agree with the statement in para. 608 of the Trial Chamber decision that most States have criminalized violations of Art. 3 common to the Conventions in their domestic penal codes? Would that be necessary to claim that customary law criminalizes violations of common Art. 3? Would that be necessary for the ICTR to try Akayesu?
   b. Would it have been sufficient that the Rwandan criminal code foresaw individual criminal responsibility for the acts Akayesu was accused of? Can we assume that the acts committed by Akayesu were prohibited under Rwandan criminal law? Would such an approach of the ICTR have violated the principle of *nullum crimen sine lege*?

7. *(Appeals Chamber, paras. 430-445)*
   a. Who are the beneficiaries of the IHL of non-international armed conflicts? Who has to respect Art. 3 common to the Conventions? Protocol II? All individuals who commit a prohibited act during an armed conflict on the

territory of the State in which the conflict is taking place? Must the act be linked to the conflict? (See for this question **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* B., Trial Chamber, Merits.] p. 1804.) Must the perpetrator belong to a Party to the conflict? Must he be a public agent for one of the Parties? Must he part of the armed forces of one of the Parties?

b. According to the Trial Chamber (*Cf.* paragraphs of the Trial Chamber Judgement reproduced in para. 430 of the Appeals Judgement), is only a person who is mandated and supposed to be helping the war effort of one of the Parties obliged to respect IHL? How do you interpret Art. 3 common to the Conventions and Protocol II on this issue? Do you think that the Appeals Chamber was right to decide that the Trial Chamber had committed an error?

c. Is the Appeals Chamber's interpretation the only one that allows for individual criminal responsibility to be applied in non-international armed conflicts that take place in a failed State?

Case No. 201, ICTR, The Media Case

THE CASE

[**Source:** ICTR, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, footnotes omitted; available on http://www.ictr.org]

Judgement of: 3 December 2003
THE PROSECUTOR
V.
FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE
Case No. ICTR-99-52-T

JUDGEMENT AND SENTENCE [...]

GLOSSARY

Akazu: "Little house"; used to refer to group of individuals close to President Habyarimana

CDR: Coalition pour la Défense de la République (Coalition for the Defence of the Republic)

CRP: Le Cercle des Républicains Progressistes (Circle of Progressive Republicans)

Gukora: To work; sometimes used to refer to killing Tutsi

Gutsembatsemba: "Kill them" in the imperative form

Icyitso/Ibyitso: Accomplice; RPF sympathizer/accomplice; sometimes used to refer to Tutsi

Impuzamugambi: "Those who have the same goal"; Name of youth wing of CDR

Inkotanyi: RPF soldier; sometimes used to refer to Tutsi

Inkuba: "Thunder"; Name of youth wing of MDR

Interahamwe: "Those who attack together"; Name of youth wing of MRND

Inyenzi: Cockroach; group of refugees set up in 1959 to overthrow the new regime; sympathizer of RPF; sometimes used to refer to Tutsi

Kangura: "Awaken" in the imperative form; Name of newspaper published in Kinyarwanda and French

MDR: Mouvement Démocratique Républicain (Democratic Republican Movement)

MRND: Mouvement Révolutionnaire National pour le Développement (National Revolutionary Movement for Development)

PL: Parti Libéral (Liberal Party)

PSD: Parti Social Démocrate (Social Democratic Party)

RDR: Rassemblement Républicain pour la Démocratie au Rwanda (Republican Assembly for the Democracy of Rwanda)

RPF: Rwandan Patriotic Front

RTLM: Radio Télévision Libre des Milles Collines

Rubanda nyamwinshi: Majority people, Hutu majority or the democratic majority of Rwanda

Tubatsembatsembe: "Let's kill them"

CHAPTER I

INTRODUCTION [...]

2. The Accused

5. Ferdinand Nahimana [...]. In 1992, Nahimana and others founded a comité d'initiative to set up the company known as *Radio Télévision Libre des Mille Collines, S.A.* He was a member of the party known as *Mouvement Révolutionnaire National pour le Développement* (MRND).

6. Jean-Bosco Barayagwiza [...] was a member of the *comité d'initiative*, which organized the founding of the company *Radio Télévision Libre des Mille Collines, S.A.* During this time, he also held the post of Director of Political Affairs in the Ministry of Foreign Affairs. [...]

3. The Indictments

8. Ferdinand Nahimana is charged [...] with seven counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (persecution, extermination and murder), pursuant to Articles 2 and 3 of the Statute. [...] He stands charged mainly in relation to the radio station called *Radio Télévision Libre des Mille Collines* (RTLM).

9. Jean-Bosco Barayagwiza is charged [...] with nine counts: conspiracy to commit genocide; genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity [...], and two counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Articles 2, 3 and 4 of the Statute. [...] He stands charged mainly in relation to the radio station called RTLM and the CDR Party. [...]

CHAPTER III

FACTUAL FINDINGS [...]

4. RTLM

4.1 RTLM Broadcasts

342. Many witnesses testified that radio played a significant role in the lives of Rwandans. Prosecution Expert Witness Alison Des Forges testified that in the 1980s, the MRND government subsidized the production of radios, which were sold at a reduced price or even given away to those in the administrative structure of the party. According to Des Forges, radio was increasingly important as a source of information as well as entertainment and a focus of social life. RTLM started broadcasting in July 1993. [...]

343. [...] Francois Xavier Nsanzuwera, who in 1994 was Prosecutor in Kigali, [...] described crossing at least four roadblocks on 10 April, finding all those manning each of the roadblocks listening to RTLM. He observed this on many occasions and described radios and weapons as the two key objects that would be found at roadblocks. Witness LAG, who manned a roadblock in Cyangugu, testified that they heard about what was happening in the country and their leaders' instructions from RTLM. [...]

4.1.1 Before 6 April 1994

345. Some RTLM broadcasts focused on ethnicity in its historical context, in an apparent effort to raise awareness of the political dynamic of Hutu-Tutsi relations. In an RTLM broadcast on 12 December 1993, for example, Barayagwiza shared his own experience as a Hutu with RTLM listeners, to illustrate the role of education and culture in the development of ethnic consciousness:

> A Hutu child, ... let me take my own example, for I was born a Hutu; my father is a Hutu, my grandfather is a Hutu, my great grandfather is a Hutu and all my mother's parents are Hutus. [...] They brought me up as a Hutu, I grew up in Hutu culture. I was born before the 1959 revolution; my father did forced labor [...]. My mother used to weed in the fields of the Tutsis who were in power. My grandfather paid tribute-money. I saw all those things, and when I asked them why they go to cultivate for other people, weed for other people when our gardens were not well maintained, they would tell me: "That is how things are; we must work for the Tutsis." [...]

346. Prosecution Expert Witness Alison Des Forges described this passage as communicative of Barayagwiza's "insistence that the ethnic groups are a fundamental reality". She suggested that while there was nothing wrong with

taking pride in one's ethnic origins, in the context of a time when Hutu power was being defined as an ideology in opposition to a minority group, which carried the threat of violence against that group, such statements could contribute to the heightening of ethnic tensions. [...]

348. Subsequently in the same broadcast, [...] Gaspard Gahigi, RTLM Editor-in-Chief, [...] suggested that "people want to conceal the ethnic problem so that the others do not know that they are looking for power", then giving the floor to Barayagwiza, who agreed and elaborated on the point:

> Yes! Notable among them are the RPF people who are asking everybody to admit that the ethnic groups do not exist. And when one raises the issue, they say that such a person is "unpatriotic, an enemy of peace, whose aim is to divide the country into two camps. However, it looks like right from the beginning of our discussion, we have proved that the ethnic groups do exist, that the ethnic problem does exist, but that today it is being linked to ... by the way, it is not only today, this dates back a long time ago, it is associated with the quest for power.
>
> The RPF claim that they are representing the Tutsis, but they deny that the Tutsis are in the minority. They are 9% of the population. The Hutus make up 80%! So, their conclusion is, "If we accepted that we are Tutsis and accepted the rules of democracy, and we went to the polls, the Hutus will always have the upper hand and we shall never rule." Look at what happened in Burundi: they also thought like that. Those who staged the coup d'Etat thought in the same way. Their mentality is like that of the *Inyenzi*, whose only target is power, yet they know very well that today it is unacceptable to attain power without going through the democratic process... They wonder: "How shall we go about acceding to power?" and they add: "The best way is to refute the existence of ethnic groups, so that when we are in power, nobody will say that it is a single ethnic group that is in power." That is the problem we are facing now. [...]

361. In a broadcast by Kantano Habimana and Noël Hitimana, on 23 March 1994, the RTLM journalists warned listeners of a long-term plan being executed by the RPF, and their undertaking "to fight anything related to 'Power,' that is, to fight any Hutu, any Hutu who says: 'Rwanda is mine, I am part of the majority. I decide first, not you.'" [...]

362. Chrétien notes with regard to this broadcast the emphasis on the fear to be felt by Hutu who have been subjugated by Tutsi. The Hutu seized power from the Tutsi in 1959, and the Tutsi were going to take it back. The historical political context was described entirely in ethnic terms, and the terms "Hutu" and "Tutsi" were used for political groups of people struggling for power. [...]

363. RTLM broadcasts engaged in ethnic stereotyping in economic terms as well as political terms. [...]

368. RTLM broadcasts also engaged in ethnic stereotyping in reference to physical characteristics. In an RTLM broadcast on 9 December 1993, Kantano Habimana discussed accusations that RTLM hated the Tutsi:

> Not all Tutsis are wicked; some of them are wicked. Not all Hutus are good, some of them are wicked. Of the ethnic groups, there are some wicked Twas This shows that human nature remains the same among all the ethnic groups in Rwanda, among all the men in Rwanda. But what type of person got it into his head that the RTLM hates the Tutsis? What have the Tutsis done to incur our hatred? A Tutsi, (he smiles) who ... and which way are the Tutsis hated? The

> mere fact of seeing a Tutsi strolling about forces you to say he has a beautiful nose, that he is tall and slim, and what not. And you grudge him for that? If he has a beautiful, aquiline nose, you also have your own nose that is fat and which allows you to breathe enough air to ventilate your lungs. [...]

369. The Chamber notes, despite Habimana's effort to express even-handedness, the hostility towards and resentment of Tutsi that is conveyed in this broadcast, as well as the acknowledgement that some thought that RTLM hated the Tutsi. The denial is unconvincing. In another RTLM broadcast, on 1 January 1994, Kantano Habimana again mentioned the concern expressed by others that RTLM was promoting ethnic hatred:

> [...] However, in this war, in this hard turn that Hutus and Tutsis are turning together, some colliding on others, some cheating others in order to make them fall fighting ... I have to explain and say: "This and that...The cheaters are so-and-so ..." You understand ... If Tutsis want to seize back the power by tricks ... Everybody has to say: "Mass, be vigilant ... Your property is being taken away. What you fought for in '59 is being taken away." So kids, do not condemn me. I have nothing against Tutsis, or Twas, or Hutus. I am a Hutu but I have nothing against Tutsis. But in this political situation I have to explain: "Beware, Tutsis want to take things from Hutus by force or tricks." So, there is not any connection in saying that and hating the Tutsis. When a situation prevails, it is talked of.

370. Again in this broadcast, there was no reference to *Inkotanyi* or *Inyenzi*. The opposing forces were presented as Hutu and Tutsi. The Tutsi were said to want to seize power back through force or trickery, and Habimana said, again unconvincingly, "I have nothing against Tutsis", which was belied by everything else he said. [...]

371. That RTLM broadcasts intended to "heat up heads" is evidenced by broadcasts calling the public to arms. In an RTLM broadcast on 16 March 1994, Valerie Bemeriki conveyed the call to "rise up":

> We know the wisdom of our armed forces. They are careful. They are prudent. What we can do is to help them whole-heartedly. A short while ago, some listeners called to confirm it to me saying: 'We shall be behind our army and, if need be, we shall take up any weapon, spears, bows. ... Traditionally, every man has one at home, however, we shall also rise up. Our thinking is that the *Inkotanyi* must know that whatever they do, destruction of infrastructure, killing of innocent people, they will not be able to seize power in Rwanda. Let them know that it is impossible. [...]

375. Many of the RTLM broadcasts reviewed by the Chamber publicly named individuals as RPF accomplices and called on listeners to be vigilant to the security risk posed by these individuals. In an RTLM broadcast on 15 March 1994, Noël Hitimana reported:

> But in Bilyogo I carried out an investigation, there are some people allied with the *Inkotanyi*, the last time, we caught Lt Eric there, I say to him that if he wants, that he comes to see where his beret is because there is even his registration, we caught him at Nyiranuma's house in Kinyambo. There are others who have become *Inkotanyi*, Marc Zuberi, good day Marc Zuberi (he laughs ironically), Marc Zuberi was a banana hauler in Kibungo. With money from the *Inkotanyi* he has just built himself a huge house there, therefore he will not be able to pretend, only several times he lies that he is *Interahamwe*; to lie that you are *Interahamwe* and when the people come to check you, they discover that you are *Inkotanyi*. This is a problem, it will be like at Ruhengeri when they (*Inkotanyi*)

came down the volcanoes taking the names of the CDR as their own, the population welcomed them with joy believing that it was the CDR who had come down and they exterminated them. He also lies that he is *Interahamwe* and yet he is *Inkotanyi*, it's well-known. How does he manage when we catch his colleague *Nkotanyi* Tutsi? Let him express his grief.

Let's go to Gitega, I salute the council, let them continue to keep watch over the people because at Gitega there are many people and even *Inkotanyi*. There is even an old man who often goes to the CND, he lives very close to the people from MDR, near Mustafa, not one day passes without him going to the CND, he wears a robe, he has an eye nearly out of its socket, I do not want to say his name but the people of Gitega know him. He goes there everyday and when he comes from there he brings news to Bilyogo to his colleague's house, shall I name them? Gatarayiha Seleman's house, at the house of the man who limps "Ndayitabi".

376. The Chamber notes that the people named in this broadcast were clearly civilians. The grounds on the basis of which RTLM cast public suspicion on them were cited in the broadcast. They are vague, highly speculative, and have no apparent connection with military activity or armed insurrection.

377. In an RTLM broadcast on 14 March 1994, Gaspard Gahigi named an *Inkotanyi* and listed at the end of the broadcast the names of all his family members:

At RTLM, we have decided to remain vigilant. I urge you, people of Biryogo, who are listening to us, to remain vigilant. Be advised that a weevil has crept into your midst. Be advised that you have been infiltrated, that you must be extra vigilant in order to defend and protect yourself. You may say: "Gahigi, aren't you trying to scare us?" This is not meant to scare you. I say that people must be told the truth. That is useful, a lot better than lying to them. I would like to tell you, inhabitants of Biryogo, that one of your neighbors, named Manzi Sudi Fadi, alias Bucumi, is no longer among you. He now works as a technician for Radio Muhabura. We have seized a letter he wrote to Ismael Hitimana, alias Safari,... heads a brigade of *Inkotanyi* there the [sic] in Biryogo area, a brigade called *Abatiganda*. He is their coordinator. It's a brigade composed of *Inkotanyi* over there in Biryogo. [...]

As you can see, the brigade does exist in the Biryogo area. You must know that the man Manzi Sudi is no longer among you, that the brigade is headed by a man named Hitimana Ismaël, co-ordinator of the *Abatiganda* brigade in Biryogo. The Manzi Sud also wrote: "Be strong. I think of you a great deal. Keep your faith in the war of liberation, even though there is not much time left. Greetings to Juma, and Papa Juma. Greetings also to Espérance, Clarisse, Cintré and her younger sister, ... Umutoni."

378. Chrétien noted that this broadcast was an accusation of someone by name as being an RPF accomplice and the reading of a private letter, including the names of the family members. He testified that an ICTR investigator had been able to find Manzi Sudi Fahdi in Kigali and learned that his whole family, including the children Espérance, Clarisse, Cintré and others, were killed during the genocide. [...]

388. In a broadcast on 3 April 1994, Noël Hitimana forecast an imminent RPF attack:

They want to carry out a little something during the Easter period. In fact, they're saying: "We have the dates hammered out." They have the dates, we know them too. They should be careful, we have accomplices among the RPF. . . who provide us with information. They tell us, "On the 3rd, the 4th and the 5th, something will happen

> in Kigali city." As from today, Easter Sunday, tomorrow, the day after tomorrow, a little something is expected to happen in Kigali city; in fact also on the 7th and 8th. You will therefore hear gunshots or grenade explosions. Nonetheless, I hope that the Rwandan armed forces are vigilant. There are *Inzirabwoba* [fearless], yes, they are divided into several units! The *Inkotanyi* who were confronted with them know who they are... As concerns the protection of Kigali, yes, indeed, we know, we know, on the 3rd, the 4th and the 5th, a little something was supposed to happen in Kigali. And in fact, they were expected to once again take a rest on the 6th in order to carry out a little something on the 7th and the 8th ... with bullets and grenades. However, they had planned a major grenade attack and were thinking: "After wrecking havoc in the city, we shall launch a large-scale attack, then ..."

389. Chrétien suggested that this broadcast gave credibility to the "reign of rumour," on the basis of the fear shared by all at the time owing to the nullification of the Arusha Accords.

4.1.2 After 6 April 1994

390. In the days just after 6 April 1994, Noël Hitimana broadcast that Kanyarengwe and Pastor Bizimungu had died, suggesting that they, having desired and provoked misfortune, had been struck by it and asking what had prompted them, both Hutu, to sign a blood pact with those who would exterminate "us", apparently from the context a reference to the Hutu. The broadcast then asked listeners to look for *Inyenzi*:

> You the people living in Rugunga, those living over there in Kanogo, those living in Kanogo, in fact, those living in Mburabuturo, look in the woods of Mburabuturo, look carefully, see whether there are no *Inyenzis* inside. Look carefully, check, see whether there are no *Inyenzis* inside ...

391. When confronted on cross-examination with the fact that this was a false report of the death of Kanyarengwe and Bizimungu, Nahimana stated that Kanyarengwe was head of the RPF and Bizimungu its spokesperson. He said he could understand that the military might ask journalists to demoralize the opponents. "When there is war, there is war, and propaganda is part of it," he said. With regard to looking for people in the forest, Nahimana expressed the view that if the people were civilians who had gone to the forest in fear, he would not accept these words. On the other hand, if military intelligence had concluded that they were armed infiltrators of the RPF, he could understand an announcement such as the one in the broadcast.

392. RTLM broadcasts continued after 6 April to define the enemy as the Tutsi, at times explicitly. In a broadcast on 15 May 1994, for example, the RTLM Editor-in-Chief Gaspard Gahigi said:

> The war we are waging, especially since its early days in 1990, was said to concern people who wanted to institute "democracy" We have said time and again that it was a lie. these days, they trumpet, they say the Tutsi are being exterminated, they are being decimated by the Hutu, and other things. I would like to tell you, dear listeners of RTLM, that the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi. [...]

395. In an RTLM broadcast on 30 May 1994, Kantano Habimana equated *Inkotanyi* with Tutsi, referring to the enemy several times first as *Inkotanyi* and then as Tutsi:

> If everybody, if all the 90% of Rwandans, rise like one man and turn on the same thing called *Inkotanyi*, only on the thing called *Inkotanyi*, they will chase it away until it disappears and it will never dream of returning to Rwanda. If they continue killing themselves like this, they will disappear. Look, the day all these young people receive guns, in all the *communes*, everyone wants a gun, all of them are Hutu, how will the Tutsi, who make up 10% of the population, find enough young people, even if they called on the refugees, to match those who form 90% of the population.
>
> How are the *Inkotanyi* going to carry this war through? If all the Hutu children were to stand up like one man and say we do not want any more descendents of Gatutsi in this country, what would they do? I hope they understand the advice that even foreigners are giving them. [...]

396. In an RTLM broadcast on 4 June 1994 Kantano Habimana more graphically equated *Inkotanyi* with Tutsi, describing the physical characteristics of the ethnic group as a guide to selecting targets of violence. He said:

> One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the *Inkotanyi* and exterminate them, all the easier that [Tr.] the reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it. Then we will go on to Kibungo, Rusumo, Ruhengeri, Byumba, everywhere. We will rest after liberating our country. [...]

403. In an RTLM broadcast of 2 July 1994, Kantano Habimana exulted in the extermination of the *Inkotanyi*:

> So, where did all the *Inkotanyi* who used to telephone me go, eh? They must have been exterminated. Let us sing: "Come, let us rejoice: the *Inkotanyi* have been exterminated! Come dear friends, let us rejoice, the Good Lord is just." The Good Lord is really just, these evildoers, these terrorists, these people with suicidal tendencies will end up being exterminated. When I remember the number of corpses that I saw lying around in Nyamirambo yesterday alone; they had come to defend their Major who had just been killed. Some *Inkotanyi* also went to lock themselves up in the house of Mathias. They stayed there and could not find a way to get out, and now they are dying of hunger and some have been burnt. However, the *Inkotanyi* are so wicked that even after one of them has been burnt and looks like a charred body, he will still try to take position behind his gun and shoot in all directions and afterwards he will treat himself, I don't know with what medicine. Many of them had been burnt, but they still managed to pull on the trigger with their feet and shoot. I do not know how they are created. I do not know. When you look at them, you wonder what kind of people they are. In any case, let us simply stand firm and exterminate them, so that our children and grandchildren do not hear that word "Inkotanyi" ever again. [...]

408. Some RTLM broadcasts linked the war to what were perceived and portrayed as inherent ethnic traits of the Tutsi. In a broadcast on 31 May 1994, for example, Kantano Habimana said:

> The contempt, the arrogance, the feeling of being unsurpassable have always been the hallmark of the Tutsis. They have always considered themselves more intelligent and sharper compared to the Hutus. It's this arrogance and contempt which have caused so much suffering to the *Inyenzi-Inkotanyi* and their fellow Tutsis, who have been decimated. And now the *Inyenzi-Inkotanyi* are also being decimated, so much so that it's difficult to understand how those crazy people reason. [...]

413. In an RTLM broadcast on 5 June 1994, Kantano Habimana described an encounter with an *Inkotanyi* child:

> Some moments ago, I was late due to a small *Inkotanyi* captured in Kimisagara. It is a minor *Inkotanyi* aged 14. [...] So *Inkotanyi* who may be in Gatsata or Gisozi were using this small dirty Inkotanyi with big ears who would come with a jerrican pretending to go to fetch water but he was observing the guns of our soldiers, where roadblocks are set and people on roadblocks and signal this after. It is clear therefore, we have been saying this for a long time, that this *Inkotanyi's* tactic to use a child who doesn't know their objective making him understand that they will pay him studies; that they will buy him a car and make him do for their war activities, carry ammunitions on the head for them. And give him a machine to shoot on the road any passenger while they have gone to dig out potatoes. Truly speaking it is unprecedented wickedness to use children during the war, because you know that a child doesn't know anything.

414. This broadcast linked a small child to espionage without citing any evidence that the child was doing anything other than fetching water and looking around. The subsequent association with weapons would leave listeners with the impression that any boy fetching water could be a suspect, covertly aiding the enemy. RTLM promoted the idea that accomplices were everywhere. [...]

415. Many RTLM broadcasts used the word "extermination"; others acknowledged, as several broadcasts cited above, that the reality of extermination was underway. On 9 June 1994 in an RTLM broadcast, Kantano Habimana said:

> I will also tell you about Kivugiza, where I went yesterday and where [I] saw *Inkotanyi* in the Khadafi mosque; over one hundred of them had been killed. However, others arrived. When they reached the place, I went there to take a look and saw that they looked like cattle for the slaughter. I don't know whether they have already been slaughtered today or whether they will be slaughtered tonight. But in fact, whoever cast a spell on these Rwandan children (or foreigners if that is the case) went all out They are braving the shots fired by the children of Rwanda in a suicidal manner. I feel they are going to perish if they are not careful.

416. The Chamber notes the striking indifference to these massacres evident in the broadcast, and the dehumanization of the victims. Although the text makes no reference to ethnicity, in light of the context in which Tutsi were fleeing and taking refuge in places of worship, as well as other broadcasts in which the terms *Inkotanyi* and Tutsi were equated, listeners might well have understood the reference to *Inkotanyi* as a reference to Tutsi civilians. Habimana's suggestion that a newly arrived group had already been slaughtered or was about to be slaughtered accepted, condoned and publicly presented the killing of hundreds of people in a mosque as normal.

417. In an RTLM broadcast on 31 May 1994 an unidentified speaker described the clubbing of a Tutsi child:

> They have deceived the Tutsi children, promising them unattainable things. Last night, I saw a Tutsi child who had been wounded and thrown into a hole 15 meters deep. He managed to get out of the hole, after which he was finished with a club. Before he died he was interrogated. He answered that the *Inkotanyi* had promised to pay for his studies up to university. However, that may be done without risking his life and without devastating the country. We do not understand the *Inkotanyi's* attitude. They do not have more light or heavy weapons than us. We are more numerous than them. I believe they will be wiped out if they don't withdraw.

418. The Chamber finds no indication in this broadcast that the Tutsi child was armed or dangerous. His brutal death was described dispassionately, the point of the broadcast being that the *Inkotanyi* did not seem to understand that they would be annihilated.

[...]

425. In contrast, some broadcasts explicitly called for killing of civilians. In an RTLM broadcast on 23 May 1994, Kantano Habimana said:

> Let me congratulate thousands and thousands of young men I've seen this morning on the road in Kigali doing their military training to fight the *Inkotany* ... At all costs, all *Inkotanyi* have to be exterminated, in all areas of our country. Whether they reach at the airport or somewhere else, but they should leave their lives on the spot. That's the way things should be ... Some (passengers) may pretext that they are refugees, others act like patients and other like sick-nurses. Watch them closely, because *Inkotanyi's* tricks are so many... Does it mean that we have to go in refugee camps to look for people whose children joined the RPA and kill them? I think we should do it like that. We should also go in refugee camps in the neighbouring countries and kill those who sent their children within the RPA. I think it's not possible to do that. However, if the *Inkotanyi* keep on acting like that, we will ask for those whose children joined the RPA among those who will have come from exile and kill them. Because if we have to follow the principle of an eye for an eye, we'll react. It can't be otherwise.

426. The Chamber notes the call for extermination in this broadcast, and although there is some differentiation in the use of the term *Inkotanyi* from the Tutsi population, nevertheless the broadcast called for killing of those who were not *Inkotanyi*, the killing of those in refugee camps whose children joined the RPA. The broadcast also warned listeners to be vigilant at the roadblocks and to beware passengers using the "pretext" that they were refugees, in effect calling on the population to attack refugees.

427. In an RTLM broadcast on 28 May 1994, Kantano Habimana made it clear that even Hutu whose mothers were Tutsi should be killed:

> Another man called Aloys, *Interahamwe* of Cyahafi, went to the market disguised in military uniform and a gun and arrested a young man called Yirirwahandi Eustache in the market In his Identity Card it is written that he is a Hutu though he acknowledges that his mother is a Tutsi Aloys and other Interahmawe of Cyahafi took Eustache aside and made him sign a paper of 150000 Frw He is now telling me that they are going to kill him and he is going to borrow this amount of money. He is afraid of being killed by these men. If you are an *Inyenzi* you must be killed, you cannot change anything. If you are *Inkotanyi*, you cannot change anything. No one can say that he has captured an *Inyenzi* and the latter gave him money, as a price for his life. This cannot be accepted. If someone has a false identity card, if he is *Inkotanyi*, a known accomplice of RPF, don't accept anything in exchange. He must be killed.

428. From this broadcast it is clear that Yirirwahandi Eustache was perceived to be an *Inyenzi* and *Inkotanyi* because he acknowledged that his mother was a Tutsi. The chilling message of the broadcast was that any accomplice of the RPF, implicitly defined to be anyone with Tutsi blood, cannot buy his life. He must be killed. [...]

431. RTLM also broadcast lists of names of individuals. In an RTLM broadcast on 31 March 1994, for example, Mbilizi announced among the news headlines "13 students of Nyanza who form a brigade that is called Inziraguteba ["persons who are never late"] will soon be enrolled by the RPF." Shortly thereafter Mbilizi started his report of this news by saying that 13 students of Nyanza had just been enrolled by the RPF. He named five schools and then read a list of thirteen names of the people he said were in the Brigade Inziraguteba. Together with each name was broadcast the young man's post in the Brigade, his age, the name of his school, and what his RPF code name would be. The ages given ranged from 13 to 18 years old. After reading the list of names, Mbilizi said:

> So, dear listeners, you have noticed that these students are very young and that can be very dangerous. We have to say that this confirms sufficiently the information that was diffused on RTLM saying that the RPF has infiltrated schools.

[...]

433. A number of broadcasts are addressed to those manning the roadblocks, in support of their activities. In a broadcast between 26 and 28 May, Kantano Habimana directly encouraged those guarding the trenches against the *Inyenzi* to take drugs:

> I would like at this time to salute those young people near the slaughterhouse, the one near Kimisagara ... Yesterday I found them dancing zouk. They had even killed a small pig. I would like to tell you that ... Oh no! The thing you gave me to smoke it had a bad effect on me. I took three puffs. It is strong, very strong, but it appears to make you quite courageous. So guard the trench well so to prevent any cockroach [*Inyenzi*] passing there tomorrow. Smoke that little thing, and give them hell.[...]

Witness Evidence of RTLM Programming [...]

444. A number of Prosecution witnesses testified that individuals referred to in RTLM broadcasts were subsequently killed as a result of those broadcasts. Nsanzuwera, the Kigali Prosecutor at the time, characterized being named on RTLM as "a death sentence" even before 7 April. [...] One such incident, which took place on 7 or 8 April, was the killing of Desire Nshunguyinka, a friend of President Habyarimana, who was killed with his wife, his sister and his brother-in-law after RTLM broadcast the license plate of the car they were traveling in. The RTLM broadcast alerted the roadblocks in Nyamirambo and said they should be vigilant as a car with that identification would be passing through, with *Inkotanyi.* When the car arrived at the roadblock almost immediately after the broadcast, these four people were killed by those manning the roadblock. Nsanzuwera said that RTLM broadcasting addressed itself to those at the roadblock and that the message was very clear: to keep the radio nearby as RTLM would provide information on the movements of the enemy. Many listened to RTLM out of fear because its messages incited ethnic hatred and violence, and Nsanzuwera said the station was called "Radio Rutswitsi" by some, which means "to burn", referring to ethnic violence. After 6 April it was even called "Radio Machete" by some.

445. Prosecution Witness FS, a businessman from Gisenyi, testified that he heard his brother's name, among others, mentioned on RTLM on 7 April 1994, and

that shortly thereafter his brother was killed, together with his wife and seven children. He testified that his brother was not the only one, but that several people were killed following radio broadcasts. [...]

449. Prosecution witnesses also described RTLM broadcasts apparently designed to manipulate the movement of Tutsis so as to facilitate their killing. An incident recounted by Nsanzuwera involved Professor Charles Kalinjabo, who was killed at a roadblock in May 1994 after RTLM broadcast an appeal to all Tutsis who were not *Inkotanyi* but rather patriots to join their Hutu comrades at the roadblocks. Charles Kalinjabo was among those who consequently left his hiding place and went to a roadblock, where he was killed after RTLM then broadcast a message telling listeners not to go and search for the enemies in their houses because they were there at the roadblocks. Witness FW testified that on 11 April 1994, he heard an RTLM broadcast telling all Tutsis who had fled their homes that they should return because a search for guns was to be conducted, and that the houses of all those who were not home would be destroyed in this search. [...] Witness FW stated that most of those who returned home following this broadcast were killed. He did not go home but looked for a hiding place because he did not trust RTLM.

450. Witness FW also testified about an incident that took place at the Islamic Cultural Centre on 13 April 1994. The witness estimated that there were 300 men, 175 women and many children, all Tutsis taking refuge there. He described dire conditions and said that some Hutu youth were entering the compound and bringing food to those inside. On 12 April, he saw the RTLM broadcaster Noël Hitimana there, and heard him asking these youth why they were bringing food to the *Inyenzi* in the Islamic Cultural Centre. Witness FW testified that he told Hitimana that these people he was calling *Inyenzi* were his neighbours and asked him why he was calling them *Inyenzi*. Approximately one hour later, Witness FW said he heard Kantano Habimana on RTLM saying that in the Islamic Cultural Centre there were armed *Inyenzi* and that the Rwandan Armed Forces must be made aware of this fact. According to the witness, none of the refugees in the compound was armed; they were all defenceless. The next morning, on 13 April, the compound was attacked by soldiers and *Interahamwe*, who encircled and killed the refugees. From his place of hiding, Witness FW was able to see what was happening. He described the reluctance of some *Interahamwe* to kill people in a mosque, which led them to order everyone to come out, including elderly women and children. They were then taken to nearby houses, and almost everyone was subsequently killed. The next morning the witness found six survivors, three of whom were severely wounded and died subsequently. They told him that once the refugees had been put into the houses, grenades were thrown into the houses, and that they were the only survivors of the attack. Among those killed was Witness FW's cousin, a seven year-old girl.

451. Witness FW testified that in May he heard an RTLM broadcast, which he described as one of the "inflammatory programs". Gahigi was interviewing Justin Mugenzi who was saying that in 1959 they had sent the Tutsi away but

that this time around they were not going to send them away, they were going to kill them, that the Hutu should kill all the Tutsi - the children, women and men - and if they had come back it is because they were not killed last time. The same mistake should not be made again, they should kill all the Tutsi. Witness FW said this statement made them very scared because they realised that their chances of survival were very slim and that if they were alive it would not be for too long. [...]

457. Prosecution Witness Philippe Dahinden, a Swiss journalist who followed RTLM from its beginnings, delivered a statement to the United Nations Human Rights Commission on 25 May 1994, calling for the condemnation of the role played by RTLM since the beginning of the massacres and asking that the UN demand the closing down of the radio. In his statement he noted, "Even prior to the bloody events of April 1994, RTLM was calling for hatred and violence against the Tutsis and the Hutu opponents. Belgian nationals and peacekeepers were also among the targets and victims of the '*radio que tue*' [the killer radio station]." Calling RTLM "the crucial propangada tool" for the Hutu extremists and the militia in the launching and perpetuating of the massacres, Dahinden said that beginning on 6 April 1994, RTLM had "constantly stirred up hatred and incited violence against the Tutsis and Hutu in the opposition, in other words, against those who supported the Arusha Peace Accords of August 1993".

458. Expert Witness Des Forges testified that the message she was getting from the vast majority of people she talked to at the time of the killings was "stop RTLM". She noted that potential victims listened to RTLM as much as they could, from fear, and took it seriously, as did assailants who listened to it at the barriers, on the streets, in bars, and even at the direction of authorities. She recounted one report that a bourgmestre had said, "Listen to the radio, and take what it says as if it was coming from me". Her conclusion on the basis of the information she gathered was that RTLM had an enormous impact on the situation, encouraging the killing of Tutsis and of those who protected Tutsis. [...]

460. With regard to broadcasts after 6 April 1994, Nahimana testified that he was revolted by those which left listeners with the impression that Tutsis generally were to be killed. He distanced himself from these activities, which he characterized as "unacceptable", stating that RTLM had been taken over by extremists. He stated that RTLM did incite the population to seek out the enemy. While saying that he did not believe that RTLM "systematically called for people to be murdered", he said he was shocked to learn in detention that broadcasters were highlighting the physical features of Tutsis, whom he acknowledged might well be killed as a consequence at a roadblock. Nahimana hypothesized that had he tried to stop RTLM from broadcasting details about individuals named as Inkotanyi, he might have been himself made the subject of an RTLM broadcast endangering his life. On cross-examination, he specifically condemned several broadcasts he was questioned about, and he requested that his condemnation be taken as a global one for all such broadcasts. [...]

461. In response to questioning from the Chamber regarding the RTLM journalists, noting that the same journalists were broadcasting before and after 6 April 1994, Nahimana attributed their changed conduct to a breakdown in management, which allowed a number of radicals to control RTLM. He said during his time in detention he had become more familiar with the programming of RTLM after 6 April, and again he denounced it, particularly the broadcasts of Kantano Habimana, who he said often took drugs, after which he would broadcast unacceptable material. He noted that Habimana had lost his leg in the bombing of RTLM in April, and he said some of the anger in his programming could be understood, though not justified, by the fact that his entire family was killed by RPF forces. Kantano was a trained and good journalist, Nahimana said, recalling that he only learned in detention that the journalists were taking drugs, which had not happened before 6 April.

462. Nahimana firmly rejected the proposition that the difference between RTLM broadcasts before and after 6 April 1994 was merely a matter of degree. He said the kind of debates aired before were not possible after 6 April. He praised Gaspard Gahigi as "the cream of the cream of the cream of the print media", noting that he had trained journalists in the Great Lakes region. He agreed that mistakes were made but said mistakes happen anywhere and he deplored such mistakes, recalling that he had said that the person slighted should be given a right of reply. After 6 April, he said some journalists were like madmen, either because of drugs or because they were upset about what happened to their colleagues. He stated that he never saw any journalist on drugs and mentioned Kantano Habimana as having joined "the camp of criminals". [...]

Discussion of Evidence

[...]

468. The Chamber notes that in the RTLM broadcasts highlighted above, there is a complex interplay between ethnic and political dynamics. This interplay was not created by RTLM. It is to some degree a reflection of the history of Rwanda. The Chamber considers the broadcast by Barayagwiza on 12 December 1993, to be a classic example of an effort to raise consciousness regarding a history of discrimination against the Hutu majority by the privileged Tutsi minority. The discrimination detailed relates to the inequitable distribution of power in Rwanda, historically. As this distribution of power followed lines of ethnicity, it necessarily has an ethnic component. Barayagwiza's presentation was a personal one clearly designed to convey a political message: that the Hutu had historically been treated as second-class citizens. The Chamber notes the underlying concern running through all the RTLM broadcasts that the armed insurgency of the RPF was a threat to the progress made in Rwanda following 1959 to remedy this historical inequity. In light of the history of Rwanda, the Chamber accepts that this was a valid concern about which a need for public discussion was perceived. [...]

472. [...] Prosecution Expert Witness Alison Des Forges acknowledged several of these types of RTLM broadcasts but stated that they were very exceptional. The Chamber accepts that this was the case, both on the basis of witness testimony and on the basis of the sampling of broadcasts it has reviewed, which indicate that RTLM had a well-defined perspective for which it was widely known. RTLM was not considered, and was not in fact, an open forum for the expression of divergent points of view.

473. Many RTLM broadcasts explicitly identified the enemy as Tutsi, or equated the *Inkotanyi* and the *Inyenzi* with the Tutsi people as a whole. Some others implied this identification. Although some of the broadcasts referred to the *Inkotanyi* or *Inyenzi* as distinct from the Tutsi, the repeated identification of the enemy as being the Tutsi was effectively conveyed to listeners, as is evidenced by the testimony of witnesses. Against this backdrop, calls to the public to take up arms against the *Inkotanyi* or *Inyenzi* were interpreted as calls to take up arms against the Tutsi. Even before 6 April 1994, such calls were made on the air [...].

474. The Chamber notes that in his testimony Nahimana suggested repeatedly that whether these individuals were in fact members of the RPF, or were legitimately thought to be members of the RPF, was a critical factor in judging the broadcasts. The Chamber recognizes that in time of war, the media is often used to warn the population of enemy movements, and that it might even be used to solicit civil participation in national defense. However, a review of the RTLM broadcasts and other evidence indicates that the individuals named were not in fact members of the RPF, or that RTLM had no basis to conclude that they were, but rather targeted them solely on the basis of their ethnicity. [...]

477. Nahimana insisted, with regard to the broadcast on 14 March 1994, by Gaspard Gahigi, reading a letter written by an *Inkotanyi*, that the letter proved the existence of RPF brigades. If authentic, it is true that the letter was written by a self-identified member of the RPF, but RTLM broadcast the names of his children, who, according to Chrétien, were subsequently killed. Even Nahimana acknowledged finally in his testimony with regard to this broadcast that he did not like the practice of airing peoples' names, especially when it might bring about their death. The Chamber recognizes the frustration expressed by Nahimana over the lack of attention, or even bare acknowledgement, that the letter was written by an RPF member, proving the existence of RPF brigades. However, many Prosecution witnesses acknowledged in their testimony that these brigades existed, and the Chamber notes that several Prosecution witnesses such as Witness AEN and WD testified that they were themselves members of the RPF inside Rwanda at the time. In this case, the issue was not whether the author of the letter was a member of the RPF but that his children were mentioned by name in an RTLM broadcast. Nahimana conceded in his testimony that this was bad practice.

478. Among the Tutsi individuals mentioned specifically by name in RTLM broadcasts prior to 6 April 1994 are a number that were subsequently killed. [...]

481. After 6 April 1994, the fury and intensity of RTLM broadcasting increased, particularly with regard to calls on the population to take action against the enemy. RTLM continued to define the *Inkotanyi* and the *Inyenzi* as the Tutsi in the same manner as prior to 6 April. This does not mean that all RTLM broadcasts made this equation but many did and the overall impression conveyed to listeners was clearly, as evidenced by witness testimony, that the definition of the enemy encompassed the Tutsi civilian population. Nahimana again asserted in the context of a particular broadcast just after 6 April that the question of whether the enemy whom listeners were told to seek out was in fact the RPF was a critical factor in judging the broadcasts. The Chamber notes that this particular broadcast called on the public to look carefully for Inyenzi in the woods of Mburabuturo. In the context of other broadcasts that explicitly equated the Inyenzi with the Tutsi population, and without any reference in this broadcast to the Inyenzi carrying arms or in some way being clearly identified as combatants, the Chamber finds that a call such as this might well have been taken by listeners as a call to seek out Tutsi refugees who had fled to the forest. The 23 May 1994 RTLM broadcast by Kantano Habimana suggested that Inkotanyi were pretending to be refugees, directing listeners that even if these people reached the airport, presumably to flee, "they should leave their lives on the spot". Habimana's 5 June 1994 RTLM broadcast called attention to a young boy fetching water as an enemy suspect, without any indication as to why he would have been suspect. In the 15 May 1994 broadcast, Gaspard Gahigi, the RTLM Editor-in-Chief, told his audience "the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi." In the 29 May 1994 RTLM broadcast, a resident described checking identity papers to differentiate between the Hutu and the *Inkotanyi* accomplices, and in the 4 June 1994 RTLM broadcast, Kantano Habimana advised listeners to identify the enemy by his height and physical appearance. "Just look at his small nose and then break it", he said on air.

482. Many of the individuals specifically named in RTLM broadcasts after 6 April 1994 were subsequently killed. [...]

484. The Chamber has considered the extent to which RTLM broadcasts calling on listeners to take action against the Tutsi enemy represented a pattern of programming. While a few of the broadcasts highlighted asked listeners not to kill indiscriminately and made an apparent effort to differentiate the enemy from all Tutsi people, most of these broadcasts were made in the context of concern about the perception of the international community and the consequent need to conceal evidence of killing, which is explicitly referred to in almost all of them. The extensive witness testimony on RTLM programming confirms the sense conveyed by the totality of RTLM broadcasts available to the Chamber, that these few broadcasts represented isolated deviations from a well-established pattern in which RTLM actively promoted the killing of the enemy, explicitly or implicitly defined to be the Tutsi population.

485. The Chamber has also considered the progression of RTLM programming over time - the amplification of ethnic hostility and the acceleration of calls for

violence against the Tutsi population. In light of the evidence discussed above, the Chamber finds this progression to be a continuum that began with the creation of RTLM radio to discuss issues of ethnicity and gradually turned into a seemingly non-stop call for the extermination of the Tutsi. Certain events, such as the assassination of President Ndadaye in Burundi in October 1993, had an impact by all accounts on the programming of RTLM, and there is no question that the events of 6 April 1994 marked a sharp and immediate impact on RTLM programming. These were not turning points, however. Rather they were moments of intensification, broadcast by the same journalists and following the same patterns of programming previously established but dramatically raising the level of danger and destruction.

Factual Findings

486. The Chamber finds that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population. RTLM broadcasts called on listeners to seek out and take up arms against the enemy. The enemy was identified as the RPF, the Inkotanyi, the Inyenzi, and their accomplices, all of whom were effectively equated with the Tutsi ethnic group by the broadcasts. After 6 April 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased. These broadcasts called explicitly for the extermination of the Tutsi ethnic group.

487. Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and to return home or to go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent RTLM broadcasts tracking their movement.

488. Radio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM - at home, in bars, on the streets, and at the roadblocks. The Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group. The *Interahamwe* and other militia listened to RTLM and acted on the information that was broadcast by RTLM. RLTM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to be eliminated once and for all.

***4.2 Ownership and Control of RTLM** [...]*

Discussion of Evidence on Control of RTLM After 6 April 1994

561. The Chamber notes that the corporate and management structure of RTLM did not change after 6 April 1994. [...]

Factual Findings

566. The Chamber finds that RTLM was owned largely by members of the MRND party, with Juvenal Habyarimana, President of the Republic, as the largest shareholder and with a number of significant shareholders from the Rwandan Armed Forces. CDR leadership was represented in the top management of RTLM through Barayagwiza as a founding member of the Steering Committee and Stanislas Simbizi, who was subsequently added to the Steering Committee of RTLM.

567. The Chamber finds that Nahimana and Barayagwiza, through their respective roles on the Steering Committee of RTLM, which functioned as a board of directors, effectively controlled the management of RTLM from the time of its creation through 6 April 1994. Nahimana was, and was seen as, the founder and director of the company, and Barayagwiza was, and was seen as, his second in command. Nahimana and Barayagwiza represented RTLM externally in an official capacity. Internally, they controlled the financial operations of the company and held supervisory responsibility for all activities of RTLM, taking remedial action when they considered it necessary to do so. Nahimana also played an active role in determining the content of RTLM broadcasts, writing editorials and giving journalists texts to read.

568. The Chamber finds that after 6 April 1994, Nahimana and Barayagwiza continued to have *de jure* authority over RTLM. They expressed no concern regarding RTLM broadcasts, although they were aware that such concern existed and was expressed by others. Nahimana intervened in late June or early July 1994 to stop the broadcasting of attacks on General Dallaire and UNAMIR. The success of his intervention is an indicator of the *de facto* control he had but failed to exercise after 6 April 1994.

***4.3 Notice of Violations** [...]*

Factual Findings

617. Concern over RTLM broadcasting was first formally expressed in a letter of 25 October 1993 from the Minister of Information to RTLM. This concern grew, leading to a meeting on 26 November 1993, convened by the Minister and attended by Nahimana and Barayagwiza, together with Félicien Kabuga. At this meeting, Nahimana and Barayagwiza were put on notice of a growing concern, expressed previously in a letter to RTLM from the Minister, that RTLM was violating Article 5, paragraph 2 of its agreement with the government, that it was promoting ethnic division and opposition to the Arusha Accords and that it was reporting news in a manner that did not meet the standards of journalism. Nahimana and Barayagwiza both acknowledged that mistakes had been made by RTLM journalists. Various undertakings were made at the meeting, relating to the program broadcasts of RTLM. Nahimana was referred to as "the Director" of RTLM, and Barayagwiza was referred to as "a founding member" of RTLM. They were both part of a management team representing RTLM at the meeting, together with Felicien Kabuga, and they both actively participated in the

meeting, indicating their own understanding, as well as the perception conveyed to the Ministry, that they were effectively in control of and responsible for RTLM programming.

618. A second meeting was held on 10 February 1994, in which reference was made to the undertakings of the prior meeting, and concern was expressed by the Minister that RTLM programming continued to promote ethnic division, in violation of the agreement between RTLM and the government. The speech made publicly and televised is strong and clear, and the response from RTLM, delivered by Kabuga, is equally strong and clear in indicating that RTLM would maintain course and defend its programming, in defiance of the Ministry of Information. RTLM broadcasting, in which the Minister was mentioned, as was his letter to RTLM, publicly derided his efforts to raise these concerns and his inability to stop RTLM. By Witness GO's account, Barayagwiza threatened the Ministry. By Nsanzuwera's account, the Minister was well aware of such threats. Nevertheless, he told Witness GO to continue his work, and the Minister pressed forward with a case against RTLM he was preparing for the Council of Ministers shortly before he and his family were killed on 7 April 1994.

619. It is evident from the letter of 26 October 1993, the meeting of 26 November 1993 and the meeting of 10 February 1994, that concerns over RTLM broadcasting of ethnic hatred and false propaganda were clearly and repeatedly communicated to RTLM, that RTLM was represented in discussions with the government over these concerns by its senior management. Nahimana and Barayagwiza participated in both meetings. Each acknowledged mistakes that had been made by journalists and undertook to correct them, and each also defended the programming of RTLM without any suggestion that they were not entirely responsible for the programming of RTLM. [...]

CHAPTER IV

LEGAL FINDINGS

1. Introduction

944. A United Nations General Assembly Resolution adopted in 1946 declares that freedom of information, a fundamental human right, "requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to see the facts without prejudice and to spread knowledge without malicious intent".

945. This case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences.

2. Genocide

946. Count 2 of the Indictments charge the Accused with genocide pursuant to Article 2(3)(a) of the Statute, in that they are responsible for the killing and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such.

947. Article 2(3) of the Statute defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

948. The Trial Chamber in *Akayesu* interpreted "as such" to mean that the act must be committed against an individual because the individual was a member of a specific group and specifically because he belonged to this group, so that the victim is the group itself, not merely the individual. The individual is the personification of the group. The Chamber considers that acts committed against Hutu opponents were committed on account of their support of the Tutsi ethnic group and in furtherance of the intent to destroy the Tutsi ethnic group.

RTLM

949. The Chamber found, as set forth in paragraph 486, that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population and called on listeners to seek out and take up arms against the enemy. The enemy was defined to be the Tutsi ethnic group. These broadcasts called explicitly for the extermination of the Tutsi ethnic group. In 1994, both before and after 6 April, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents who supported the Tutsi ethnic group. In some cases these persons were subsequently killed. A specific causal connection between the RTLM broadcasts and the killing of these individuals - either by publicly naming them or by manipulating their movements and directing that they, as a group, be killed - has been established (see paragraph 487). [...]

Causation

952. The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.

953. The Defence contends that the downing of the President's plane and the death of President Habyarimana precipitated the killing of innocent Tutsi

civilians. The Chamber accepts that this moment in time served as a trigger for the events that followed. That is evident. But if the downing of the plane was the trigger, then RTLM [...] w[as] the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM [...], before and after 6 April 1994.

[...]

Genocidal Intent

957. In ascertaining the intent of the Accused, the Chamber has considered their individual statements and acts, as well as the message they conveyed through the media they controlled.

958. On 15 May 1994, the Editor-in-Chief of RTLM, Gaspard Gahigi, told listeners:

> ... they say the Tutsi are being exterminated, they are being decimated by the Hutu, and other things. I would like to tell you, dear listeners of RTLM, that the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi.

959. The RTLM broadcast on 4 June 1994 is another compelling illustration of genocidal intent:

> They should all stand up so that we kill the *Inkotanyi* and exterminate themthe reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it.

960. Even before 6 April 1994, RTLM was equating the Tutsi with the enemy, as evidenced by its broadcast of 6 January 1994, with Kantano Habimana asking, "Why should I hate the Tutsi? Why should I hate the *Inkotanyi*?" [...]

963. [...] Demonizing the Tutsi as having inherently evil qualities, equating the ethnic group with "the enemy" and portraying its women as seductive enemy agents, the media called for the extermination of the Tutsi ethnic group as a response to the political threat that they associated with Tutsi ethnicity. [...]

965. The editorial policies as evidenced by [...] the broadcasts of RTLM constitute, in the Chamber's view, conclusive evidence of genocidal intent. Individually, each of the Accused made statements that further evidence his genocidal intent. [...]

969. Based on the evidence set forth above, the Chamber finds beyond a reasonable doubt that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze acted with intent to destroy, in whole or in part, the Tutsi ethnic group. The Chamber considers that the association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal animus that motivated the Accused. To the contrary, the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity, underscores the fact that their membership in the ethnic group, as such, was the sole basis on which they were targeted. [...]

3. Direct and Public Incitement to Commit Genocide

Jurisprudence

978. The Tribunal first considered the elements of the crime of direct and public incitement to commit genocide in the case of *Akayesu*, noting that at the time the Convention on Genocide was adopted, this crime was included "in particular, because of its critical role in the planning of a genocide". The *Akayesu* judgement cited the explanatory remarks of the delegate from the USSR, who described this role as essential, stating, "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so." He asked "how in these circumstances, the inciters and organizers of the crime should be allowed to escape punishment, when they were the ones really responsible for the atrocities committed."

979. The present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994 and the related legal question of what constitutes individual criminal responsibility for direct and public incitement to commit genocide. Unlike Akayesu and others found by the Tribunal to have engaged in incitement through their own speech, the Accused in this case used the print and radio media systematically, not only for their own words but for the words of many others, for the collective communication of ideas and for the mobilization of the population on a grand scale. In considering the role of mass media, the Chamber must consider not only the contents of particular broadcasts and articles, but also the broader application of these principles to media programming, as well as the responsibilities inherent in ownership and institutional control over the media. [...]

ICTR Jurisprudence

1011. The ICTR jurisprudence provides the only direct precedent for the interpretation of "direct and public incitement to genocide". In *Akayesu*, the Tribunal reviewed the meaning of each term constituting "direct and public incitement". With regard to "incitement", the Tribunal observed that in both common law and civil law systems, "incitement", or "provocation" as it is called under civil law, is defined as encouragement or provocation to commit an offence. The Tribunal cited the International Law Commission as having characterized "public" incitement as "a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television". While acknowledging the implication that "direct" incitement would be "more than mere vague or indirect suggestion", the Tribunal nevertheless recognized the need to interpret the term "direct" in the context of Rwandan culture and language, noting as follows:

> ... [T]he Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit... .

The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.

1012. In *Akayesu*, the Tribunal defined the *mens rea* of the crime as follows:

> The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

1013. The *Akayesu* judgement also considered whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful and concluded that the crime should be considered as an inchoate offence under common law, or an *infraction formelle* under civil law, i.e. punishable as such. The Tribunal highlighted the fact that "such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results" and held that "genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator".

1014. In determining more precisely the contours of the crime of direct and public incitement to commit genocide, the Trial Chamber notes the factual findings of the Tribunal in *Akayesu* that the crowd addressed by the accused, who urged them to unite and eliminate the enemy, the accomplices of the Inkotanyi, understood his call as a call to kill the Tutsi, that the accused was aware that what he said would be so understood, and that there was a causal relationship between his words and subsequent widespread massacres of Tutsi in the community.

1015. In *Akayesu*, the Tribunal considered in its legal findings on the charge of direct and public incitement to genocide that "there was a causal relationship between the Defendant's speech to [the] crowd and the ensuing widespread massacres of Tutsis in the community". The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement. As set forth in the Legal Findings on Genocide, when this potential is realized, a crime of genocide as well as incitement to genocide has occurred.

Charges Against the Accused [...]

1025. The Accused have also cited in their defence the need for vigilance against the enemy, the enemy being defined as armed and dangerous RPF forces

who attacked the Hutu population and were fighting to destroy democracy and reconquer power in Rwanda. The Chamber accepts that the media has a role to play in the protection of democracy and where necessary the mobilization of civil defence for the protection of a nation and its people. What distinguishes [...] RTLM from an initiative to this end is the consistent identification made [...] the radio broadcasts of the enemy as the Tutsi population. [...] [L]isteners were not directed against individuals who were clearly defined to be armed and dangerous. Instead, Tutsi civilians and in fact the Tutsi population as a whole were targeted as the threat. [...]

1029. With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect. [...]

RTLM

1031. RTLM broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase "heating up heads" captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as "Radio Machete". The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active. The power of the human voice, heard by the Chamber when the broadcast tapes were played in Kinyarwanda, adds a quality and dimension beyond words to the message conveyed. In this setting, radio heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners. The denigration of Tutsi ethnicity was augmented by the visceral scorn coming out of the airwaves - the ridiculing laugh and the nasty sneer. These elements greatly amplified the impact of RTLM broadcasts.

1032. In particular, the Chamber notes the broadcast of 4 June 1994, by Kantano Habimana, as illustrative of the incitement engaged in by RTLM. Calling on listeners to exterminate the *Inkotanyi*, who would be known by height and physical appearance, Habimana told his followers, "Just look at his small nose and then break it". The identification of the enemy by his nose and the longing to break it vividly symbolize the intent to destroy the Tutsi ethnic group.

1033. The Chamber has found beyond a reasonable doubt that Ferdinand Nahimana acted with genocidal intent, as set forth in paragraph 969. It has found beyond a reasonable doubt that Nahimana was responsible for RTLM programming pursuant to Article 6(1) and established a basis for his responsibility under Article 6(3) of the Statute [...]. Accordingly, the Chamber finds Ferdinand Nahimana guilty of direct and public incitement

to genocide under Article 2(3)(c), pursuant to Article 6(1) and Article 6(3) of the Statute.

1034. The Chamber has found beyond a reasonable doubt that Jean-Bosco Barayagwiza acted with genocidal intent, as set forth in paragraph 969. It has found beyond a reasonable doubt that Barayagwiza was responsible for RTLM programming pursuant to Article 6(3) of the Statute of the Tribunal [...]. Accordingly, the Chamber finds Jean-Bosco Barayagwiza guilty of direct and public incitement to genocide under Article 2(3)(c), pursuant to Article 6(3) of its Statute. [...]

4. Conspiracy to Commit Genocide

1040. Count 1 of the Indictments charge the Accused with conspiracy to commit genocide pursuant to Article 2(3)(b) of the Statute, in that they conspired with each other, and others, to kill and cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such. [...]

1042. The requisite intent for the crime of conspiracy to commit genocide is the same intent required for the crime of genocide. That the three Accused had this intent has been found beyond a reasonable doubt and is set forth in paragraph 969. [...]

1047. The Chamber considers that conspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework. A coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose.

1048. The Chamber further considers that conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other. Institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action. The Chamber considers the act of coordination to be the central element that distinguishes conspiracy from "conscious parallelism", the concept put forward by the Defence to explain the evidence in this case. [...]

5. Complicity in Genocide

1056. Count 4 of the Nahimana Indictment, Count 3 of the Barayagwiza Indictment and Count 3 of the Ngeze Indictment charge the Accused with complicity in genocide, in that they are complicit in the killing and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such. The Chamber considers that the crime of complicity in genocide and the crime of genocide are mutually exclusive, as one cannot be guilty as a principal perpetrator and as an accomplice with respect to the same offence. In light of the finding in relation to the count of genocide, the

Chamber finds the Accused not guilty of the count of complicity in genocide.

6. Crimes Against Humanity (Extermination)

1057. Count 6 of the Nahimana Indictment, Count 5 of the Barayagwiza Indictment and Count 7 of the Ngeze Indictment charge the Accused with extermination pursuant to Article 3(b) of the Statute of the Tribunal, in that they are responsible for the extermination of the Tutsi, as part of a widespread or systematic attack against a civilian population on political, racial or ethnic grounds.

1058. The Chamber notes that some RTLM broadcasts [...] preceded the widespread and systematic attack that occurred following the assassination of President Habyarimana on 6 April 1994 [...]. [T]he Chamber has found that systematic attacks against the Tutsi population also took place prior to 6 April 1994. The Chamber considers that the broadcasting of RTLM [...] prior to the attack that commenced on 6 April 1994 formed an integral part of this widespread and systematic attack, as well as the preceding systematic attacks against the Tutsi population. [...]

1061. [...] The Chamber agrees that in order to be guilty of the crime of extermination, the Accused must have been involved in killings of civilians on a large scale but considers that the distinction is not entirely related to numbers. The distinction between extermination and murder is a conceptual one that relates to the victims of the crime and the manner in which they were targeted.

1062. [...] RTLM instigated killings on a large-scale. The nature of media, particularly radio, is such that the impact of the communication has a broad reach, which greatly magnifies the harm that it causes. [...]

7. Crimes Against Humanity (Persecution)

1069. Count 5 of the Nahimana Indictment and Count 7 of the Barayagwiza and Ngeze Indictments charge the Accused with crimes against humanity (persecution) on political or racial grounds pursuant to Article 3(h) of the Statute, in that they are responsible for persecution on political or racial grounds, as part of a widespread or systematic attack against a civilian population, on political, ethnic or racial grounds. [...]

1071. Unlike the other acts of crimes against humanity enumerated in the Statute of the Tribunal, the crime of persecution specifically requires a finding of discriminatory intent on racial, religious or political grounds. The Chamber notes that this requirement has been broadly interpreted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to include discriminatory acts against all those who do not belong to a particular group, i.e. non-Serbs. As the evidence indicates, in Rwanda the targets of attack were the Tutsi ethnic group and the so-called "moderate" Hutu political opponents who supported the Tutsi ethnic group. The Chamber considers that the group against which discriminatory attacks were perpetrated can be defined by its political component as well as its ethnic

component. [...] RTLM [...], as has been shown by the evidence, essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity. In these circumstances, the Chamber considers that the discriminatory intent of the Accused falls within the scope of the crime against humanity of persecution on political grounds of an ethnic character. [...]

1073. Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. [...]

1074. The Chamber notes that freedom of expression and freedom from discrimination are not incompatible principles of law. Hate speech is not protected speech under international law. In fact, governments have an obligation under the International Covenant on Civil and Political Rights to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Similarly, the Convention on the Elimination of all Forms of Racial Discrimination requires the prohibition of propaganda activities that promote and incite racial discrimination.

1075. A great number of countries around the world, including Rwanda, have domestic laws that ban advocacy of discriminatory hate, in recognition of the danger it represents and the harm it causes. [...]

1076. The Chamber considers, in light of well-established principles of international and domestic law, and the jurisprudence [...], that hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination. Within this norm of customary law, the prohibition of advocacy of discrimination and incitement to violence is increasingly important as the power of the media to harm is increasingly acknowledged.

1077. The Chamber has reviewed the broadcasts of RTLM [...] in its Legal Findings on Direct and Public Incitement to Genocide (see paragraphs 1019-1037). Having established that all communications constituting direct and public incitement to genocide were made with genocidal intent, the Chamber notes that the lesser intent requirement of persecution, the intent to discriminate, has been met with regard to these communications. Having also found that these communications were part of a widespread or systematic attack, the Chamber finds that these expressions of ethnic hatred constitute the crime against humanity of persecution, as well as the crime of direct and public incitement to genocide.

1078. The Chamber notes that persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms. [...]

1079. The Chamber notes that Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi woman as a femme fatale, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM (). The Ten Commandments, broadcast on

RTLM [...], vilified and endangered Tutsi women, as evidenced by Witness AHI's testimony that a Tutsi woman was killed by CDR members who spared her husband's life and told him "Do not worry, we are going to find another wife, a Hutu for you". By defining the Tutsi woman as an enemy in this way, RTLM [...] articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.

1080. The Chamber notes that persecution when it takes the form of killings is a lesser included offence of extermination. [...]

DISCUSSION

1. a. Would you qualify the situation in Rwanda from 6 April 1994 on as an armed conflict? Who were the parties to the conflict? (*Cf.* Arts. 2 and 3 common to the Conventions and Art. 1 of Protocol II.)

   b. Do the killings of Tutsi civilians by members of militias, or even by other Hutu civilians constitute acts of war? Can a genocide be committed in times of peace? What about a crime against humanity? Is war not a necessary condition for the commission of those crimes? How do you reconcile the definition of a crime against humanity, which has to be committed "as part of a widespread or systematic attack" with the fact that this crime can be committed in times of peace? Are these crimes violations of International Humanitarian Law (IHL)? (*Cf.*, for instance, Arts. 12 (2) and 50 of Convention I; Arts. 12 (2) and 51 of Convention II; Arts. 13 and 130 of Convention III; Arts. 32 and 147 of Convention IV and Art. 85 (2) of Protocol I.)

2. What are the differences between genocide and grave breaches of IHL? What are the differences between crimes against humanity and genocide? More precisely, between the crime of persecution and genocide? Is it possible that a crime that is qualified as genocide does not constitute a crime of persecution? When does a crime of persecution not constitute genocide? (*See also* **Case No. 180**, ICTY, The Prosecutor v.. Tadic. [*Cf.* B., Trial Chamber, Merits, paras. 618-654, and C., Appeals Chamber, Merits, paras. 238-249 and 271-304.] p. 1804; **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A., paras. 492-523.] p. 2171.)

3. How can someone be condemned for having committed genocide while he did not commit murders himself?

4. What do you think about the influence of the media in the commission of such crimes? What is the role of the media in time of war? What are the limits to the contents of their broadcasts in terms of international law? If a media is used as a means to incite to commit crimes, as it was the case during the genocide in Rwanda, would it become, under IHL, a legitimate military target? And if it is used to broadcast propaganda information or appeals to the mobilization of the population against the enemy? (*Cf.* Art. 52 of Protocol I.)

2. Positions of Third Countries

Case No. 202, France, Radio Mille Collines

THE CASE

[**Source:** *Situation*, Journal of "Droit International 90" Research Centre, Winter 1995-1996, pp. 48-51; original in French, unofficial translation.]

RSF v. Mille Collines

PARIS COURT OF APPEAL
First Criminal Appeal Division

Appeal against an order establishing partial lack of jurisdiction and the inadmissibility of a civil suit in criminal proceedings.

Judgment delivered in chambers on November 6, 1995. [...]

Decision taken after deliberation thereof in accordance with Article 200 of the Code of Penal Procedure. [...]

On the merits

[...]

In support of its case the association *Reporters sans frontières* essentially claims that, on the one hand, the four persons to whom it refers [...] were behind the creation, organization, funding and content of the broadcasts of *Radio-télévision Libre des Mille Collines*, which was a notorious means of inciting the commission of the reported crimes, and, on the other, some of them were members of the *Réseau Zéro* or "death squads" in Rwanda. [...]

Before examining the admissibility of the civil suit brought by the association *Reporters sans frontières*, the investigating judge ruled on his jurisdiction. [...]

From the perspective of international criminal law, the civil party claims that the French courts have jurisdiction, invoking the provisions of international instruments relating to the repression of genocide, war crimes, crimes against humanity and torture.

In its statement of grounds for appeal the civil party further cites international custom in support of the jurisdiction of the French courts with respect to genocide, war crimes and crimes against humanity.

The Court maintains, however, that in the absence of provisions in domestic law, international custom cannot have the effect of extending the extraterritorial jurisdiction of the French courts. In that respect, only the provisions of international treaties are applicable under the national legal system, on condition that:

- said treaties have been duly approved or ratified by France;
- the provisions of those treaties have in themselves direct effect on account of their content. [...]

The investigating judge also declared that he had no jurisdiction on the basis of the four Geneva Conventions of August 12, 1949 or Additional Protocol II of June 8, 1977, to which France is party.

Under the four Geneva Conventions, which entered into force with respect to France on December 28, 1951, the High Contracting Parties undertake to adopt the legislative measures necessary to punish grave breaches by means of appropriate sanctions.

[From] Articles 49, para. 2, of the First Convention, 50, para. 2, of the Second Convention, 129, para. 2, of the Third Convention, and 146, para. 2, of the Fourth Convention, which are identical in wording, [...]

[i]t may be deduced from the use of the words *"each High Contracting Party shall be under the obligation"* that the above obligations are incumbent solely upon the States Parties.

Moreover, the aforementioned provisions are too general in nature directly to create rules governing extraterritorial jurisdiction in respect of criminal matters, as such rules must be worded in precise terms. [...]

DISCUSSION

1. Does IHL provide for the competence of France to prosecute crimes even if they were not committed in France, nor committed by or against a French citizen? Has France an obligation to use that competence?

2. Are Arts. 49 (2)/50 (2)/129 (2)/146 (2) respectively of the four Conventions self-executing? Is the argument that their wording places obligations on the Parties and not on their courts relevant? Are those provisions too general? Is paragraph 1 of those Articles self-executing? Could paragraph 2 be self-executing and paragraph 1 not?

Case No. 203, France, Dupaquier, *et al.* v. Munyeshyaka

THE CASE

[**Source:** *Revue générale de droit international public*, vol. 4, 1996, pp. 1084-1089; original in French, unofficial translation, footnotes omitted.]

DUPAQUIER, *ET AL.* v. MUNYESHYAKA
Indictment Division of the Nîmes Court of Appeal, France,
March 20, 1996

On June 21, 1995, Maître Rigal, Deputy Bailiff at Nîmes, delivered to the Chief Public Prosecutor in Nîmes a summons on behalf of Jean-Franois Dupaquier [*et al.*] to proceed without delay with the immediate arrest of Father Wenceslas

Munyeshyaka and any other person on French territory alleged to have participated in the Rwandan genocide.

On July 12, 1995 the same persons filed a complaint citing the same acts with the Public Prosecutor of the Paris *Tribunal de Grande Instance* [Court of Major Jurisdiction].

In the complaint and the appended depositions, 16 persons affirmed that in *La Sainte Famille* parish in Kigali, Father Wenceslas Munyeshyaka had, during the months of April and May 1994 in particular, ill-treated Tutsi refugees by depriving them of food and water, sold his services, delivered the refugees up to the Hutu militia and forced women to have sexual intercourse with him in exchange for their lives.

This religious figure was, according to witnesses, armed and wore a bullet-proof vest, and participated actively in the selection of Tutsis to be handed over to their Hutu enemies for execution.

Since September 24, 1994, Wenceslas Munyeshyaka has taken refuge in France and has been living in Bourg-Saint-Andol (Ardèche), where he has held the post of parish curate. [...]

Questioned on August 1, 1995, Wenceslas Munyeshyaka denied the acts of which he was accused. A committal warrant was issued against him.

By order of the Indictment Division of August 11, 1995, Wenceslas Munyeshyaka was released under judicial supervision.

Meanwhile, further depositions, testimonies and applications to join the proceedings as civil parties have increased the number of complaints by civil parties, with the result that by September 18, 1995, 15 such applications had been recorded in the file (D45).

In the ruling of partial lack of jurisdiction of January 9, 1996 referred to the Court, the Investigating Judge declared that he did not have jurisdiction to examine the classifications of genocide, crimes against humanity and war crimes and on the basis of the international conventions of December 9, 1948, August 12, 1949 and January 27, 1977; [...]

The claimants in the civil action Jean-Louis Nyilinkwaya [*et al.*], in a brief filed on March 1, claimed that the ruling should be reversed and that the investigating judge, before whom the acts of genocide, crimes against humanity and war crimes had legitimately been referred, had jurisdiction.

Whereas a case has been referred to the Investigating Judge of Privas concerning acts which, assuming that they are established, were committed during April and May 1994 in Kigali (Rwanda) against foreigners by a Rwandan national, Wenceslas Munyeshyaka, who is currently residing in the Ardèche region of France; [...]

Whereas, pursuant to the provisions of Articles 689 *et seq.* of the Code of Criminal Procedure, the presence of the person under investigation in the Ardèche does not give the Investigating Judge of Privas jurisdiction to deal with crimes committed abroad by a foreigner against foreigners; [...]

Whereas the jurisdiction of the Investigating Judge of Privas cannot be established on the basis of the international conventions of Geneva of August 12, 1949 relative to the protection of civilians and the condition of prisoners in times of war, which cover different types of situations; [...]

In view of the above

The Indictment Division of the Nîmes Court of Appeal [...]

On the merits sets aside the ruling handed down,

Declares that the acts attributed to Father Wenceslas Munyeshyaka constitute, assuming that they are established, crimes of genocide and complicity in genocide,

Declares that the Investigating Judge of Privas does not have jurisdiction to examine them.

DISCUSSION

1. How can the Geneva Conventions be considered to "cover different types of situations" than that in which the alleged crimes of Munyeshyaka have been committed?
2. Was there not an armed conflict in Rwanda? Did not the alleged acts of Munyeshyaka violate the Geneva Conventions? (*Cf.* Art. 3 common to the Conventions and Protocol II.)
3. Did the Court consider the rules on universal jurisdiction of the Geneva Conventions not directly applicable before French courts? That they do not cover violations of the law of non-international armed conflicts? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

Case No. 204, Switzerland, X. v. Federal Office of Police

THE CASE

[**Source:** *Recueil officiel des arrêts du Tribunal Fédéral Suisse* (Judgements of the Swiss Federal Tribunal), Official Collection, vol. 123, Part II, 1997, pp. 175-191; original in French, unofficial translation.]

Extract from the judgment of the First Court of Public Law of April 28, 1997 in the case of X. v. the Federal Police Office (administrative-law appeal)

[...]

X. was arrested in Switzerland on February 11, 1995. A criminal investigation was instituted against him on the count of violation of the laws of war and placed in the hands of a military judge advocate. Essentially he was charged with having promoted, funded and organized massacres of civilians in the Bisesero region of

the Kibuye prefecture during the ethnic war which took place in Rwanda from April to July 1994.

On March 12, 1996 the Trial Chamber of the International Criminal Tribunal for Rwanda in Arusha, Tanzania (hereinafter referred to as the "ICTR") officially requested the deferment to its jurisdiction of all the proceedings brought against X.

By a decision of July 8, 1996 the Military Court of Cassation responded to that request. [...]

On August 26, 1996 the Registrar of the ICTR submitted to Switzerland a request for the transfer of the accused in support of which he produced the following documents:

- an indictment dated July 11, 1996 from the Prosecutor of the ICTR. In it X. is accused of bringing armed persons into the Bisesero region between April and June 1994 and ordering them to attack civilians who had come there to seek refuge; X. is claimed to have personally taken part in certain attacks. The charges are as follows: crimes of genocide for the killing or serious injury to the physical or mental health of members of a population, committed with intent to destroy, in whole or in part, an ethnic or racial group as such; (2) conspiracy to commit genocide; (3, 4, 5) crimes against humanity for killing and exterminating persons as part of a widespread and systematic attack and committing other inhuman acts against a civilian population on political, ethnic or racial grounds; (6) violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for committing or ordering to be committed acts of violence to life, health and the physical or mental well-being of persons;
- a decision confirming the indictment issued on July 15, 1996 by the Trial Chamber of the ICTR;
- an "arrest warrant with an order for transfer" issued the same day. In it the ICTR requests the surrender of X. so that he may answer for the crimes referred to in the indictment; the accused was to be informed of his procedural rights and take cognizance of the indictment.

[...]

By a decision of December 30, 1996 the Federal Police Office [*Office Fédéral de la Police* - the "OFP"] ordered the transfer of X. to the ICTR on account of the acts referred to in the request of August 26, 1996. Those acts were also punishable in Swiss law and fell within the jurisdiction of the ICTR. [...]

By means of an administrative-law appeal X. requests the following: that the decision to transfer him be declared void; that the OFP be asked to obtain from the ICTR exact figures on the sums allocated to the defence and the facilities granted to the latter; and that the OFP be questioned or asked to question the Federal Council on Switzerland's commitment to allow X. to serve a possible custodial sentence in its territory.

[...]

Extract from reasons:

[...]

2. - *(a)* In its resolution 827 (1993), the United Nations Security Council decided to establish an "ad hoc" International Tribunal to try war crimes committed in the Former Yugoslavia; at the same time it adopted a Statute for that Tribunal, drawn up by the UN Secretary-General. Under the terms of the Statute, "all States" are under the obligation to cooperate fully with the Tribunal and to amend, where necessary, their domestic legislation.

In its resolution 955 of November 8, 1994, the UN Security Council decided to set up a special Tribunal to try those presumed responsible for acts of genocide and other serious violations of international humanitarian law committed in Rwanda and in the neighbouring States by Rwandan citizens between 1 January and December 31, 1994, and adopted the Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as "ICTR") [*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154.] That resolution lays down the same obligations on States as resolution 827 (1993). In accordance with Article 8, para. 2, of its Statute, the International Tribunal has "primacy" over national courts in the event of concurrent jurisdiction and may request that a case be deferred to its jurisdiction at any time. [...]

- *(b)* On February 2, 1994, and then on March 20, 1995, the Federal Council decided unilaterally to apply those two resolutions in view of the fact that they fall within the scope of Chapter VII of the Charter of the United Nations (maintenance of peace), they seek to ensure the actual application of international humanitarian law, in particular the Geneva Conventions, and Switzerland took an active part in the preparation of the two Statutes, the character and, to a large extent, the contents of which are identical. The obligations imposed on States include cooperation in the search for persons, the arrest and surrender of remanded prisoners and accused persons, and other acts of judicial cooperation (Article 28 of the Statute of the ICTR). A national law appeared necessary in order to ensure effective cooperation with the two International Tribunals. [...]

- *(c)* On December 21, 1995 the Federal Assembly adopted the Emergency Federal Decree ["arrêt fédéral urgent", a form of urgent legislation adopted by parliament and subject to the possibility of a popular referendum only after its enty into force] Relating to Cooperation with International Tribunals Responsible for the Prosecution of Grave Breaches of International Humanitarian Law. The provisions contained in the Decree, which deal with the particular problems posed by that specific type of cooperation and are intended to simplify procedures by avoiding delays [...], are in part completely new and in part inspired by the Federal Law on Mutual International Assistance in Criminal Matters (EIMP) with the necessary amendments. Subject to provisions

to the contrary, the rules contained in the Decree and the implementing regulations thereof are applicable by analogy to cooperation with those international tribunals (Article 2 of the Decree).

The Decree governs cooperation with the International Tribunals for the Former Yugoslavia and for Rwanda and the Federal Council may extend the scope thereof to cooperation with other tribunals of the same type set up by the Security Council (Article 1). [...]

4. In accordance with Article 10 of the Decree, any person may be transferred to the international tribunal concerned for the purpose of criminal prosecution where it is apparent from the request and the attached documents that the breach (a) falls within the jurisdiction of that tribunal and (b) is punishable in Switzerland. [...] In order to guarantee effective cooperation with the international tribunals, Switzerland decided to reduce as much as possible the grounds likely to stand in the way of surrender. Therefore, the expression "transfer" was chosen deliberately by the legislature to make it clear that "classic" extradition within the meaning of the EIMP is not involved, having regard to the nature of the requesting authority and the terms governing the grant thereof. [...]

[...] [W]hen a transfer request is pending before it, the Swiss authority to which it is made does not have to verify the substance of the charge brought against the person concerned. The requesting authority does not have to provide evidence of the acts which it alleges or even show that they are likely to have happened. Only a request which is clearly incorrect or incomplete, and thus makes the representation from the requesting authority look like an obvious abuse, will be rejected. [...] Those principles, which were developed with respect to extradition, apply all the more with respect to the procedure for transfer. The legislature intended that procedure be simpler and quicker so as to preclude both verification of the alibi and a defence alleging that the breach was political in nature (first paragraph of Article 13 of the Decree). [...]

- *(b)* The appellant does not deny, with good reason, that the two conditions laid down in Article 10 of the Decree are met in this case. The acts with which he is charged in accordance with the indictment of 11 July 1996 are considered to constitute genocide and conspiracy to commit genocide, a crime against humanity and a grave breach of Article 3 common to the Geneva Conventions and Additional Protocol II thereto and they fall within the jurisdiction of the ICTR in accordance with Articles 2, 3, and 4 of the Statute. In respect of acts committed on Rwandan territory in 1994, the territorial and temporal jurisdiction of the ICTR is not in doubt (Article 7 of the Statute). Moreover, as has already been pointed out by the Courts-Martial Appeal Court, civilians who, during an armed conflict, commit a breach of public international law, render themselves liable to prosecution for breaches of the laws of war within the meaning of Article 109 of the Military Penal Code [*Code pénal militaire* - the "CPM" - *See* **Case**

No. 47, Switzerland, Military Penal Code. p. 912.] Therefore, the acts with which X. is charged are also punishable in Swiss law. [...]

7. Essentially, the appellant contends that the proceedings before the ICTR do not meet the requirements of a fair trial. He claims that since it was established the tribunal has had management and funding problems and has not functioned satisfactorily. He submits that the substantial expenses necessary for the defence of the appellant will not be reimbursed. Furthermore, the information requested from the ICTR on that matter has not been forthcoming and there are concerns that Article 6 (1) of the European Convention on Human Rights [the "ECHR"] (equality of arms) and 6 (3) (c) and (d) of the ECHR (rights of the defence) may be contravened. In any event the requesting authority should be asked to specify which sums will be allocated to the assigned defence counsel to cover his fees.

- *(a)* Where it grants extradition or assistance in legal matters, Switzerland must assure itself that the proceedings for which it is providing cooperation guarantee those being prosecuted a minimum standard which corresponds to that provided by the law of democratic States as laid down in particular in the European Convention on Human Rights and the UN Covenant on Civil and Political Rights (UN Covenant II [...]). [...] Switzerland would be contravening its own commitments if it deliberately granted assistance or the extradition of a person to a State in which there were serious grounds to believe that the person concerned might be subject to treatment which violated the ECHR or UN Covenant II. [...]

- *(b)* Those principles, which were developed in connection with international assistance involving third States, should not be applied automatically in the specific case of assistance to be granted to international criminal courts whose jurisdiction Switzerland has expressly and unreservedly recognized. When they decided unilaterally to apply resolutions 827 (1993) and 955 (1994) the Federal Council, and then the Swiss legislature, assumed that those international tribunals, which are products of the community of States, would provide sufficient guarantees with respect to the proper course of proceedings. [...] Contrary to the assertions of the appellant, it is not possible to see a gap in the law which could to be filled by the Tribunal [...]. Therefore, there is no need to examine, as the appellant would like, whether the proceedings before the ICTR conform to the minimum standards laid down in the ECHR and UN Covenant II, as such conformity must be presumed. In any case, such an examination would not make it possible to reject a request for cooperation, as is demonstrated below.

- *(aa)* The presumption which the requesting tribunal enjoys on the basis of its very nature is borne out by the wording of its Statute. That is because Article 20 cited above grants the accused all the procedural rights afforded by the ECHR and UN Covenant II. Furthermore, Rule 44 [*sic*] of the ICTR's rules of procedure and evidence, which

were adopted on July 5, 1996, provide for the assignment of counsel to indigent accused persons. The criteria governing indigence, the list of counsel willing to be appointed and the scale of fees are determined by the Registrar of the Tribunal. Exercising that power, the Registrar of the ICTR drew up a directive, approved by the Tribunal on January 9, 1996, concerning the assignment of counsel which lays down the terms and procedure governing their appointment and remuneration.

Moreover, the counsel for the appellant was herself assigned by the ICTR on December 12, 1996 to defend the appellant. On that occasion, the Registrar sent her the three instruments already attached to the request for transfer, the Statute of the Tribunal and an interlocutory law for pre-trial detention.

- *(bb)* In its resolution 50/213 C of June 7, 1996 the General Assembly of the United Nations asked the Office of Internal Oversight Services to carry out an inspection at the ICTR. That inspection took place from September 30, to November 1996. The report by that Office, which was submitted to the General Assembly on February 6, 1996, referred to the deficient management of the ICTR, several failures within the system and internal differences between its bodies (the President of the Tribunal, the Registry, and the Office of the Prosecutor) which resulted in the replacement of a number of officials. It stated that the Tribunal was not achieving its objectives and would not do so without the necessary support. Certain changes were under way but many more appeared to be necessary. The Office drew up several recommendations, in particular with respect to the role of the Registrar and his organization. A further, limited, examination was to take place during the second quarter of 1997. In his note of February 6, 1997, which accompanied the report, the Secretary-General accepted those conclusions as his own. He committed himself to fill the gaps which had been exposed and take all the measures necessary to rationalize and increase the support which the Secretariat gives to the Tribunal. As "immediate follow up" to the abovementioned recommendations additional assistance is now being given on the spot to the Tribunal and more systematic support procedures have been developed to meet its needs.

- *(cc)* It should be pointed out that the abovementioned criticisms regarding the effectiveness of the Tribunal [...] relate only to its management and organizational problems. By contrast, no fears have been voiced specifically with regard to respect for the rights of the accused. Moreover, the failures referred to have been taken seriously by the competent international authorities and specific measures have been taken to remedy them effectively. The stringent checks to which the ICTR has been submitted constitute the best guarantee that the Tribunal will have sufficient means to function satisfactorily and that the right of the appellant to a fair trial will be safeguarded there.

Therefore, the appellant's allegations regarding the ICTR's poor organization and lack of funds do not preclude the assumption that the criminal proceedings as a whole will, in accordance with its Statute, meet the minimum requirements imposed by the instruments relating to human rights. In accordance with a request for assistance granted on the basis of the confidence which is legitimately inspired by the requesting tribunal, there is no reason to impose conditions on the transfer or to question that Tribunal on the procedures governing the defence assigned to the accused.

- *(c)* The appellant would also like the Federal Council to be questioned and to commit itself to permitting him to serve any custodial sentence imposed upon him in Switzerland and to expressing that intention to the ICTR. In accordance with Rule 103 of the ICTR's rules, "Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons ..." [first paragraph]. "Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed" [second paragraph]. Invoking his status as an asylum-seeker in Switzerland, the appellant states that he fears imprisonment in Rwanda in view of the deplorable prison conditions which prevail there and other violations of human rights which are being committed in that State at present.

  That request likewise has no place within the context of those proceedings. That is because the surrender of the appellant to the ICTR is in no way comparable with straightforward extradition to Rwanda. Prior to the trial the appellant will be detained in Tanzania. Furthermore, there is no indication that in the event that he were found guilty the sentence would be served in Rwanda if there were any grounds to believe, in particular, that he would be exposed to treatment which violated Article 3 of the ECHR or Article 7 of UN Covenant II. Article 26 of the Statute and Rule 104 of the rules [of procedure and evidence] stipulate that all sentences of imprisonment shall be supervised by the Tribunal or a body designated by it and that should dispel the fears of the appellant.

  Article 29, para. 1, of the Decree permits enforceable decisions of an international tribunal to be implemented in Switzerland where the convicted person is habitually resident in Switzerland and where the sentence relates to offences punishable in Switzerland. However, that presupposes a request by the ICTR. Other than where the convicted person is a Swiss national, [...] no right exists to serve a sentence imposed by the International Tribunal in Switzerland and the Decree does not permit the Federal Court to draw up, under the present procedure, any proviso or condition concerning the place or conditions of imprisonment. [...]

DISCUSSION

1. Is X. accused of grave breaches of IHL? Taking into account Art. 109 of the Swiss Military Penal Code (*See* **Case No. 47**, Switzerland, Military Penal Code. p. 912.), may Switzerland punish X. for the alleged acts? From the point of view of IHL, may Switzerland prosecute such acts? Must Switzerland prosecute such acts?

2. Why was Switzerland bound by the ICTR Statute, even though it was not a UN Member State?

3. a. Is the transfer of an accused to the ICTR an extradition? May a State under IHL transfer an accused against whom it has a case for grave breaches of IHL to the ICTR? (*Cf.* Arts. 49 (2)/50 (2)/129 (2)/146 (2) respectively of the four Conventions.)

   b. May a State under the ICTR Statute (*See* **Case No. 196**, UN, Statute of the ICTR. p. 2154.) consider a transfer to the ICTR as an extradition and subject it to the usual procedures of its extradition laws? Which conditions of such procedures could contradict the ICTR Statute?

   c. For what reasons may Switzerland refuse to transfer an accused to the ICTR? Under the ICTR Statute? Under Swiss law?

4. a. Does IHL prescribe judicial guarantees and guarantees of treatment for the benefit of suspected authors of grave breaches? Are such guarantees applicable in States not party to the conflict? (*Cf.* Arts. 49 (4)/50 (4)/129 (4)/146 (4) respectively of the four Conventions.)

   b. Must Switzerland ensure that the aforementioned guarantees will be respected before it extradites a suspected author of a grave breach to a third State: Under IHL? Under International Human Rights Law? Are your answers similar with respect to transfers to the ICTR? If not, what are the differences?

   c. Is there a risk that the aforementioned guarantees for the accused will be violated in Arusha?

5. a. May the ICTR transfer the accused to Rwanda to serve a possible sentence?

   b. Could Switzerland insist that the accused serve his possible sentence in Switzerland? At least if he were a Swiss citizen? Under the ICTR Statute? Under Swiss Law?

   c. Could Switzerland refuse to transfer to the ICTR an accused if he were a Swiss citizen? At least if he were prosecuted for his crimes in Switzerland?

Case No. 205, Switzerland, The Niyonteze Case

[*See also* **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. p. 2171 and **Case No. 47**, Switzerland, Military Penal Code [hereafter MPC]. p. 912.]

THE CASE

[N.B.: In accordance with the practice of Swiss tribunals, the name of the accused is not published in the public decisions of this case. However, we have taken the liberty to reveal it as was done by the Federal Council in its message to Parliament on the Rome Statute of the ICC of 15 November 2000, Feuille fédérale (Federal Gazette) 2001, 487, n. 270, and Luc REYDAMS, *International Decisions, Niyonteze v. Public Prosecutor*, American Journal of International Law 96 (2002), pp. 231-236.]

[In order to facilitate comprehension of this case, the decision of the Court of Cassation is (27 April 2001) is reproduced below *before* the Appeals Chamber Judgement of 26 May 2000.]

A. Military Court of Cassation

[**Source:** Switzerland, *Tribunal militaire de cassation* (Military Court of Cassation), decision of 27 April 2001 in the N. case, available (in French) at http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/umund/chrechtsprechung.Par.0004.DownloadFile.tmp/N.pdf; unofficial translation.]

THE MILITARY COURT OF CASSATION
[the supreme military tribunal of Switzerland]
rules as follows
at its hearing of 27 April 2001 in Yverdon-les-Bains, [...]
on the application for judicial review
filed by
N., represented by [...],
and by
the *Prosecutor of Divisional Chamber 2*, Lieutenant-Colonel [...],
against
the decision handed down on 26 May 2000 by Military Appeals Chamber 1A,
in which N. was found guilty of breaches of the laws of war
(Art. 109 of the Swiss military code), sentenced to 14 years' imprisonment
(less the time already spent in pre-trial detention) and deportation
from Switzerland for a period of fifteen years,
and ordered to pay the costs of the case

Details of the case:

A. An investigation in support of evidence, followed by an ordinary military criminal investigation, were ordered on 3 July and 20 August 1996 respectively, with regard to N., a Rwandan citizen living in Switzerland as a refugee.

The Prosecutor of Military Divisional Chamber 2 (hereinafter referred to as "the Prosecutor,") prepared an indictment on 3 July 1998. In substance, the facts alleged against the Accused were as follows: between the beginning of the month of May and 15 July 1994, during which time a widespread or systematic attack was in progress against the Hutu opposition and the Tutsi minority, acting in his capacity as bourgmestre of Mushubati

commune, Prefecture of Gitarama, Rwanda, he called together a number of the residents of his commune, which was poorly regarded by those in power, at the top of a hill named Mont Mushubati, where he exhorted or ordered them to kill other Rwandans, namely Tutsis and moderate Hutus who were not taking part in the conflict; during the same period, in the refugee camps at Kabgayi in Rwanda, he encouraged a number of Tutsis and moderate Hutus from his commune to return there, with the intention of having them killed, perpetrating acts of violence against them and despoiling them of their property, and also ordered the soldiers accompanying him to kill two persons; finally, he took no steps to prevent the massacre of the Tutsi and moderate Hutu population in his commune. The facts set out in the indictment are to be seen in the context of the massacres that occurred in Rwanda between April and July 1994.

B. In its judgment delivered on 30 April 1999, Military Divisional Chamber 2 (hereinafter referred to as "the Divisional Chamber") found N. guilty of murder (Art. 116 of the Military Penal Code, [hereinafter referred to as "the MPC"], [...] of incitement to murder (Articles 22 and 116 MPC), of attempted murder (Articles 19a and 116 MPC) and of grave breaches of international conventions governing the conduct of hostilities and the protection of persons and property (Art. 109 MPC) and sentenced him to life imprisonment and to deportation from Switzerland for a period of 15 years. The Divisional Chamber found the accused guilty on the first two counts, regarding the meeting on Mont Mushubati and the events in the camps at Kabgayi, but found him not guilty on the third count related to breach of his duty as bourgmestre.

C. N. lodged an appeal against this judgment. Military Appeals Chamber 1A (hereinafter the Appeals Chamber) heard the appeal between 15 and 26 May 2000. In its decision handed down on 26 May, it allowed N.'s appeal in part. The Chamber found him guilty of breaches of the laws of war (Art. 109 MPC) and sentenced him to 14 years' imprisonment and deportation from Switzerland for a period of 15 years [...].

D. N. applied for review [...]. He claimed [...] that there had been a breach of the provisions of the MPC that deal with breaches of the law of nations during armed conflict (Military Penal Procedure, hereafter MPP [MPP, http://www.admin.ch/ch/f/rs/c322_1.html], Art. 185 (1) (d) as it relates to Articles 108 and 109 of the MPC [...]).

E. The Prosecutor also applied for review [...], maintaining that in respect of one matter the Appeals Chamber had dealt with the facts in an arbitrary manner by rejecting one of the counts on which the Divisional Chamber had found N. guilty. He also criticized the length of sentence imposed.[...]

Whereas:[...]

II. Application for judicial review filed by N. (hereinafter "the accused") [...]

3. In order to deal with the accused's claims regarding the taking of evidence or the contents of the indictment, it is first necessary to outline the elements constituting the offence of which he has been found guilty, so as then to be able to determine the pertinent or essential facts (*see* MPP Art. 185 (1) (f)

[Military Penal Procedures, http://www.admin.ch/ch/f/rs/c322_1.html]) to the application of criminal law.

a) The Appeals Chamber has found the accused guilty under Art. 109 MPC (breaches of the laws of war). That article forms part of the chapter of the MPC that deals with breaches of the law of nations during armed conflicts (Articles 108 to 114 MPC). Paragraph 1 of that article reads as follows:

> "Any person violating the provisions of international conventions concerning the conduct of hostilities or the protection of persons and property,
> any person violating other recognized laws and customs of war, shall, unless more stringent provisions apply, be subject to imprisonment.
> The penalty for grave breaches shall be imprisonment." [...]

In principle, the provisions of Articles 108 to 114 MPC apply where war has been declared and to other conflicts between two or more States (Art. 108 (1) MPC). However, Art. 108 (2) MPC stipulates that breaches of international agreements are punishable if those agreements specify a broader field of application. It therefore follows that the 'international conventions governing the conduct of hostilities and the protection of persons and property' that apply to non-international conflicts, and which hence have a wider field of application than those of the conventions applicable exclusively to international conflicts, also fall under the provisions of Art. 109 (1) MPC.

b) [...] The impugned judgment also refers to [...] Protocol II of 8 June 1977, which came into force for Switzerland on 17 August 1982 and for Rwanda on 19 May 1985 and which "develops and supplements Art. 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application." (Protocol II, Art. 1 (1)). In particular, it sets out in more detail than does common Article 3 the fundamental guarantees for humane treatment of "persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol II, Art. 4). Specifically, it prohibits at any time and in any place whatsoever: "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment." (Protocol II, Art. 4 (2) (a)).

c) It is not in dispute that Article 3 common to the four Geneva Conventions (hereinafter 'common Article 3'), along with the further provisions of Protocol II, forms part of the 'provisions of international conventions' mentioned under Art. 109 (1) MPC, thereby making it possible to punish breaches of common Article 3 and of Protocol II Art. 4 under that provision. Furthermore, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has recently confirmed the conclusion that a breach of common Article 3 constitutes a crime and can hence lead to criminal prosecution under the domestic legislation of a State (see the judgment of 20 Februa-

ry 2001 in the Celebici case, para. 168). Nor is it in dispute that a foreign perpetrator of breaches of the laws of war, acting against foreigners, during a non-international conflict on the territory of another State, can be prosecuted and sentenced by the Swiss courts under Art. 109 MPC, as ordinary Swiss criminal law contains no comparable provisions. This extension of the territorial jurisdiction of Swiss criminal law arises out of Art. 2 (9) MPC, which provides that civilians (by which are meant persons not liable for military service in Switzerland) who, during an armed conflict, commit breaches of the law of nations (Articles 108 to 114) are subject to Swiss military criminal law. This rule must be read in conjunction with Art. 9 MPC, which states that the MPC applies to offences committed in Switzerland and in other countries. Courts-martial have jurisdiction, as Art. 218 MPC stipulates that all persons subject to military law are liable to be tried before courts-martial (para. 1), even if the offence has been committed outside Switzerland (para. 2). [...]

4. [...] the accused claims a breach of an essential element of procedure, on the grounds that the Appeals Chamber found him guilty of acts not mentioned in the indictment [...]. [...] the Appeals Chamber points out that the eldest daughter of one witness (Witness 21, whose anonymity is guaranteed under this procedure, a protective measure afforded to most witnesses from Rwanda), first name D., aged 23, and the wife of the uncle of Witness 3, were killed following the Mont Mushubati meeting and that these two deaths were a result of the accused's speech inciting the population of his commune to eliminate Tutsis. According to the accused, the victims had to be cited by name in the indictment and this procedural error prevented the Appeals Chamber from convicting him on the corresponding count. [...]

b) [...] The indictment mentions the meeting on top of Mont Mushubati, during which the accused is alleged to have "exhorted, then given the formal order to the participants [...] to commit murder, kill and attack the property of opposition Hutus mentioned above and the Tutsi minority." It does not give further details as to the identities of the victims, but does state that they "were not participating in the conflict."

The alleged breach of common Article 3 (via Art. 109 MPC) is in this instance related to "murder of all kinds" (common Article 3 (1) and (2) (a)). In other words, and in terms of Swiss law, the accused is alleged to be the indirect perpetrator or instigator of murders which, in the context of the massacres carried out in Rwanda during this period, were alleged to be a direct consequence of the meeting on Mont Mushubati. Criminal proceedings for breaches of the laws of war do not automatically require that the precise identity of the victims be given. Mentioning certain of these victims in the judgment could be seen as providing additional information in the context already defined at the opening of the trial by the indictment; this would add detail to the accusation presented by the Prosecutor, without modifying the objective in terms of the alleged facts [...].

Furthermore, the accused advances a rule supposedly applicable before the ICTR, the effect of which would be that the victims must be named where breaches of common Article 3 are alleged. In his arguments, the accused cites no provision of that tribunal's statute or rules of procedure, nor any precise jurisprudence of the tribunal. In any case, the Swiss courts are not bound to apply foreign or international rules of procedure. [...] This ground for review is therefore unfounded.

5. The accused criticises the examination of evidence in a number of respects [...].

6. a) The Appeals Chamber found (in Chapter 3 of the impugned judgment) that the accused, who had returned to Mushubati in the night of 18/19 May 1994 following a period spent in Europe between 12 March and 14 May 1994, returning via Libreville, Kinshasa and Goma, summoned the population of the commune to a meeting on top of Mont Mushubati somewhere in the second half of May 1994, acting in his capacity as bourgmestre. On the appointed day, part of the population made their way to the top of the hill via various paths. On arrival, following approximately 1 1/2 hours' walk, the accused gave a speech in front of a crowd of some two hundred persons, probably using a public address system or a megaphone. He was accompanied by a number of soldiers. The substance of his speech was that Mushubati commune was poorly regarded by the government because, during his absence, the population had merely killed Tutsis' livestock and burned down their houses, allowing them to escape to the camps at Kabgayi. The authorities were accusing the inhabitants of Mushubati of having allowed numerous Tutsis and moderate Hutus to escape the large-scale massacre that had recently taken place in the region.

At the time of the meeting there were few Tutsis remaining in the commune and they were in hiding, particularly in the forests on Mont Mushubati. The aim of the meeting was to flush out any surviving Tutsis and to incite hatred of Tutsis among those present. During his speech, the accused exhorted the population to kill the surviving Tutsis, together with pregnant Hutu women where the father of the child was a Tutsi. More precisely, he issued a formal instruction to those present to carry out "ground clearing" [*débroussaillage* in French], by which was meant to kill Tutsis and moderate Hutus of the opposition, and to attack their property. The participants at the meeting obeyed the orders and exhortations of their bourgmestre, which led to the deaths of an unknown number of persons, including the daughter of Witness 21, D., aged 23, and the wife of the uncle of another witness (Witness 3). D. (whose father was a Tutsi) was killed on the Kabgayi road the day of the Mont Mushubati meeting and her body was thrown into a latrine. She is on a list of missing persons. The (Tutsi) wife of the uncle of Witness 3 was killed and her body thrown into a river.

[...] According to the accused, the decision to call the population together had been taken at a meeting attended by the bourgmestre

and the councillors of the commune's sectors, the aim being to organize community work in the form of "ground clearing" in the normal sense of the word, i.e. clearing away undergrowth along the forest paths on the slopes of Mont Mushubati. The work was intended to facilitate action against looting, arson, illegal logging, banditry and the activities of the Interahamwe (the Interahamwe movement was at the origin of the youth wing of the majority party, the MRND and, in 1994, the members of that movement played an active role in the massacre of the Tutsis). The accused agreed that it had taken approximately 1 1/2 hours to climb the hill. He claimed to have made a speech thanking those present for attending, encouraging them to fight bandits and the Interahamwe and calling on them to resist incitation to hatred or violence.

The Appeals Chamber found that the accused's version of the aims of the Mont Mushubati meeting, the "ground-clearing" and the content of his speech (discouraging aggression and re-establishing security) was not plausible. By contrast, the Chamber had been convinced by the statements of witnesses, of which it had summarized the decisive elements.

b) In his application for review, the accused calls into question the credibility of the witnesses whose testimony the Appeals Chamber has accepted. He points out numerous contradictions between their depositions. From those discrepancies he concludes that these depositions are generally unconvincing.

[...] It is true that discrepancies or errors in witnesses' testimony can raise questions as to their credibility. In referring to the first-instance judgment, the Appeals Chamber took account of the specific situation applying to witnesses who had experienced the bloody events of spring 1994 in Rwanda, who had in many cases lost members of their families and suffered trauma, some of whom were illiterate and had no knowledge of calendars. These are not typical situations for Swiss courts. Furthermore, the judges of the ICTR have also pointed out the specificities of this situation as it applies to assessing the probative value of testimony. They have noted in this context that, unlike the leaders of Nazi Germany, who went to great lengths to record their deeds committed during the Second World War, the planners and perpetrators of the Rwandan massacres in 1994 left virtually no trace of what they had done, making the testimony of survivors all the more important (*see* the ICTR judgment in the *Kayishema and Ruzindana* case, 21 May 1999, para. 65). In the view of the ICTR, therefore, one must take into account the influence of traumatic experiences on witnesses' testimony, but one should not dismiss such testimony merely because it relates to traumatic events; certain discrepancies and errors are to be expected under such circumstances (*ibid.*, para. 75). In the instant case, Swiss judicial bodies took steps to render themselves capable of assessing the reliability of testimony in this particular context: examining magistrates and trial judges travelled

to Rwanda, heard numerous witnesses in Rwanda and in Switzerland of the events of 1994, and also heard journalists and specialists on the contemporary history or the culture of the country. The Appeals Chamber was also able to draw on the book by US historian and leader of a group of experts Alison Des Forges (*Leave None to Tell the Story: Genocide in Rwanda*, published by Human Rights Watch and the International Federation for Human Rights, Paris, 1999), which presents a survey of events in Rwanda during 1994, together with their historical, political and cultural background. The book, which mentions neither the accused nor the massacres in Mushubati commune, does not constitute evidence, but the work of historians does represent an important and uncontested documentary resource for a Swiss judge called upon to consider related testimony. [...]

c) Turning to the first-instance judgment, the Appeals Chamber found that the version of the facts presented by the accused was of itself implausible. For the Divisional Chamber, it was in particular hardly likely that "ground clearing" would succeed in re-establishing security and that priority would be given in wartime to the problems of arson, illegal logging and illegal charcoal-making. It was not untenable [for the Divisonal Chamber] to take such elements into account.

But, above all, the Appeals Chamber was able to base its decision on statements from persons who claimed to have attended the Mont Mushubati meeting and from others to whom the speech made by the accused at that meeting had been communicated. [...]

To support his version of the events concerning the Mont Mushubati meeting, the accused stated that "ground clearing" or clearing the edges of the forest along the forest paths was necessary at the time, that the work was intended to prevent illegal usage of the forest and that this was borne out by an expert opinion concerning the condition of vegetation in the area, submitted in evidence. However, there is little to be gained from discussing the necessity or existence of forestry work in 1994; even if one accepts that it was necessary to clear away undergrowth along the forest paths, none of the testimony heard indicates that this was the purpose - even the secondary purpose - of the meeting in question. [...]

8. a) In considering the personal situation of the accused (Chapter 3 of the impugned judgment), the Appeals Chamber summed up the circumstances under which the accused decided to return to Rwanda following the outbreak of the conflict and of the massacres. The Chamber also mentioned the activities of the accused during the weeks he spent in his commune (from 18/19 May to 11/12 June 1994) and the manner in which his departure and that of his family for Zaire (now the Democratic Republic of the Congo) was arranged.

[...] The Chamber also found that on returning to Mushubati the accused enjoyed effective and significant powers. [...]

c) The factual conclusions regarding the political affiliation and the powers of the bourgmestre of Mushubati in May 1994 could also be

relevant to application of Art. 109 MPC as it applies to common Article 3 (see 3. above and 9. below). Action against breaches of the laws of war presupposes that certain objective conditions are met with respect to the perpetrator and the context in which he acts during the course of a conflict. [...]

The accused does not dispute the extent of the powers exercised by a bourgmestre in peacetime, but claims that following the outbreak of the conflict, and in particular after the interim government was set up in Gitarama, a few kilometres from Mushubati, he exercised no more than purely administrative power in his commune, owing to the presence of large numbers of soldiers and militia. In support of his arguments, the accused outlined the conditions under which he had acted during the events set out in the impugned judgment.

Clearly, it is difficult for a foreign court to determine, several years after the event, the extent of the powers exercised by an agent of the Rwandan civilian administration in dramatic circumstances over a period of a few weeks. However, all the facts established show that the accused retained certain of his powers, that his authority as bourgmestre was not called into question and that there was no direct confrontation with the government, the prefect, the army or the militia regarding the administration of his commune or his political status. In this very special situation, where State bodies at all levels could no longer function as they had hitherto and where institutions were no longer as structured or as effective as before, a bourgmestre clearly did not exercise as much power as he would under normal circumstances. Indeed, the impugned judgment speaks of a "chaotic situation", and one that left the accused with only limited freedom of decision and action in comparison with a normal situation. This being so, the Chamber's findings with regard to the extent of the powers enjoyed by the accused under these circumstances appears neither untenable nor manifestly at variance with the actual situation as it emerges from the proceedings and testimony. On this point, therefore, the factual findings of the impugned judgment are not arbitrary.

9. The accused claims that criminal law has not been respected [...], specifically in relation to Arts. 108 (3), and 109 (1) of the MPC, Article 3 common to the Geneva Conventions, Articles 146 and 147 of the Fourth Geneva Convention and Art. 4 of Additional Protocol II. He claims that the actions of which he is accused [...] have no proximate connection with the armed conflict in Rwanda and that he therefore does not fulfil the objective conditions required in order to be considered the perpetrator of breaches of these provisions of international humanitarian law. [...]

   a) As mentioned above, [...] a conviction can be secured only on the basis of Art. 109 MPC, and the "provisions of international conventions" to which that article refers are those of common Article 3 and of Art. 4 of Protocol II. Article 108 (2) MPC does not apply in this context. Articles 146 and 147 of the Fourth Geneva Convention (relative to the protection of civilian persons in time of war) set out the obligations on

the Contracting Parties: to enact legislation to provide penal sanctions for persons committing grave breaches of the Convention, to search for persons alleged to have committed breaches of the Convention and to try such persons or surrender them to another State for trial. They do not contain any rules directly applicable to the conduct of hostilities. Moreover, by enacting Art. 109 MPC, Switzerland has discharged the obligation to enact legislation contained in Art. 146 (1) of the Fourth Convention [...].

The category into which the Rwandan conflict of 1994 falls is not in dispute [...]: this was an armed conflict not of an international character within the meaning of common Article 3. The conflict also falls within the scope of Protocol II, which is somewhat narrower than that of common Article 3: it corresponds to the definition of Protocol II, Art. 1 (1): a conflict taking place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations (common Article 3 applies only to conflicts of lesser intensity [...]).

The accused does not dispute the fact that the acts of which he is accused, and the reality of which is not contested (see 6. and 7. above) could be classified as intentional homicides, with him the indirect perpetrator, co-perpetrator or instigator. The victims of these acts, of whom an unknown number were killed, in particular Tutsis hiding in Mushubati or refugees in Kabgayi, were "persons taking no active part in the hostilities" protected by common Article 3 and Protocol II. The violence to life perpetrated upon these persons is explicitly prohibited by these instruments of international humanitarian law (common Article 3 (1), (2) (a) and Protocol II, Art. 4 (2) (a)) which prohibit various forms of participation in homicide [...]. This is in accordance with the point generally accepted under international criteria, that the notion of intentional homicide or murder covers all situations in which the perpetrator, by his behaviour, causes the death of a person and acts with intent as regards his behaviour and the expected result (see the message from the Swiss federal council regarding the Rome Statute of the International Criminal Court, the Swiss federal law on cooperation with the ICC and the revision of criminal law, *Feuille fédérale* 2001 I, p. 474, n. 5.3.2.1).

Nonetheless, for common Article 3 and Art. 4 of Protocol II to be applicable under Art. 109 MPC, there must be a certain nexus between the acts (and their perpetrator) and the armed conflict, as not every act of violence to life that occurs in the territory of a country involved in such a conflict is covered by international humanitarian law. The Appeals Chamber found that this condition was satisfied. The accused disputed this. [...]

b) According to the impugned judgment, there is no justification for applying the criteria of the ICTR, which would require a proximate

connection between the offence and the armed conflict and would restrict the scope of the Geneva Conventions to persons holding functions in either the armed forces or the civilian government. In the view of the Appeals Chamber, the concept of perpetrator should be seen in the broad sense; any person, military or civilian, who attacks a person protected by the Geneva Conventions breaches these provisions and falls under Art. 109 MPC. Moreover, a link must still exist between the offences and the armed conflict. Having established these principles, the Appeals Chamber ruled on the relationship between the functions of the accused, which conferred upon him a certain degree of power over the population of his commune, the armed forces and the militia, and the acts committed with regard to the meeting on Mont Mushubati and the visits to Kabgayi. The Chamber found that the accused met the objective criteria for being the perpetrator of the offences of which he was accused, and that a connection existed between his actions and the armed conflict.

c) Certain first-instance judgments of the ICTR have described in some detail the twofold condition of a nexus between the accused and the armed forces and between the armed conflict and the crime.

In its judgment of 21 May 1999 in the *Kayishema and Ruzindana* case, Trial Chamber II of the ICTR found that persons who were not members of the armed forces could only be held criminally responsible if a link existed between them and the armed forces. As the armed forces were at all times under the authority of officials representing the government, such officials were expected to support the war effort and to play a certain role (see *Kayishema and Ruzindana* judgment, para. 175). In its judgment of 2 September 1998 in the *Akayesu* case (Akayesu having been bourgmestre of Taba commune), Trial Chamber II of the ICTR found that the list of persons subject to the provisions of common Article 3 and Protocol II included individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war effort. In spring 1994, it was not to be excluded that a bourgmestre - who was not simply a civilian - might belong to this category (see Akayesu judgment, paragraphs 631 and 634).

As regards the link between the armed conflict and the crime, Chamber II of the ICTR had mentioned a "direct connection" and not some vague and indefinite link. However, the Chamber did not attempt to define a test *in abstracto* (*Kayishema and Ruzindana* judgment, para. 188). In the *Akayesu* judgment (para. 641), Chamber I of the ICTR also mentioned the need for a "nexus," without describing it in more detail.

It should be pointed out that in the above two cases tried in first instance by the ICTR, both of which involved civilians (a bourgmestre, a prefect and a businessman), the Chamber found that the prosecution had not proved the existence of a nexus between the alleged crimes and the armed conflict (see *Akayesu*, para. 643 and *Kayishema and Ruzindana*, paragraphs 615 and 623).

The Appeals Chamber also cited the judgment handed down by ICTR Chamber I on 27 January 2000 in the Musema case. That judgment made reference to the two judgments cited above regarding the nexus between the crime and the armed conflict, i.e. the condition that the crimes be closely linked with the hostilities or committed in connection with the armed conflict (paragraphs 259 and 260). That judgment also refers to the principle set out in the other judgments regarding the criminal responsibility of civilians with respect to breaches of the laws of war (para. 264 *et seq.*). The Chamber found that Musema, the director of a tea factory appointed by the State, could fall into the category of individuals liable to be held responsible for grave breaches of international humanitarian law (para. 275). However, this question was left undecided, as the prosecution failed to prove the nexus required beyond all reasonable doubt (para. 974).

d) In its role as supreme court, the Military Chamber of Cassation interprets Art. 109 MPC independently. It has not previously had the opportunity to rule on the conditions under which, in the context of a non-international armed conflict, civilians can be held responsible for breaches of the laws of war or the provisions of international humanitarian law set out in common Article 3 and Protocol II. [...]

The criteria applied by the Trial Chambers of the ICTR to decide whether a breach of common Article 3 or of Protocol II has occurred need not necessarily be applied by the Swiss courts. However, it is difficult to find grounds for not doing so, particularly in view of the fact that these criteria are relatively broad. The criterion of a "direct" connection, i.e. not vague or indeterminate, between the offences and the armed conflict is not very precise, and rests on an assessment of the specific case. Regarding the categories of civilians who may be the perpetrators of such crimes, the ICTR has adopted a concept that does not appear particularly restrictive: all individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war effort. The ICTR does not exclude the possibility that a Rwandan bourgmestre could be subject to the corresponding provisions. In the instant case, one must therefore take these criteria and interpret them in the light of the concrete situation of the accused.

It is unfortunate that the Appeals Chamber stated that it was departing from current jurisprudence of the ICTR whereas, notwithstanding that statement, it applied that jurisprudence to the specific case of the criteria outlined above. There is hence no need to analyse further this

alleged divergence in the interpretation of international humanitarian law. However, it is necessary to verify whether, in applying these criteria on the basis of facts established in a non-arbitrary manner, the Appeals Chamber was correct in finding that the elements constituting the crime described under Art. 109 MPC were present.

e) Under the Rwandan administrative system, the bourgmestre is considered an agent of the State. The position is a prominent one, as the number of communes is limited (145 in 1991, with a typical population of between 40,000 and 50,000. See Des Forges, *op. cit.*, p. 55 in the French version). While the bourgmestre has no official military function, the case has shown that the accused was regularly accompanied by soldiers, over whom he exercised a certain degree of authority. Both during the Mont Mushubati meeting and during his visits to Kabgayi, he acted using his functions as bourgmestre or taking advantage of the authority that the position of bourgmestre conferred upon him, giving orders to inhabitants of his commune. His aim was to "support or fulfil the war efforts," to use the terminology of the ICTR, in other words to promote the achievement by the government of the day of its aim of massacring Tutsis and moderate Hutus. [...]

It is clear both that there is a sufficient nexus between the crimes committed at Mont Mushubati and Kabgayi and the armed conflict, and that his position and the manner in which he discharged his function of bourgmestre mean that he fulfilled the conditions for being subject to common Article 3 and the provisions of Protocol II as a perpetrator of crimes. The complaint of a violation of Art. 109 MPC is therefore groundless.

10. The accused claims that criminal law has not been respected (Art. 185 (1) (d) MPP), criticizing the penalty of deportation from Switzerland for fifteen years. He criticizes the Chamber for not having taken into account his status of refugee in Switzerland, where he is well-integrated and where his wife and two children are also living, likewise as refugees. [...]

a) [...]

b) As concerns deportation of a refugee on penal grounds, Art. 44 MPC should be interpreted and applied in the light of Art. 32(1) of the Convention relating to the Status of Refugees[...] and of Art. 65 of the law on asylum, hereinafter referred to as "Lasi" [available at http://www.admin.ch/ch/f/rs/c142_31.html], that is, in a manner more restrictive than in respect of other foreigners [...]. Those provisions allow deportation on grounds of public order. In view of the acts of which the accused has been convicted, those grounds apply. Consequently, there is no need to first consider whether the accused does indeed enjoy the protection of the above Convention. Article 1 (F) (a) of the Convention stipulates that it does not apply to persons who have committed "a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes," nor to consider whether there are grounds for revoking asylum or refugee

status. Those measures are provided for under Lasi Art. 63 if the refugee has obtained asylum or refugee status by making false declarations or concealing essential facts, or if he has committed particularly reprehensible crimes. It is not for a judge in criminal proceedings to order such revocation. Furthermore, the fact that the family of the accused is living in Switzerland does not exclude deportation, given the seriousness of the crime (see Art. 8 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, [available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm]).

The Appeals Chamber applied legal criteria to determine whether and for how long the accused should be deported from Switzerland. Given the nature of the crimes committed, it is clearly legitimate to cite the protection of public security and the impugned decision does not appear excessively severe on this point. The Appeals Chamber has not, therefore, abused its powers of discretion in applying Art. 40 (1) MPC. [...]

III. Application for judicial review by the Prosecutor [...]

13. The Prosecutor maintains that, in determining the duration of imprisonment, the Appeals Chamber did not take sufficient account of the extreme gravity of the crimes committed by the accused, and that the cumulation of offences also constituted aggravating circumstances. According to the Prosecutor, a sentence of 20 years' imprisonment was the only possibility.

a) While the Military Chamber of Cassation does enjoy liberty to determine whether there has been a breach of federal law it cannot, in view of the discretionary powers conferred to lower courts in this domain, allow an appeal regarding sentencing unless the sentence: departs from the legal framework, is based on criteria other than those of Art. 44 MPC, fails to take account of the factors set out therein or appears so excessively severe or lenient that the question arises of abuse of such discretionary powers [...].

b) A sentence of 14 years' imprisonment is of itself severe. It is true that the Trial Chambers of the ICTR have imposed longer sentences on persons responsible for the genocide or massacres in Rwanda, particularly in the case of the bourgmestre of Taba, Jean-Paul Akayesu, but this is not a decisive factor. It is not certain that the sentencing criteria in the Statute of this international tribunal correspond to those of Art. 44 MPC, nor that one can compare the actions of the accused with those of Akayesu. But be that as it may, the sentence handed down in the instant case, based on an assessment made in accordance with legal criteria, does not appear to be excessively lenient. The Prosecutor's appeal is therefore also unfounded on this point. [...]

16. The Military Chamber of Cassation confirms the sentence of 14 years' imprisonment [...]

For the foregoing reasons

The Military Chamber of Cassation

finds as follow:

1. The appeal lodged by N. is allowed in part, the impugned judgment is quashed in part insofar as it orders the deportation of the appellant and the case is returned to Military Appeals Chamber 1A for a new decision as to whether or not to grant a stay of deportation.

   On all other points, the motion for review brought by N. is dismissed.

2. The motion for review brought by the Prosecutor of Divisional Chamber 2 is dismissed.

3. The period that the accused has spent in pre-trial detention between the date on which the appeal decision was handed down and the date of the present decision, being 336 (three hundred and thirty-six) days, shall be deducted from the sentence.

4. The sentence of 14 years' imprisonment is confirmed [...].

B. Appeals Decision

[**Source:** Switzerland, *Tribunal militaire d'appel* (Military Appeals Chamber) 1A, decision of 26 May 2000 in the N. case, available (in French) at http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/umund/chrechtsprechung.Par.0002.DownloadFile.tmp/Urteil_N_2_Instanz.pdf.]

MILITARY APPEALS CHAMBER 1A
Sitting from 15 May to 26 May 2000
Palais de Justice, salle G3, GENEVA [...]

CASE:

N, [...] currently in pre-trial detention [...]
accused of:

I. Murder (Art. 116 MPC),

II. Incitement to murder (Articles 116 and 22 MPC),

III. Violation of the laws of war (Art. 109 MPC), namely:

   a) breach of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Art. 3 (1) (a) and (1) (c), Art. 3 (2) and Articles 12, 13 and 50),
   b) breach of the Geneva Convention relative to the Treatment of Prisoners of War (Art. 3 (1) (a) and (c), 13, 14, 129 and 130),
   c) breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Art. 3 (1) (a) and (c) 16, 27, 31, 32, 146 and 147),
   d) breach of the Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts (Articles 4, 5 and 13).

IS CALLED

The accused is present, assisted by his appointed counsel. [...]

II. FACTUAL QUESTIONS

CHAPTER 1 - PRELIMINARY REMARKS

[...] In establishing the facts, the Chamber will draw on the testimony gathered by the examining magistrate, that presented to the Divisional Chamber and this Chamber, and all documents and statements filed. The Appeals Chamber will also examine the deliberations of the impugned judgment regarding assessment of the evidence in general and of testimony in particular. In assessing the testimony, it is important to bear in mind the system of norms and values obtaining in Rwanda, the time that has elapsed since the alleged offences and the level of education of the witnesses. The Chamber finds it unnecessary to examine minor discrepancies in detail to assess the plausibility or otherwise of testimony; rather, one must take the testimony as a whole. This is all the more so in view of the fact that the defence has questioned the credibility of certain witnesses only at the appeal stage, when they were not in a position to explain discrepancies that might cast doubt upon their statements. [...]

CHAPTER 2 - THE PERSONAL CIRCUMSTANCES OF THE ACCUSED

A) N. was born in the commune of M. [...] He is a Roman Catholic. He has three brothers and ten half-brothers and sisters. His parents are farmers. [...] In 1980, he underwent senior secondary education, specializing in sciences (mathematics, physics and chemistry) in Nyanza, Butare Prefecture. In 1983, he obtained the certificate of secondary education, which qualified him for university entry or for a career. Between 1983 and 1984, the accused attended an advanced course at the national postal and telecommunications college in Kigali, qualifying as a telecommunications technician. He then studied at the *Institut africain de statistique et d'économie* in Kigali, leaving in 1986 with a teaching diploma in economics and statistics. He pursued his career [...] until April 1993, when he took up his post as bourgmestre in the commune of Mushubati, with a monthly salary of 30,000 Rwandan francs (approximately $ 300). He had been elected bourgmestre in autumn 1992 in the first round of elections, with 83% of the votes cast by an electoral college consisting of representatives of the various political parties, denominations and administrative bodies of the commune.

The accused married Ms M. in 1989. He has two children [...]. He first joined the opposition MDR (Mouvement démocratique républicain) in 1991, as an activist. He lived in Kigali from 1983 to 1993. Starting in April 1986, he served a number of internships abroad (in Canada, Italy and the United States). He went to France on 12 March 1994, to attend a course on local government. [...] He remained in Paris until 13 May 1994, while seeking the best way to return to his country. On 14 May 1994 he flew to Kinshasa via Libreville and then continued to Goma where he stayed for two days. From there he rented a vehicle and arrived in Mushubati on the night of 18/19 May 1994. By that time, the large-scale massacres had already ended and there were very few Tutsis in his commune, whereas they had previously accounted for 15% of the population. They were now dead, in hiding or had taken refuge in the parishes of Kabgayi and Nyarusange. [...]

CHAPTER 5 - BREACH OF THE DUTIES OF A BOURGMESTRE

The Divisional Chamber did not find it proven beyond reasonable doubt that the accused personally distributed rifles or grenades to certain persons, nor that he trained them in their use. The trial judges did find that the accused had acted in his capacity of bourgmestre to help certain persons in difficulty to flee the country, most of them Tutsis, in particular by providing them with false papers, and that he had in all probability saved a certain number of lives in so doing. They also found that the accused had not done all that one could expect him to do in his capacity of bourgmestre to prevent or limit the massacres, but that these omissions had to be compared with the accused's acts of commission and his general behaviour, and did not constitute crimes additional to those of which he was found guilty. As the Prosecutor did not appeal from the first instance judgment, these aspects of the verdict will not be called into question (see Chapter 2, "Legal questions").

[N.B.: In its (unpublished) decision, the Divisional Chamber acquitted N. of breach of the duties of a bourgmestre. It found that those omissions were absorbed by the acts of commission of which the accused was convicted and that they were not punishable under any applicable instrument.]

III. LEGAL QUESTIONS

CHAPTER 1 - THE *RATIONE MATERIAE* AND *RATIONE PERSONAE* JURISDICTION OF SWISS COURTS-MARTIAL [...]

B. *Ratione materiae* jurisdiction [...]

The Appeals Chamber finds that Art. 109 MPC contains a clause prohibiting not only breaches of the international conventions signed and ratified by Switzerland, but also breaches of the customary laws recognized by the international community (see the message from the Swiss Federal Council regarding partial revision of the Military Penal Code, 6 March 1967, [...]). The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter referred to as "the Convention on Genocide"), which has not yet been ratified by Switzerland, contains elements of customary law (see the message of the Federal Council concerning the Convention on the Prevention and Punishment of the Crime of Genocide and the corresponding revision of criminal law, [...]) which fall under Art. 109 MPC. This convention could hence be applicable as customary law. However, Art. 109 MPC must be interpreted in relation to Art. 108 MPC which, as its marginal note indicates, specifies the field of application of Chapter 6 of the Military Penal Code. That provision stipulates that in the case of war or international armed conflict, (para. 1), Art. 109 MPC applies without reservation. In the case, for instance, of the war in the former Yugoslavia, which had an international dimension, the Swiss courts-martial have jurisdiction on the basis of customary law to try persons accused of breaches of the Geneva Conventions and of the crime of genocide.

However, non-international armed conflicts are covered in particular by para. 2, which restricts international agreements to the wider field of application. In the case of such conflicts Art. 109 MPC does not apply automatically, but requires the existence of an international convention ratified by Switzerland. In the

absence of such a convention, it is not possible to apply the customary law provided for under Art. 109 MPC to an internal armed conflict. In the case of the Rwandan conflict, which was non-international (see Chapter 3C, "Legal questions"), Swiss courts-martial do not have jurisdiction to try the case on the basis of the prohibition of genocide established by customary law, as Switzerland has not ratified the Convention on Genocide. However, they do have jurisdiction in the case from the point of view of Article 3 common to the Geneva Conventions and Protocol II, which apply to non-international armed conflicts, and which fall under the reservation made in Art. 108 (2) MPC [...].

The Appeals Chamber will therefore consider the breach of Art. 109 MPC exclusively as regards the Geneva Conventions and Protocol II.

C. *Ratione personae* jurisdiction

Article 218 (1) MPC provides that all persons to whom military law applies are liable to be tried by courts-martial, subject to the reservations of Art. 13 (2), and Art. 14. This rule also applies when the offence has been committed outside Switzerland (para. 2). The criminal law applicable is determined by Articles 1 to 9 MPC, contained in Chapter 1 of the Military Penal Code. Under Art. 2 (9) MPC, civilians who commit breaches of the law of nations during an armed conflict (Articles 108 to 114 MPC) are subject to military law.

Switzerland enacted Art. 2 (9) MPC to meet its international obligations and to allow international law to be applied. In this specific context, even if not at war or threatened by imminent danger of war, Switzerland has undertaken to prosecute anyone, irrespective of nationality, who may have committed grave breaches of the Geneva Conventions outside Switzerland [...].

Contrary to the findings of the trial judges, the clause in Art. 109 (1) (3) MPC ("sauf si des dispositions plus sévères sont applicables" [unless more severe provisions apply]) is not a cross reference but a reservation. Its effect is not to make civilians generally subject to military law. It concerns persons who would normally be subject to military law, and its effect is to prevent such persons from claiming that they may be punished exclusively in accordance with the Geneva Conventions, thereby avoiding the risk of any more severe penalty that military law might apply. It is worth pointing out at this point that the maximum penalty for breaches of the laws of war under Art. 109 MPC is 20 years' imprisonment (Art. 28 MPC), whereas the Military Penal Code does provide for life imprisonment for certain offences (in particular under Art. 116, Art. 139 (2), Art. 140 (2) and Art. 151c, para. 4). The interpretation of the Appeals Chamber is further supported by Art. 6 MPC, in conjunction with Art. 220 MPC. Under those provisions, a civilian committing an ordinary crime (Articles 115 to 179 MPC) remains subject to civilian criminal law and civilian courts, even if he participates in crimes with military personnel.

The Appeals Chamber finds it contrary to the system of military law to make a person who is not a Swiss national and has committed offences outside Switzerland and against foreigners subject to that law, when Switzerland is neither at war nor facing imminent danger of war. The Appeals Chamber

therefore does not have jurisdiction to try N. under Articles 115 to 179 MPC, even if he remains subject to Rwandan civilian or military jurisdiction for ordinary crimes (such as murder) or the crime of genocide. [...] On this point, the impugned judgment is erroneous and the appeal well founded. [...]

CHAPTER 3 - APPLICABILITY OF COMMON ARTICLE 3 AND OF PROTOCOL II [...]

B. *Ratione loci*

While common Article 3 and Protocol II, Art. 4(2) of Protocol II do prohibit the acts they describe "in any place," that prohibition is clearly limited to the territory of a High Contracting Party (common Article 3 and Protocol II, Art. 1(2) of Protocol II). This territory extends beyond the front or the immediate area in which hostilities are occurring, to include the whole territory of the State in which hostilities are taking place [...].

In accordance with these principles, the provisions in question apply to the whole of Rwanda. [...]

C. *Ratione materiae*

Common Article 3 applies to any "armed conflict not of an international character." This notion, which common Article 3 does not define in detail, implies a situation in which hostilities are occurring between armed forces or organized armed groups within a single State [...].

The notion of "armed forces" in Art. 1 (1) of Protocol II, must be seen in its widest sense, to include all armed forces described in domestic legislation (see the *Musema* judgment, para. 256, and the references cited). "Responsible command" implies some degree of organization within the armed groups or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable of, on the one hand, planning and carrying out sustained and concerted military operations - operations that are kept up continuously and that are done in agreement according to a plan - and on the other, of imposing discipline [...].

This condition implies the concept of duration: international humanitarian law applies from the start of armed conflict and extends beyond the cessation of hostilities [...], in the case of internal conflicts, until a peaceful solution has been achieved [...].

D. *Ratione personae*

1. The victims

Common Article 3 protects persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat. This provision, which is very broad in scope, covers members of armed forces and persons taking no part in hostilities, but applies above all to civilians, i.e. persons who do not bear arms [...].

Art. 2 (2) of Protocol II applies to all persons affected by armed conflict within the meaning of Art. 1. By this one must understand in particular persons who do not, or no longer take part in hostilities and enjoy the rules of protection laid down by the Protocol for their benefit and all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons (see [...] Sandoz[/Swinarski]/Zimmermann. (Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, 1986, nos 4485 and 4489 [available at http://www.icrc.org/ihl]). Article 4(1) of the Protocol concerns all persons not participating directly in hostilities, or who are no longer participating. In view of their similarity, the formulations of common Article 3 and Art. 4 of Protocol II must be considered synonymous (*Cf. Akayesu* judgment, [**Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A.] p. 2171.] para. 629.).

ICTR jurisprudence uses a negative definition of "civilian," taking the victim as its basis. A civilian is anyone who falls outside the category of "perpetrators," namely individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts (*Cf. Musema* judgment, para. 280).

In the instant case, victim D., the wife of the uncle of Witness 3, Witness 32 and his brother F. are all civilians who possess the characteristics of victim within the meaning of common Article 3 and Protocol II, Art. 2(2) and Art. 4.

2. The perpetrators

A perpetrator must belong to a "Party to the conflict" (common Article 3) or to the "armed forces", be they governmental or dissident (Protocol II, Art. 1). However, neither text specifies or defines the category of persons capable of committing war crimes. Given the primary purpose of these international instruments, which is to protect civilians against the atrocities of war, and given their humanitarian aim, the Appeals Chamber finds that the term "perpetrator" needs to be defined broadly. What has been said with regard to defining the category of victim applies also to that of potential perpetrator. Any person, military or civilian, who harms a person protected by the Geneva Conventions as defined above, has contravened these conventions and falls under Art. 109 MPC. The Appeals Chamber therefore diverges from the judgments of the ICTR, which require a proximate connection between the offence and the armed conflict, and restrict the application of the Geneva Conventions to persons holding positions in the armed forces or the civilian government (*Cf. Musema*, para. 259 and the references to the *Akayesu* judgment, paragraphs 642 and 643, where the ICTR found that this nexus did not exist, despite evidence of very substantial support for the war effort on the part of the accused. On that question in particular the Prosecutor of the ICTR lodged an appeal).

Nevertheless, the Appeals Chamber finds that under all of these circumstances there must be a nexus between the offence and the armed conflict. If, during a civil war in which the civilians on both sides are protected by the Geneva Conventions, one protected person commits an offence against another, it is

necessary to establish a link between that act and the armed conflict. If such a link does not exist, the action constitutes not a war crime but an ordinary crime.

In this instance, N. was the bourgmestre of Mushubati, a commune of some 80,000 people. He was part of the Rwandan civilian administration, from which he had not resigned. On the contrary, when he returned to Rwanda on 19 May 1994 he once again took up the post he had delegated to his deputy during his absence in Europe, and the government of the day did not perceive him as a member of the opposition. At the time of the acts of which the appellant is accused, a war was in progress between the FAR and the FPR, a conflict that it would be very hard to dissociate from the massacres of Tutsis and of moderate Hutus. While the war had somewhat reduced the powers of bourgmestre N., there is considerable evidence that he still exercised effective *de jure* and *de facto* power over the citizens of his commune and over the military personnel and militias present therein. A number of points emphasize his links with the FAR, which was a party to the armed conflict: he had received a recommendation from a senior officer, Colonel K.; during his two visits to Kabgayi he was accompanied by soldiers, and three soldiers provided an escort when his family and his sisters left the bishop's residence in Kabgayi. At Mont Mushubati he was also accompanied by soldiers. He was able to move around freely, not only in his own commune but as far as Gitarama. He moved freely through road-blocks and his wife had even been recognized as the wife of the bourgmestre, assuring her of favourable treatment by the militias. He was able to obtain petrol in Gitarama on a number of occasions and had no difficulty obtaining an exit visa for his family and his sisters.

It was in his capacity as a public servant that N. summoned the men of his commune to Mont Mushubati for the purpose of inciting them to hate and eliminate Tutsis, to commit killings and murder and to attack the property of moderate Hutus and the Tutsi minority. [...] N.'s status as perpetrator and the existence of a link between his actions and the armed conflict are therefore proven.

As all the conditions for applying common Art. 3 and Protocol II are satisfied, the facts proven will be assessed in the light of those provisions.

CHAPTER 4 - LEGAL CLASSIFICATION OF THE OFFENCES AND DETERMINATION OF PENALTY

A. Legal classification of the offences

Article 109 of the MPC is an independent provision [...] to which the general concepts of action, conspiracy, complicity and instigation apply. [...]

In his capacity as bourgmestre, N. summoned the people of his commune to Mont Mushubati for the purpose of inciting them to hate and eliminate Tutsis, to commit killings and murder, to attack the property of moderate Hutus and the Tutsi minority and to kill Hutu women pregnant by Tutsi men. This behaviour would of itself constitute attempted incitement to murder or homicide, and would be punishable without any need to find or identify victims. The Appeals Chamber

notes in this connection that N.'s words led to the deaths of an unknown number of persons, including D. and the wife of the uncle of Witness 3.

The appellant is therefore guilty of incitement to breaches of the laws of war (Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Articles 3, 146 and 147, and Art. 4 of Protocol II), as provided for under Art. 109 MPC. The offences led to intentional homicides and constitute grave breaches within the meaning of Art. 109 (1) (3) MPC.

Again in his capacity as bourgmestre, the appellant went to Kabgayi on at least two occasions, accompanied by soldiers, to encourage the refugees from his commune to return to Mushubati, with the sole aim of having them massacred. He also ordered the soldiers accompanying him to kill Witness 32 and his brother F., only the former having survived.

The appellant is therefore guilty of grave breaches of the laws of war (Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Articles 3, 146 and 147, and Art. 4 of Protocol II), as provided for under Art. 109 MPC.

B. Determination of penalty

In the case of grave breaches, the penalty is between one and twenty years' imprisonment, as provided for under Art. 109 (1) (3) MPC, in conjunction with Art. 28 MPC. Within that legal framework, the sentence is to be determined in accordance with Art. 44 MPC and the criteria derived from jurisprudence [...].

The acts described above constitute intentional violence to life, life being the supreme right protected by criminal law. These acts constitute war crimes and are intrinsically very serious. They led to the deaths of at least three persons. These persons were not only literally executed, under horrific circumstances (e.g. using a rifle butt and bayonet); they were subsequently denied even a decent grave, being thrown into the gutter (in the case of the brother of Witness 32) or a latrine (in the case of D.). Considerable emotional detachment is required to incite others to murder and to have human beings killed in such a sordid manner. Hatred is also required. The appellant harboured genuine hatred of Tutsis and moderate Hutus, as evinced by his words on Mont Mushubati and in the telephone call of 14 August 1996. Furthermore, the Appeals Chamber has observed no feelings of pity, nor any sign of remorse or repentance with respect to the victims or in connection with the tragic events that ravaged Rwanda.

Because he was outside Rwanda from 12 March 1994 to 19 May 1994, N. did not participate in the meeting of 18 April 1994, and did not play an active role at the height of the massacres, which occurred during the second half of April 1994. Without being one of the originators, he participated in the massacre process following his return from Europe for a period of not more than three weeks. Certainly, his professional position and his capacity of bourgmestre obliged him to ensure the safety of all residents of his commune, whether Tutsi or Hutu moderate or, at least, to abstain from harming them. The Appeals Chamber does find that this constitutes aggravation. Nevertheless, the Chamber is mindful that on his return to Mushubati, the appellant was confronted with a chaotic situation,

which left him with only limited freedom of decision and action. These circumstances reduce the criminal intent attributed to N. [...]

Under these circumstances, the Appeals Chamber considers fourteen years' imprisonment sufficient punishment. In accordance with Art. 50 MPC, the time spent in pre-trial detention (1,367 days) shall be deducted from the sentence. [...]

FOR THESE REASONS [...]

in accordance with Articles 3, 146 and 147 of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War and with Article 4 of Protocol II additional to the said Convention, [...]:

VERDICT

I. The appeal is allowed in part.

II. N. is found guilty of breaches of the laws of war (Art. 109 MPC)

He is therefore sentenced to fourteen years' imprisonment [...].

DISCUSSION

1. a. Was there armed conflict in Rwanda during the relevant period? Was it international or non-international? (*Cf.* Arts. 2 and 3 common to the Conventions, and Art. 1 of Protocol II.)

   b. Does Protocol II apply "until a peaceful settlement of a conflict is achieved"? (*Cf.* Art. 2 (2) of Protocol II.)

   c. Does Art. 2 define the personal field of application of Protocol II?

2. a. Who is protected by Art. 3 common to the Conventions and by Art. 4 of Protocol II?

   b. Does the international humanitarian law (IHL) of non-international armed conflict protect, in their capacity as persons not taking part in hostilities, only those who are not perpetrators? (*Cf.* Art. 3 common to the Conventions, and Art. 4 of Protocol II.)

3. a. Does the material field of application of the provisions of the Swiss Military Penal Code that concern offences against IHL meet the requirements of the provisions of IHL on grave breaches? Is it more restricted or does it go further? (*Cf.* Arts. 49/50/129/146 common to the Conventions, and **Case No. 47**, Switzerland, Military Penal Code. p. 912.)

   b. Does Switzerland have the right to make violations of international agreements punishable even if the agreements themselves do not provide for criminal responsibility? Even concerning acts committed in foreign countries by foreigners against foreigners?

   c. Does Art. 109 of the Swiss Military Penal Code (*See* **Case No. 47**, Switzerland, Military Penal Code. p. 912.) make all violations of the Geneva Conventions punishable? Only grave breaches? Also violations of customary IHL?

d. Is the wording of Art. 109 of the Swiss Military Penal Code sufficiently precise for a provision of criminal law?

4. a. Why couldn't Mr Niyonteze be prosecuted for genocide? Because genocide is not an offence in Switzerland? Or because Switzerland was not competent to prosecute it as the genocide was committed abroad?

b. Is Switzerland bound by the prohibition of genocide? Is genocide punishable in Switzerland? Is the prohibition of genocide included in the "international treaties on the conduct of hostilities" or the "laws and customs of war"? Is genocide prohibited in the event of armed conflict? Only in the event of armed conflict?

c. If a genocide is committed in armed conflict, does it fall within Art. 109 of the Swiss Military Penal Code? Only if the armed conflict is international?

d. Why can Swiss courts apply customary international law in the event of international armed conflict but not of non-international armed conflict? Isn't customary international law part of domestic law in a monist legal system such as Switzerland's?

5. Can a violation of customary IHL applicable to non-international armed conflict be punished by Switzerland? Should a violation of Art. 3 common to the Geneva Conventions or of Protocol II be punished in Switzerland, according to these instruments? According to customary IHL as interpreted by the ICTY in the Tadic case on jurisdiction? (*Cf.* in particular para. 134 of that decision, *see* **Case No. 180**, ICTY, The Prosecutor v. Tadic. [A., Jurisdiction.] p. 1804.)

6. a. Why is a Swiss military court competent to prosecute a Rwandan who committed violations of IHL against Rwandans in Rwanda? Is this prescribed by IHL? Would it be prescribed by IHL if the conflict in Rwanda had been classified as international? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

b. Is a Swiss military court competent to prosecute a Rwandan who committed ordinary crimes against Rwandans in Rwanda? Why not?

c. In your country, in what circumstances can violations of IHL also be prosecuted as common crimes?

7. Were Art. 3 common to the Geneva Conventions and Protocol II applicable throughout the territory of Rwanda? Or only where there was fighting between the government and the Rwandan Patriotic Front?

8. a. Who are the addressees of the IHL of non-international armed conflict? Who can violate Art. 3 common to the Geneva Conventions? Who can violate Protocol II? Anyone committing a prohibited act in a territory where a non-international armed conflict is under way? Does there need to be a link between the armed conflict and the prohibited act? Does the perpetrator have to belong to a party to the conflict? To the armed forces of a party? Does he have to be serving in the civilian administration or in the armed forces?

b. On the question of determining for whom the prohibitions of the IHL of non-international armed conflicts are intended, are you inclined to agree with the

Military Appeals Court, the Trial Chamber of the ICTR, the Swiss Military Court of Cassation or the ICTR Appeals Chamber? (*See* **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [B., Appeals Chamber.] p. 2171.) Does the Swiss military court have the right to deviate from ICTR case law? Doesn't the ICTR, by virtue of Art. 8 (2) of its Statute (adopted by the Security Council under Chapter VII of the United Nations Charter), have "the primacy over the national courts of all States"?

c. According to the ICTR Trial Chamber's interpretation, could a doctor in a civilian hospital violate the obligation to care for the wounded laid down in Art. 3 (2) common to the Geneva Conventions and in Art. 7 of Protocol II? Could a judge violate the judicial guarantees laid down in Art. 3 (1) (d) common to the Geneva Conventions and in Art. 6 of Protocol II? Could a prison guard violate Art. 5 of Protocol II? Would the ICTR trial chamber's interpretation render these provisions meaningless?

9. a. Did Mr Niyonteze violate Arts. 3, 146 and 147 of Convention IV and Art. 4 of Protocol II or only some of these provisions?

b. Under the laws of your country, does a prosecution for war crimes involve the need to specify the identity or the number of the victims? In what cases?

c. Don't Arts. 146 and 147 of Convention IV contain rules that could be directly applied in a monist constitutional system such as Switzerland's? Are these articles applicable to non-international armed conflicts?

10. a. Why was Mr Niyonteze acquitted of violating his duties as bourgmestre? Were his omissions with respect to the lives of thousands of inhabitants of his community considered to be part of the actions taken that led to charges against him? Were they not punishable under an applicable law? Doesn't a non-military leader bear penal responsibility owing to his position of authority? (*Cf.* Arts. 86 (2) and 87 of Protocol I.)

b. Is the fact that Mr Niyonteze was a bourgmestre an aggravating factor or a mitigating circumstance? Could he have prevented his community from taking part in the genocide even though it was already badly thought of by those in power? If he had neither called the people to Mount Mushubati nor visited the Kabgayi camp, would he nevertheless have committed a wrongful act by the mere fact of having allowed the genocide to take place in his community?

11. What were the costs and the practical and intercultural problems for Switzerland arising from the prosecution of Mr Niyonteze? Were they worth it? Could Switzerland have handed the case over to the ICTR (*see* Arts. 8, 17 and 28 of the ICTR Statute, **Case No. 196**, UN, Statute of the ICTR. p. 2154.)? What in your view are the advantages and disadvantages of Mr Niyonteze being tried by a Rwandan, international or Swiss court?

Case No. 206, ICJ, Democratic Republic of Congo v. Belgium

THE CASE

[**Source:** International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement 14 Febuary 2002; available on http://www.icj-cij.org; footnotes only partially reproduced.]

INTERNATIONAL COURT OF JUSTICE YEAR 2002
14 February 2002
CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

JUDGEMENT [...]

13. On 11 April 2000 an investigating judge of the Brussels tribunal de première instance issued "an international arrest warrant in absentia" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo. [...]

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law"). [*See* **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937.]

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested. Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law". [...]

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings [...], in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations". Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, [...] ". [...]

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today. [...]

45. [...] [T]he Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. [...] [I]n view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo. [...]

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed [...] in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office [...] and acts committed during the period of office. [...]

56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. [...]

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal

jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts. Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above. In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. [...]

75. The Court has already concluded [...] that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów: "[t]he essential principle [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (P.C.I.J., Series A, o. 17, p. 47). In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated. [...]

78. For these reasons,

THE COURT, [...]

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Al-Khasawneh; Judge ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert. [...]

SEPARATE OPINION OF PRESIDENT GUILLAUME [...]

17. Passing now to the specific case before us, I would observe that Mr. Yerodia Ndombasi is accused of two types of offence, namely serious war crimes, punishable under the Geneva Conventions, and crimes against humanity.

As regards the first count, I note that, under Article 49 of the First Geneva Convention,

Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention: [...] This provision requires each contracting party to search out alleged offenders and bring them before its courts (unless it prefers to hand them over to another party). However, the Geneva Conventions do not contain any provision on jurisdiction comparable, for example, to Article 4 of The Hague Convention [for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 provides: "Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory [...]."] What is more, they do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned. They accordingly cannot in any event found a universal jurisdiction in absentia. Thus Belgium could not confer such jurisdiction on its courts on the basis of these Conventions, and the proceedings instituted in this case against Mr. Yerodia Ndombasi on account of war crimes were brought by a judge who was not competent to do so in the eyes of international law. [...]

If the Court had addressed these questions, it seems to me that it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law. [...]

SEPARATE OPINION OF JUDGE REZEK [...]

[N.B.: unofficial translation.]

7. Of all the existing provisions of treaty law, article 146 of the Fourth 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War - an article that can also be found in the other three 1949 Conventions - is the one that offers the strongest support for the respondent State's claim

that criminal jurisdiction may be exercised on the sole basis of the principle of universal jurisdiction. [...]

However, not only does the present case fall outside the strict field of application of the 1949 Conventions, but as Ms Chemillier-Gendreau pointed out in seeking to clarify the meaning of this provision, quoting the words of one of the most eminent specialists of international criminal law (and of criminal international law), Claude Lombois: "Wherever that condition is not put into words, it must be taken to be implied: how could a State search for a criminal in a territory other than its own? How could it hand a criminal over if he were not present in its territory? Both searching and handing over presuppose acts of restraint, linked to the prerogatives of sovereign authority, the spatial limits of which are constituted by the territory."

8. Before attempting to steer the law of nations in a direction contrary to certain principles that still govern international relations today, every State needs to ask itself what the consequences would be if other States, and possibly a great number of other States, adopted the same practice. It is no coincidence that the Parties discussed before the Court the question of how certain European countries would react if a Congolese judge had charged members of their governments with crimes supposedly committed by them, or on their orders, in Africa. [...]

SEPARATE OPINION OF JUDGE BULA-BULA [...]

[N.B.: unofficial translation.]

65. The principle of a "universal jurisdiction" as so understood is asserted in Article 49 of the First Geneva Convention of 12 August 1949, among other places. But the conception which the respondent State has of this principle, and above all the way in which it seeks to apply it in the present case, deviate from the law as it stands.

66. According to the authorized interpretation of this treaty provision, the system is based on three fundamental obligations that are laid on each Contracting Party, namely "the obligation to enact *special legislation* on the subject, the obligation to *search for* any person accused of violation of the Convention, and the obligation to try such persons or, if the Contracting Party prefers, to *hand them* over for trial to another State concerned" [note 69: Jean Pictet (ed.), Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, ICRC, 1952, p. 362; emphasis added.]. [...]

70. Not only does the Commentary lay emphasis on the prosecution of suspects without regard for their nationality, it also stresses territorial jurisdiction. This is only to be expected under classical international law as it was codified in Geneva: as soon as one of the Contracting Parties "is aware that a person on its territory has committed such an offence, it is its duty to see that such a person is arrested and prosecuted without delay." It is not, therefore, merely on request by a State that the necessary police searches should be undertaken, but also spontaneously. Beyond the national territory to which, in principle, a State's authority - be it legislative, executive or judicial - is

limited, the Commentary, in my opinion, quite naturally refers to the mechanism of judicial cooperation constituted by extradition - a mechanism that requires "sufficient charges" to be brought against the accused. [...]

DISSENTING OPINION OF JUDGE VAN DEN WYNGAERT [...]

34. I now turn to the Court's proposition that immunities protecting an incumbent Foreign Minister under international law are not a bar to criminal prosecution in certain circumstances, which the Court enumerates. The Court mentions four cases where an incumbent or former Minister for Foreign Affairs can, despite his immunities under customary international law, be prosecuted: [...] (Judgment, para. 61).

In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to de facto impunity. All four cases mentioned by the Court are highly hypothetical.

35. Prosecution in the first two cases presupposes a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime goes unpunished. And this is precisely what happened in the case of Mr. Yerodia. The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect. [...]

54. There is no rule of *conventional international law* to the effect that universal jurisdiction in absentia is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IVth Geneva Convention of 1949, which lays down the principle *aut dedere aut judicare*. A textual interpretation of this Article does not logically presuppose the presence of the offender, as the Congo tries to show. The Congo's reasoning in this respect is interesting from a doctrinal point of view, but does not logically follow from the text. For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect. Reading into Article 146 of the IVth Geneva Convention a limitation on a State's right to exercise universal jurisdiction would fly in the face of a *teleological interpretation* of the Geneva Conventions. The purpose of these Conventions, obviously, is not to restrict the jurisdiction of States for crimes under international law. [...]

59. International law clearly permits universal jurisdiction for war crimes and crimes against humanity. For both crimes, permission under international law exists. For crimes against humanity, there is no clear treaty provision on

the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction127. In the case of war crimes, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 of the IVth Geneva Convention, which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians.

DISCUSSION

1. a. Can grave breaches of IHL be committed by making statements constituting incitement to racial hatred? In August 1998 was there an international armed conflict in the Congo? Can grave breaches of IHL also be committed in the context of a non-international armed conflict? Under IHL? Under Belgian law? (*Cf.* **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region, p. 2098; Art. 2 common to the Conventions; Arts. 50/51/130/147 respectively of the four Conventions; Art. 4 of Convention IV.)

   b. Can a crime against humanity be committed by making statements constituting incitement to racial hatred?

2. Does the reasoning by which the Court granted full immunity to the foreign minister in office and a certain amount of immunity to the former foreign minister apply only to foreign ministers? To all government ministers? Also to heads of State? Also to heads of government? Also to diplomats? (Referred to collectively below as "rulers".)

3. (*para. 60*) What is the difference between the concepts of "impunity" and "immunity"?

4. Does IHL allow States to provide for granting of impunity (unilaterally or by treaty) to persons being prosecuted for grave breaches? (*Cf.* Arts. 51/52/131/147 respectively of the four Conventions.)

5. a. Does IHL allow States to grant immunity unilaterally to persons being prosecuted for grave breaches? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions; Art. 85 of Protocol I.)

   b. (*paras. 56-58*) Is there a customary exception to the personal immunity provided for under IHL in the event of prosecutions for international crimes? Is there a customary exception to the obligation to search for and prosecute perpetrators of grave breaches of IHL when those concerned have personal immunity under international law?

   c. Does the obligation under IHL to prosecute grave breaches hold also with respect to persons having international immunity? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

6. (*para. 59*) Is there a contradiction between the obligation to prosecute and personal immunity, both of which are provided for under international law? If there is a contradiction between two norms, which of the two takes precedence?

That which belongs to *jus cogens*? Does the principle according to which there is an obligation to prosecute belong to *jus cogens*? Does the personal immunity provided for under international law belong to *jus cogens*? (*Cf.* Art. 1, Arts. 49/50/129/146 and Arts. 51/52/131/148 respectively of the four Conventions.)

7. a. Was the issue before the Court the immunity of the ruler in office or that of the former ruler? Does its decision also give an opinion about the immunity of the former ruler?

   b. Why does the former ruler continue to benefit from immunity for acts committed in the discharge of his duties during his term in office?

   c. Can it be supposed that rulers committing grave breaches of IHL do so in a private capacity?

8. Does the reasoning by which the Court granted full immunity to rulers in office and a certain amount of immunity to former rulers apply only to prosecutions based on universal jurisdiction by default or also when the suspected criminal is present in the territory of the prosecuting State? When the prosecuting State exercises its competence in relation to a crime committed on its territory?

9. a. If it be supposed that the obligation to prosecute takes precedence over immunity, would this hold for rulers in office too?

   b. What would the consequences be if the obligation to prosecute were systematically given priority over international immunity?

10. (*para. 61*) Is the Court's list of circumstances authorizing the prosecution of rulers sufficient to fight effectively against the rulers' impunity? Does the obligation to prosecute laid down in IHL need to be interpreted as limited, as far as rulers are concerned, to the four cases listed by the Court? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

11. How would you propose to reconcile the obligation to prosecute under IHL and international immunities?

12. a. Does the obligation to prosecute the perpetrators of grave breaches of IHL provide for universal jurisdiction in the event such offences are committed? Does it oblige States to provide for universal jurisdiction? Even with respect to a perpetrator outside the territory of a prosecuting State? What would be the practical consequences of such an obligation? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

   b. Does IHL allow universal jurisdiction to be established by default?

13. Why did Belgium have to withdraw the arrest warrant at a time when Mr Yerodia was no longer a government minister? Was this a case of immunity of former rulers for official acts? Was it a consequence of the general obligation to stop a continuing violation? A re-establishment of the situation which existed before the wrongful act was committed? A kind of satisfaction? Could Belgium issue a new warrant?

XXX. COLOMBIA

Case No. 207, Colombia, Constitutional Conformity of Protocol II

THE CASE

[**Source:** RULING No. C-225/95, Re: File No. L.A.T.-040; original in Spanish, unofficial translation, footnotes partially omitted.]

REPUBLIC OF COLOMBIA,
CONSTITUTIONAL COURT

Constitutional review of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on June 8, 1977, and of Law 171 of December 16, 1994, whereby said Protocol is approved.

[...]

II. LEGAL BASIS

Jurisdiction and scope of the powers of the Court

1. The Constitutional Court has jurisdiction to review the constitutionality [...] [of] Protocol II and the law approving it, in conformity with Article 241, para. 10, of the Constitution. Moreover, as this Body has repeatedly stated, this is a preliminary, full and automatic procedure for confirming the constitutionality of the draft treaty and the law approving it, for reasons of substance as well as form. [...]

   [...]

The nature of international humanitarian law and its mandatory character at the international and internal levels [...]

6. As regards the law of armed conflicts, traditional doctrine made a distinction between the law of The Hague, as it is known, or the law of war in the strict sense, as codified in the Hague Conventions of 1899 and 1907, the aim of which was to regulate the conduct of hostilities and lawful means of combat, and the law of Geneva, or international humanitarian law in the strict sense, the purpose of which is to protect persons not participating directly in hostilities. This might suggest that when the Constitution speaks of humanitarian law it is referring only to what is known as the Geneva Law. Such is not the case, however, since legal opinion considers that nowadays it is impossible to make a clear-cut distinction between these two bodies of law, because protection of the civilian population (*i.e.*, the conventional aim of international humanitarian law in its strict sense) logically implies the regulation of legitimate means of combat (*i.e.*, the aim of the traditional law of

war), and vice-versa. Furthermore, Hague Law has been absorbed to some extent by Geneva Law, as demonstrated by the broad regulation of means of combat in Part III of Protocol I additional to the Geneva Conventions of 1949. [...]

7. International humanitarian law essentially stems from a number of practices which are understood to form part of what is known as the customary law of civilized peoples. Most of the treaties of international humanitarian law should consequently be viewed more as a simple codification of existing obligations than as the creation of new rules and principles. In the aforementioned rulings, and in accordance with the authoritative nature of international doctrine and jurisprudence, this Body has therefore considered the rules of international humanitarian law as forming an integral part of *jus cogens*. Now, Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a *jus cogens* norm, or peremptory norm of general international law, as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Consequently, according to the same article of the Vienna Convention, a treaty that conflicts with the above principles is void under international law. This explains why the humanitarian rules are binding on States and parties to a conflict, even if they have not approved the treaties in question, since the mandatory nature of these rules does not derive from the consent of the States but from their customary character. This Body has already stated the following, in this respect:

"To summarize, since the principles of international humanitarian law embodied in the Geneva Conventions and their two Protocols constitute a set of minimum ethical standards applicable to situations of internal or international conflict and widely accepted by the international community, they form part of jus cogens *or the customary law of nations. Consequently, their binding force derives from their universal acceptance and the recognition which the international community of States as a whole has conferred upon them by adhering to this set of rules and by considering that no contrary rule or practice is acceptable. It does not derive from their codification as rules of international law, as will be explained in greater detail below. Hence respect for these principles does not depend on whether or not States have ratified or acceded to the international instruments enshrining those principles.*

International humanitarian law is, above all, a set of ethical standards whose absolute and universal validity does not depend on it being enshrined in positive law".

8. [...]

It can therefore be concluded from the foregoing that the compulsory nature of international humanitarian law applies to all parties to an armed conflict, and not only to the armed forces of States which have ratified the relevant treaties. Irregular armed individuals or national armed forces may not then

legitimately consider that they do not have to respect the minimum standards of humanity in an armed conflict because they are not party to the relevant international agreements, since, once again, the regulatory force of international humanitarian law derives from the universal acceptance of its rules by civilized peoples and from the fundamental humanitarian values enshrined in these international instruments. All armed individuals, whether or not they are part of a State force, are therefore under the obligation to respect the rules embodying those basic humanitarian principles, from which there is no possible derogation even in the extreme situation of armed conflict.

9. An armed individual may not cite failure to comply with humanitarian law by his adversary as an excuse for his own violations of these rules, since the restrictions pertaining to behaviour in combat apply for the benefit of the individual. The distinctive feature of this law is therefore that its rules constitute inalienable guarantees that are unique in that they impose obligations on armed individuals not for their own benefit but for that of third parties, namely the non-combatant population and the victims of the conflict. That explains why humanitarian obligations are not based on reciprocity; indeed, they are incumbent upon each of the parties and do not depend on compliance by the other party, because the beneficiary of those guarantees is the non-combatant third party - not the parties to the conflict. In this respect, this Court has already noted that "the traditional principle of reciprocity does not operate in these treaties and, as the International Court of Justice states in the case of the conflict between the USA and Nicaragua, no exception can be made".

   Colombia has the honour of being one of the first independent nations to have defended the principle that humanitarian obligations are not based on reciprocity. Indeed, long before the first Geneva or Hague Conventions were signed in Europe, "El Libertador", Simón Bolívar, signed a "treaty to regulate warfare" with General Morillo to "avoid bloodshed whenever possible". According to the French jurist Jules Basdevant, this agreement is one of the most important precursors of international law applicable to armed conflict, since not only does it contain innovative provisions on humane treatment for the wounded, the sick and prisoners, but it is also the first known application of the customs of war to what we would now call a war of national liberation. Soon after, on April 25, 1821, Bolívar issued a proclamation to his soldiers, ordering them to respect the rules regulating warfare. According to Bolívar, "even when our enemies break those rules, we must respect them, so that the glory of Colombia is not stained with blood" (emphasis added).

10. In the case of Colombia, the humanitarian provisions are especially binding due to the fact that Article 214, para. 2, of the Constitution provides that "the rules of international humanitarian law shall be respected in all cases". As already stated by this Body, this means not only that international humanitarian law is valid at all times in Colombia, but also that it is automatically incorporated in the "national legal order, which is, moreover, consistent with the mandatory nature (as already explained) of the axioms which make this body of law an integral part of *jus cogens*". Consequently

both the members of irregular armed forces and all State officials, particularly all members of the police force whose duty it is to apply the humanitarian rules, are under the obligation to respect the provisions of international humanitarian law at all times and in all places, not merely because these are mandatory rules of international law (*jus cogens*) but also because they are binding rules *per se* of the legal order and must be adhered to by all inhabitants of the territory of Colombia. Indeed, the rules of international humanitarian law preserve that intangible and obvious core of human rights which can on no account be disregarded, even in the extreme situation of armed conflict. They represent the "elementary considerations of humanity" which the International Court of Justice referred to in its 1949 ruling on the Corfu Channel case. Hence there can be no justification, whether before the international community or before the laws of Colombia, for committing acts which clearly violate the dictates of the public conscience, such as arbitrary killings, torture, ill-treatment, hostage-taking, forced disappearances, trial without judicial guarantees and the imposition of *ex post facto* penalties.

Constitutional incorporation of the rules of international humanitarian law

11. [...]

The human rights treaties and the conventions of international humanitarian law are complementary sets of regulations which, under the common concept of protection of the principles of humanity, form part of the international system for the protection of the rights of the individual. The difference between them is therefore one of applicability, since the former are intended essentially for peacetime situations and the latter for situations of armed conflict, but both bodies of law are designed for the protection of human rights. This Court has already stated in this respect that "international humanitarian law constitutes the application of the essential, minimum and inalienable principles enshrined in the human rights instruments to the extreme situation of armed conflict".

Now, Article 93 of the Constitution establishes that certain parts of the human rights treaties ratified by Colombia take precedence over domestic legislation. This Court has previously specified that two conditions need to be fulfilled in order for these treaties to prevail over internal law. "The first is recognition that a human rights issue is involved, and the second is that that issue is connected with one of the rights which may not be restricted during states of emergency." It is obvious that international humanitarian law treaties, such as the Geneva Conventions of 1949 or Protocol I, or this Protocol II under review, meet those conditions, since they recognize human rights which may not be limited either in times of armed conflict or in states of emergency. [...]

[...]

Protocol II, Common Article 3 and respect for national sovereignty [...]

14. On the one hand, Common Article 3 states that the application of its provisions "shall not affect the legal status of the Parties to the conflict". From

the legal standpoint this short phrase was of revolutionary import at the time, because it meant that, in internal conflicts, application of the humanitarian rules ceased to be dependent on the recognition of insurgents as belligerents.

Before the 1949 Geneva Conventions, some legal experts considered that the law of armed conflicts only applied once the State involved, or third-party States, had recognized those who had taken up arms as belligerents. This meant that for a rebel group to be considered subject to international humanitarian law, it was necessary for it to have been acknowledged as being subject to international law, since, in very simple terms, recognition of belligerent status gives rebels or irregular armed groups the right to wage war under equal conditions and with equal international guarantees as the State. Once belligerents have been recognized as such, they cease to be subject to the national legal order, and the internal conflict becomes a civil war governed by the rules applicable to international conflict, since those who have taken up arms have been recognized, either by their own State or by third-party States, as a "belligerent community" with the right to wage war. In such circumstances, belligerents captured by the State automatically enjoy the status of prisoners of war and may not therefore be punished simply for taking up arms and participating in the hostilities, as their recognition as belligerents entitles them to serve as combatants.

Such a situation obviously resulted in disregard for the humanitarian rules in non-international conflicts, since acknowledgement of belligerent status has a significant impact in terms of national sovereignty. The 1949 Conventions therefore distinguished strictly between recognition of belligerent status and the application of humanitarian law, by stating that their provisions could not be invoked to alter the legal status of the parties. The phrase quoted above consequently removes any doubt that humanitarian law might erode the sovereignty of a State. In practice, it means that application of the humanitarian rules by a State in an internal conflict does not imply recognition of belligerent status for those who have taken up arms.

In a non-international armed conflict, individuals who take up arms are therefore subject to international humanitarian law, since they are under the obligation to respect the humanitarian rules on account of these being *jus cogens* provisions binding on all the parties in conflict. Nevertheless, rebels do not become subject to public international law simply by virtue of the application of humanitarian law, because they continue to be subject to the penal legislation of the State, and may be punished for taking up arms and disturbing the public order. [...]

15. [...]

The conclusion that may be drawn from the above is that Protocol II does not interfere with national sovereignty, nor does it imply recognition of groups of insurgents as belligerents. It is therefore wrong to assume, as some speakers have done, that by implementing Protocol II the State of Colombia would be conferring legitimacy upon irregular armed groups, since application of the humanitarian rules has no effect on the legal status of

the parties. In an explanation of the reasons for the draft law approving this international instrument, the Government rightly stated as follows:

"What is important is that in international practice there are no known examples of States using the adherence of another State to the Protocol as a justification for recognizing subversive groups operating on the territory of that State as belligerents. Furthermore, with or without Protocol II, belligerent status can be acknowledged at any time, regardless of whether the State in which such groups are operating is a party to this instrument.

[...]"

[footnote 25 reads: "Explanation of the reasons for the draft law approving the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts", in *Gaceta del Congreso* [Gazette of the Congress], No. 123/94, August 17, 1994, p. 7.]

16. The foregoing does not mean that humanitarian law has no impact on the concept of sovereignty because, as pointed out by the Government Procurator's Office, these rules presuppose a new perspective of the relationship between the State and its citizens. Indeed, the fact that parties in conflict are restricted in the means of warfare they are entitled to use by the obligation to ensure protection of the individual means that the State no longer has absolute sovereignty over its citizens, and there is no longer a vertical relationship between the governing body and those governed by it, since State attributions are restricted by the rights of the individual. [...]

17. On the other hand, Common Article 3 states that the parties to a conflict can reach special agreements to strengthen application of the humanitarian rules. Agreements of this nature are not, strictly speaking, treaties, as they are not established between entities subject to public international law but between the parties to an internal conflict, which are subject to international humanitarian law. Furthermore, the legal validity of the humanitarian rules does not depend on the existence of such agreements. The latter do, on the other hand, serve a perfectly reasonable political purpose, because the practical and effective validity of international humanitarian law depends to a large extent on the resolve and commitment of the parties to respect its provisions. Obviously this does not mean that humanitarian obligations are subject to reciprocity, as they are independently binding on each of the parties, as was pointed out in paragraph 9 of this Ruling. The existence of such reciprocal undertakings appears to be politically desirable, however, because this will gradually ensure a more effective application of the humanitarian rules set out in Protocol II. [...]

18. The Constitutional Court similarly considers that the presence of neutral organizations, such as the International Red Cross, as provided for in Article 3 common to the 1949 Geneva Conventions and in Article 18 of Protocol II, does not constitute a threat to the sovereignty of the Colombian State, because the latter has freedom of decision whether or not to request their services or accept their offers. Furthermore, the Court agrees with the Government Procurator's Opinion that the activities of such organizations may play a crucial role in ensuring that international humanitarian law is truly put into practice and does not simply have regulatory validity. Experience at

the international level has shown, moreover, that the participation of these organizations in monitoring compliance with the humanitarian rules can help not only to render armed conflicts more humane but also to promote the restoration of peace.

Protocol II, the humanization of warfare, the protection of human dignity and the rights and duties of peace [...]

20. [...]

This Body has already stated that a *de jure* State must not seek to deny the existence of conflicts, as these are inevitable in life in society. What the State can and must provide for are "adequate institutional channels, since the function of a constitutional system is not to suppress conflict, which is intrinsic to life in society, but to control it so that it is a source of wealth and develops peacefully and democratically". Consequently, the primary duty of the State with regard to armed conflicts is to prevent them from happening; to achieve this, it must establish mechanisms that leave sufficient room at the social and institutional levels for the peaceful resolution of the various types of conflict that may arise in society. This is a major component of the State's duty to preserve public order and guarantee peaceful coexistence.

Once conflict has broken out, ensuring that the war is waged in a humane manner does not absolve the State of its responsibility to restore public order, using the range of resources provided for in the country's legal order, since, as stated earlier in this Ruling, application of international humanitarian law does not suspend the validity of national legislation.

21. This clearly shows that humanitarian law does not in any way legitimate war. Its purpose is to ensure that the warring parties adopt measures to protect the individual. As pointed out in the Government Procurator's Opinion, and by government representatives and others, the humanization of war is, moreover, of special constitutional significance when it comes to efforts aimed at restoring peace. Both national and international legal opinion has, in fact, repeatedly emphasized that the humanitarian rules are not confined to limiting the ravages of war, but also have an unspoken goal that may, on occasion, be more valuable still. Indeed, by preventing unnecessary cruelty in military operations, they can also foster reconciliation between the parties. Thus, by recognizing a minimum set of applicable rules and ethical standards, international humanitarian law encourages mutual recognition by the protagonists and therefore promotes the peace process and the reconciliation of societies disrupted by armed conflict. [...]

The "Martens clause" and the relationship between Protocol II and the rules of international humanitarian law

22. The preamble [to Protocol II] also contains what international legal opinion refers to as the "Martens clause", which is the principle according to which "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".

The clause indicates that Protocol II must not be interpreted in isolation but must be viewed at all times within the context of the entire body of humanitarian principles, as the treaty simply extends the application of these principles to non-international armed conflicts. Hence the Constitutional Court considers that the absence of specific rules in Protocol II relating to the protection of the civilian population and to the conduct of hostilities in no way signifies that the Protocol authorizes behaviour contrary to those rules by the parties in conflict. The rules contained in other international humanitarian conventions that are compatible with the nature of non-international conflicts should in general be considered applicable to the latter, even if they are not set out in Protocol II, since, once again, the codified rules in this field are the expression of the principles of *jus cogens* that are understood to be automatically incorporated in Colombian domestic legislation, as ruled by this Body in previous decisions.

23. Accordingly, none of the rules of international humanitarian law that expressly apply to internal conflicts, namely Common Article 3 and this Protocol under review, contains detailed provisions governing legitimate means of warfare and the conduct of hostilities. However, international legal opinion holds that these rules, which derive from the law of war, are applicable to internal armed conflicts, as this is the only way of affording effective protection to the potential victims of such conflicts.

At a meeting in Taormina, Italy, on April 7, 1990, the Council of the International Institute of Humanitarian Law adopted a Declaration on the rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts. [footnote 29 reads: "See the text of this declaration in the *International Review of the Red Cross*, September-October 1990, No. 278, pp. 404-408"]

According to this declaration, which may be considered the most authoritative expression of international legal opinion in this field, non-international conflicts are governed by the rules relating to the conduct of hostilities which, by virtue of the principle of proportionality, limit the right of the parties to choose means of warfare, in order to prevent superfluous injury or unnecessary suffering. Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of chemical or bacteriological weapons, mines, booby-traps, "dum-dum" bullets and similar devices apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.

24. In the case of Colombia, the applicability of these rules to internal armed conflicts is all the more obvious since the Constitution states that "the rules of international humanitarian law shall be respected in all cases" (Constitution, Art. 214, para. 2). [...]

Applicability of Protocol II in Colombia

25. Article 1 specifies the field of application of Protocol II and establishes certain requirements "*ratione situationis*" that are stricter than those contained in Article 3 common to the 1949 Geneva Conventions. Whereas Common Article 3 governs any internal armed conflict that extends beyond internal disturbances and tension, Protocol II requires that irregular armed groups be under responsible command and exercise such territorial control as to enable them to carry out sustained and concerted military operations and to apply the rules of international humanitarian law.

The requirements set out in Article 1 could give rise to wide-ranging legal and empirical discussions on whether Protocol II is applicable in the case of Colombia. The Court considers that such discussions may be relevant in terms of the international obligations of the State of Colombia. With regard to Colombian constitutional law, however, the Court concludes that discussion is unnecessary because, as stated in the Government Procurator's Opinion, the requirements for the applicability of Article 1 are maximum requirements which may be waived by States, since Protocol II expands on and supplements Article 3 common to the 1949 Geneva Conventions. Now the Colombian Constitution clearly establishes that the rules of international humanitarian law shall be respected in all cases (Constitution, Art. 214, para. 2). This means that, in accordance with the Constitution, international humanitarian law - obviously including Protocol II - applies in all cases in Colombia, without it being necessary to determine whether the conflict in question reaches the level of intensity required by said Article 1.

Similarly, Article 1, para. 2, states that Protocol II does not apply "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". The Court considers that this too constitutes a requirement for applicability as regards the international obligations of the State of Colombia, but that, by virtue of Colombian constitutional law, the peremptory rule contained in Article 214, para. 2, of the Constitution takes precedence. Consequently, the requirements of humane treatment, as set out in international humanitarian law, are maintained in any case in situations of violence which are not defined as war and do not have the characteristics of an armed conflict. The humanitarian rules are thus extended in practical terms to cover such cases, since they can also serve as a model for regulating internal disturbances. This means that the rules of humanitarian law apply permanently and consistently at the domestic level, as they are not confined to international conflicts or declared civil wars. The humanitarian principles must be respected not only in states of emergency but also in all circumstances in which they are necessary to protect the dignity of the individual. [...]

The principle of distinction between combatants and non-combatants

28. One of the basic rules of international humanitarian law is the principle of distinction according to which the parties in conflict must differentiate between combatants and non-combatants, since the latter may never be the

targets of acts of war. There is an elementary reason for this: although war seeks to weaken the enemy's military capacity, it may not target those who do not actively participate in the hostilities - either because they have never taken up arms (civilian population), or because they have ceased to be combatants (disarmed enemy troops) - since they are not military personnel. The law of armed conflicts therefore considers that military attacks against such persons are unlawful, as stated in Article 48 of Protocol I, applicable in this respect to internal conflicts, which establishes that the "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".

Article 4 of the treaty under review takes up this rule, which is essential in introducing an effective measure of humanity in any armed conflict, because it states that non-combatants, whether or not their liberty has been restricted, have the right to be treated humanely and are entitled to respect for their person, honour, convictions and religious practices.

29. Article 4 also sets out objective criteria for the application of the principle of distinction, since the parties in conflict may not define at will who is and is not a combatant, and therefore who may or may not be a legitimate object of attack. Under this article, which must be interpreted in the light of the provisions of Articles 50 and 43 of Protocol I, combatants are persons who take a direct part in hostilities as active members of the armed forces or of an armed organization incorporated in those armed forces. Hence Article 4 protects, as non-combatants, "all persons who do not take a direct part or who have ceased to take part in hostilities". Furthermore, Article 50 of Protocol I provides that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian; this means that he or she may not be the object of attack. Article 50 also stipulates 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". As stated in Article 13, para. 3, of the treaty under review, civilians do not lose that status, and may not therefore be the object of attack, "unless and for such time as they take a direct part in hostilities".

Obligations deriving from the principle of distinction

30. The distinction between combatants and non-combatants has fundamental consequences. Firstly, as stated in the rule regarding immunity of the civilian population (Art. 13), the parties have the general obligation to protect civilians from the dangers arising from military operations. From this follows, as stated in paragraph 2 of this same article, that the civilian population as such may not be the object of attack, and acts or threats of violence the primary purpose of which is to spread terror are prohibited. General protection of the civilian population from the dangers of war also implies that it is not in keeping with international humanitarian law for one of the parties to involve the population in the armed conflict, as in so doing it would turn civilians into participants in the conflict and would thus expose them to military attacks by the adverse party.

31. This general protection of the civilian population also covers objects indispensable to the latter's survival, which are not military objectives (Art. 14). Cultural objects and places of worship (Art. 16) may not be used for military purposes or be the object of attack, and it is prohibited to attack works and installations containing dangerous forces, if such attack may cause severe losses among the civilian population (Art. 15). Finally, Protocol II also prohibits ordering the displacement of the civilian population for reasons related to the conflict, unless the security of civilians or imperative military reasons so demand. In the latter case, the Protocol states that "all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, health, hygiene, safety and nutrition" (Art. 17).

32. Humanitarian protection extends, without discrimination, to the wounded, the sick and the shipwrecked, whether or not they have taken part in hostilities. Protocol II thus stipulates that all possible measures must be taken to search for and collect the wounded, sick and shipwrecked, to protect them and to provide them with the necessary assistance (Art. 8). They must therefore be treated humanely and must receive, to the fullest extent possible and with the least possible delay, the medical care and attention required by their condition (Art. 7).

    These rules providing for humanitarian assistance to the wounded, the sick and the shipwrecked obviously imply that guarantees and immunities must be granted to persons entrusted with giving such aid; Protocol II thus protects medical and religious personnel (Art. 9), medical duties (Art. 10) and medical units and transports (Arts 11 and 12), which must be respected at all times by the parties in conflict.

33. [...]

    As regards the situation in Colombia, application of these rules by the parties to a conflict is particularly binding and important, since the armed conflict currently affecting the country has seriously affected the civilian population, as evidenced by the alarming data on the forced displacement of persons included in this case. The Court cannot disregard the fact that, according to the statistics compiled by the Colombian Episcopacy, more than half a million Colombians have been displaced from their homes as a result of the violence and that, as stated in the investigation in question, the principal cause of displacement involves violations of international humanitarian law associated with the internal armed conflict.

34. The Court does not share the rather confused argument put forward by one of the speakers that the protection of the civilian population is unconstitutional since combatants could use the population as a shield, thereby exposing it "to suffer the consequences of the conflict". On the contrary, the Court considers that, pursuant to the principle of distinction, the parties to the conflict may not use and endanger the civilian population in order to gain a military advantage, as that contradicts their obligations to afford general protection to the civilian population and to direct their military operations exclusively against military objectives.

Furthermore, the feigning of civilian status to injure, kill or capture an adversary constitutes an act of perfidy which is prohibited by the rules of international humanitarian law, as clearly stipulated in Article 37 of Protocol I. Protocol II admittedly does not explicitly forbid this form of conduct by the parties in conflict, but, as already pointed out in this Ruling, that does not mean that it is authorized, since the treaty must be interpreted in the light of all the humanitarian principles. As stated in the Taormina Declaration, the prohibition of perfidy is one of the general rules governing the conduct of hostilities that applies in non-international armed conflicts.

Fundamental prohibitions and guarantees

35. Article 4 of the treaty under review not only provides for the general protection of non-combatants but also, expanding on Article 3 common to the 1949 Geneva Conventions, lays down a series of absolute prohibitions which may be regarded as the hard core of guarantees afforded by international humanitarian law. [...]

36. By virtue of their direct and obvious link with the protection of the life, dignity and integrity of the individual, these prohibitions under international humanitarian law also have major consequences in constitutional terms, because they require the military principle of due obedience, set out in Article 91, sub-para. 2, of the Constitution, to be assessed in the light of those overriding constitutional values. This Body has in fact already pointed out that, since military discipline must be reconciled with respect for constitutional legislation, a distinction inevitably needs to be drawn between military obedience "which must be observed by subordinates so that discipline does not break down, and obedience which, by overstepping the limits of a reasonable order, involves blindly following instructions issued by superiors". The Constitutional Court thus stated as follows:

"*Accordingly, by virtue of the criterion which has been established, a subordinate may indeed refuse to obey an order given by his superior if it involves torturing a prisoner or causing the death of someone* hors de combat, *because the mere statement of such an act, without the person concerned requiring any special level of legal knowledge, shows that such conduct is clearly detrimental to human rights and in obvious contradiction with the Constitution.*

The notion of a legitimate order, upheld by the Constitution in its preamble, could not be interpreted in any other way, nor could Article 93 of the Constitution, according to which "the international conventions and treaties ratified by the Congress, which recognize human rights and prohibit their restriction in states of emergency, take precedence over the domestic legal order.

Under the terms of the First Geneva Convention of August 12, 1949, approved by Law 5a of 1960 (Official Gazette No. 30318), which the High Contracting Parties undertook to respect and for which they pledged to ensure respect "in all circumstances", there are serious violations against which States must take appropriate measures. [...]"

The above considerations show that the article regarding due military obedience (Constitution, Art. 91) cannot be interpreted in isolation, but its meaning needs to be determined systematically. It is therefore necessary to set this principle against the other principles, rights and duties enshrined in the Constitution, and in particular its scope must be brought in line with the minimal obligations imposed upon parties to a conflict by international humanitarian law. [...]

The circumstances described above lead to one obvious conclusion: due military obedience cannot be invoked to justify committing acts that are clearly detrimental to human rights. [...] This is established, for example, in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [...] which takes precedence over the internal legal order, since it recognizes rights that cannot be suspended in states of emergency (Constitution, Art. 93), [and] states unequivocally that "an order from a superior officer or a public authority may not be invoked as a justification of torture". [...]

Optional clause on the granting of amnesty upon the cessation of hostilities, for reasons related to the armed conflict

41. Article 6, para. 5, stipulates that once hostilities have ended, "the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".

One of the speakers regards this provision as unconstitutional because of the unacceptable impunity it implies, since amnesty would be granted in advance for atrocious crimes. Furthermore, the speaker maintains that the granting of amnesty would cease to be a prerogative of the State and would become a commitment agreed beforehand and a kind of "pirate's licence" for offences perpetrated during the armed conflict.

42. The Court does not share this opinion, and considers that the above interpretation of the scope of Article 6 is incorrect. Indeed, in order to understand the meaning of the aforementioned provision, it is necessary to take into consideration its purpose in a humanitarian law treaty designed to apply in internal conflicts, as this type of rule does not appear in the humanitarian treaties relating to international wars. A close examination of Protocol I applicable to international conflicts does not show any provision relating to the granting of amnesties and pardons between the parties in conflict, at the end of hostilities, even though this treaty contains more than one hundred articles. Moreover, the provision in Article 75 of Protocol I that establishes procedural guarantees is almost identical to Article 6 of Protocol II, but makes no reference to the question of amnesty.

This omission from Protocol I is not a careless oversight, nor does it mean that combatants captured by one of the parties will continue to be deprived of their liberty after the armed conflict has come to an end. The omission is clearly justified, because in the case of international wars, combatants

captured by the enemy automatically enjoy the status of prisoners of war, as stipulated in Article 44 of Protocol I and Article 4 of the Third Geneva Convention relative to the Treatment of Prisoners of War. Now, as already stated in this Ruling, one of the essential characteristics of prisoner-of-war status is that prisoners may not be punished simply for having taken up arms and having participated in hostilities; indeed, if States are at war, the members of their respective armed forces are considered to have the right to serve as combatants. The party that captures them may retain them only in order to limit the enemy's potential to wage war, but it may not punish them for having fought. Consequently, if a prisoner of war has not violated humanitarian law, he must be released and repatriated without delay after the cessation of active hostilities, as stated in Article 118 of the Third Geneva Convention. Any prisoner who has violated humanitarian law should be punished as a war criminal in the instance of a grave breach, or could be subject to other penalties for other violations, but he may in no case be punished for having served as a combatant.

It is thus unnecessary for States to grant reciprocal amnesty after the end of an international war, because prisoners of war must be automatically repatriated. In internal armed conflicts, however, those who have taken up arms do not in principle enjoy prisoner-of-war status and are consequently subject to penal sanctions imposed by the State, since they are not legally entitled to fight or to take up arms. In so doing they are guilty of an offence, such as rebellion or sedition, which is punishable under domestic legislation. [...]

In situations such as those of internal conflict, where those who have taken up arms do not in principle enjoy prisoner-of-war status, it is easy to understand the purpose of a provision designed to ensure that the authorities in power will grant the broadest possible amnesty for reasons related to the conflict, once hostilities are over, as this can pave the way towards national reconciliation. [...]

III. DECISION

With regard to the foregoing, the Constitutional Court of the Republic of Colombia, in the name of the Colombian people and pursuant to the Constitution,

DECIDES:

1. To declare the Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on June 8, 1977, to be APPLICABLE.
2. To declare Law 171 of December 16, 1994, approving the Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), to be APPLICABLE. [...]

DISCUSSION

1. What are the advantages and inconveniences of the Colombian system prescribing a preliminary control by the Constitutional Court on whether an international treaty to which Colombia is about to be bound is compatible with the Colombian Constitution?

2. a. Are States not party to a treaty which contains a rule of IHL still bound by that rule because it is a rule of customary law or because it belongs to *ius cogens*? Do all rules of IHL belong to *ius cogens*? Is a rule of IHL not belonging to *ius cogens* binding?

   b. Is every rule belonging to customary law or to *ius cogens* also binding on an armed group fighting within a State against the government? Are only such rules binding on such a group?

   c. Did Protocol II become part of Colombian law through Art. 214 (2) of the Colombian Constitution even before Colombia became a Party to Protocol II?

3. Are the rules of IHL subject to possible derogation in exceptional situations, *e.g.*, in armed conflicts? In situations of emergency not amounting to armed conflicts?

4. In which sense do rebels fighting against a government become subjects of international law thanks to IHL? Does it impact your answer whether the concerned State is a party to Protocol II?

5. Are special agreements under Art. 3 (3) common to the Conventions subject to the law of treaties? Are these special agreements legally binding? Do the humanitarian obligations such agreements foresee exist independently of such agreements? What purpose do they have in this case?

6. In which sense does a distinction between *ius ad bellum* and *ius in bello* exist in non-international armed conflicts? Are non-international armed conflicts prohibited under international law?

7. a. Under the reasoning of para. 22 of the Judgement, are all rules of IHL applicable in non-international armed conflicts? Because or as far as they belong to *ius cogens*? At least in Colombia, due to Art. 214 (2) of the Colombian Constitution? Does Art. 214 (2) make them applicable even outside armed conflicts? Does Art. 214 (2) incorporate the treaties of IHL independently of their rules on their material scope of application?

   b. Why is the principle of distinction applicable in non-international armed conflicts? Because it is the only way to protect the civilian population? Because it is a rule of customary law applicable to international armed conflicts? Because parties to non-international armed conflicts have created, through their behaviour, this rule of customary law? Because it is implicit in the prohibition on attack of the civilian population in Art. 13 (2) of Protocol II?

   c. Do the laws of international and those of non-international armed conflicts distinguish between the same categories of individuals under the principle of distinction? Does Art. 4 of Protocol II establish the principle of distinction between civilians and combatants? Is that principle mentioned anywhere else

in Protocol II? What reasons could you imagine for the absence in Protocol II of wording similar to that found in Art. 48 of Protocol I?

d. According to the Court, did a non-international armed conflict exist in Colombia at the time of the decision? Were the conditions for the applicability of Protocol II fulfilled?

e. Why should Protocol II be read in harmony with Arts. 43 and 50 of Protocol I? How does the Court conclude that rules of the law of international armed conflict not mentioned in Protocol II (nor Art. 3 common) nevertheless apply to non-international armed conflicts? Because they are customary? Because without them the guarantees foreseen in Protocol II are void? Are all paragraphs of Art. 50 of Protocol I equally applicable in non-international armed conflicts even if they do not appear in Art. 13 of Protocol II? Which elements of Art. 50 of Protocol I cannot even apply by analogy in non-international armed conflicts?

f. Why is the prohibition of feigning civilian status not mentioned in Protocol II? Why is such behaviour nevertheless prohibited in non-international armed conflicts? Due to the Martens clause? Because it is prohibited by customary law? Because it is implied in the prohibition on attack of civilians?

8. Why may a superior order to commit a serious violation of IHL not be carried out?

9. In which respect does the interpretation of Art. 6 (5) of Protocol II given in this decision contradict that of the Supreme Court of South Africa in **Case No. 141**, South Africa, AZAPO v. Republic of South Africa. p. 1522? Which arguments are similar? Which additional arguments on the interpretation of Art. 6 (5) of Protocol II appear in the Colombian decision?

Case No. 208, Inter-American Court of Human Rights, The Las Palmeras Case

THE CASE

[**Source:** Inter-American Court of Human Rights, *Las Palmeras case*. Preliminary objections, Judgment of February 4, 2000. Available on http://www.corteidh.or.cr/index_ing.html; footnotes are partially reproduced.]

INTER-AMERICAN COURT OF HUMAN RIGHTS
LAS PALMERAS CASE
PRELIMINARY OBJECTIONS

JUDGMENT OF FEBRUARY 4, 2000 [...]

I. INTRODUCTION OF THE CASE

1. This case was submitted to the Court by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") on July 6, 1998. The Commission's application originates from a petition (No. 11.237) received by its Secretariat and dated in Bogota on January 27, 1994.

II. FACTS SET FORTH IN THE APPLICATION

2. [...] It is alleged that on January 23, 1991, the Departmental Commander of the Putumayo Police Force had ordered members of the National Police Force to carry out an armed operation in Las Palmeras, municipality of Mocoa, Department of Putumayo. Members of the Armed Forces would provide support to the National Police Force.

That, on the morning of that same day, some children were in the Las Palmeras rural school waiting for classes to start and two workers, Julio Milcíades Cerón Gómez and Artemio Pantoja, were there repairing a tank. The brothers, William and Edebraiz Cerón, were milking a cow in a neighboring lot. The teacher, Hernán Javier Cuarán Muchavisoy, was just about to arrive at the school.

That the Armed Forces fired from a helicopter and injured the child Enio Quinayas Molina, 6 years of age, who was on his way to school.

That in and around the school, the Police detained the teacher, Cuaràn Muchavisoy, the workers, Cerón Gómez and Pantoja, and the brothers, William and Edebraiz Cerón, together with another unidentified person who might be Moisés Ojeda or Hernán Lizcano Jacanamejoy; and that the National Police Force extrajudicially executed at least six of these persons.

That members of the Police Force and the Army have made many efforts to justify their conduct. In this respect, they had dressed the bodies of some of the persons executed in military uniforms, they had burned their clothes and they had threatened those who witnessed the event. Also, that the National Police Force had presented seven bodies as belonging to rebels who died in an alleged confrontation. Among these bodies were those of the six persons detained by the Police and a seventh, the circumstances of whose death have not been clarified.

That, as a consequence of the facts described, disciplinary, administrative and criminal proceedings had been initiated. The disciplinary proceeding conducted by the Commander of the National Police Force of Putumayo had delivered judgment in five days and had absolved all those who took part in the facts at Las Palmeras. Likewise, two administrative actions had been opened in which it had been expressly acknowledged that the victims of the armed operation did not belong to any armed group and that the day of the facts they were carrying out their usual tasks. That these proceedings proved that the National Police Force had extrajudicially executed the victims when they where defenseless. As regards the criminal military action, after seven years, it is still at the investigation stage and, as yet, none of those responsible for the facts has been formally accused. [...]

IV. PROCEEDING BEFORE THE COURT [...]

16. On September 14, 1998, Colombia filed the following preliminary objections; [...]

Second:

The Inter-American Commission on Human Rights is not competent to apply international humanitarian law and other international treaties.

Third:

The Inter-American Court of Human Rights is not competent to apply international humanitarian law and other international treaties. [...]

VIII. THIRD PRELIMINARY OBJECTION: LACK OF COMPETENCE OF THE COURT

28. In the application submitted by the Commission, the Court is requested to "conclude and declare that the State of Colombia violated the right to life, embodied in Article 4 of the Convention and Article 3, common to all the 1949 Geneva Conventions... ." In view of this request, Colombia filed a preliminary objection affirming that the Court "does not have the competence to apply international humanitarian law and other international treaties."

    In this respect, the State declared that Articles 33 and 62 of the Convention limit the Court's competence to the application of the provisions of the Convention. It also invoked Advisory Opinion OC-1 of September 24, 1982 (paragraphs 21 and 22) and stated that the Court "should only make pronouncements on the competencies that have been specifically attributed to it in the Convention."

29. In its brief, the Commission preferred to reply jointly to the objections regarding its own competence and that of the Court with regard to the application of humanitarian law and other treaties. Before examining the issue, the Commission stated, as a declaration of principles, that the instant case should be decided in the light of "the norms embodied in both the American Convention and in customary international humanitarian law applicable to internal armed conflicts and enshrined in Article 3, common to all the 1949 Geneva Conventions". The Commission reiterated its belief that both the Court and the Commission were competent to apply this legislation.

    The Commission then stated that the existence of an armed conflict does not exempt Colombia from respecting the right to life. As the starting point for its reasoning, the Commission stated that Colombia had not objected to the Commission's observation that, at the time that the loss of lives set forth in the application occurred, an internal armed conflict was taking place on its territory, nor had it contested that this conflict corresponded to the definition contained in Article 3 common to all the Geneva Conventions.

    Nevertheless, the Commission considered that, in an armed conflict, there are cases in which the enemy may be killed legitimately, while, in others, this was prohibited. The Commission stated that the American Convention did not contain any rule to distinguish one hypothesis from the other and, therefore, the Geneva Conventions should be applied. The Commission also invoked in its favor a passage from the Advisory Opinion of the International Court of Justice on The Legality of the Threat or Use of Nuclear Weapons as follows [*See* **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. p. 896.]:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict that is designed to regulate the conduct of hostilities. Thus

> whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

The Commission stated that, in the instant case, it had first determined whether Article 3, common to all the Geneva Conventions, had been violated and, once it had confirmed this, it then determined whether Article 4 of the American Convention had been violated. [...] [footnote 2: Legality of the threat or use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 240.]

30. During the public hearing, Colombia tried to refute the arguments set out by the Commission in its brief. In this respect, the State emphasized the importance of the principle of consent in international law. Without the consent of the State, the Court may not apply the Geneva Conventions.

The State's representative then affirmed that neither Article 25 or Article 27.1 of the American Convention may be interpreted as norms that authorize the Court to apply the Geneva Conventions.

Lastly, Colombia established the distinction between "interpretation" and "application." The Court may interpret the Geneva Conventions and other international treaties, but it may only apply the American Convention. [...]

32. The American Convention is an international treaty according to which States Parties are obliged to respect the rights and freedoms embodied in it and to guarantee their exercise to all persons subject to their jurisdiction. The Convention provides for the existence of the Inter-American Court to hear "all cases concerning the interpretation and application" of its provisions (Article 62.3).

When a State is a Party to the American Convention and has accepted the contentious jurisdiction of the Court, the Court may examine the conduct of the State to determine whether it conforms to the provisions of the Convention, even when the issue may have been definitively resolved by the domestic legal system. The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility.

33. In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.

Therefore, the Court decides to admit the third preliminary objection filed by the State.

IX. SECOND PRELIMINARY OBJECTION: LACK OF COMPETENCE OF THE COMMISSION

34. As its second preliminary objection, Colombia alleged the lack of competence of the Commission to apply international humanitarian law and other international treaties. [...]

Although the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (cf. Articles 33, 44, 48.1 and 48). Cases in which another Convention, ratified by the State, confers competence on the Inter-American Court or Commission to hear violations of the rights protected by that Convention are excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons.

Therefore, the Court decides to admit the second preliminary objected filed by the State. [...]

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE [...]

7. In sustaining, as I have been doing, for years, the convergences between the *corpus juris* of human rights and that of International Humanitarian Law (at normative, interpretative and operational levels), I think, however, that the concrete and specific purpose of development of the obligations *erga omnes* of protection (the necessity of which I have been likewise sustaining for some time) can be better served, by the identification of, and compliance with, the *general obligation of guarantee* of the exercise of the rights of the human person, *common to the American Convention and the Geneva Conventions (infra)*, rather than by a correlation between sustantive norms - pertaining to the protected rights, such as the right to life - of the American Convention and the Geneva Conventions.

8. That general obligation is set forth in Article 1.1 of the American Convention as well as in Article 1 of the Geneva Conventions and in Article 1 of the Additional Protocol I (of 1977) to the Geneva Conventions. Their contents are the same: they enshrine the duty *to respect*, and to *ensure respect* for, the norms of protection, in all circumstances. This is, in my view, the common denominator (which curiously seems to have passed unnoticed in the pleadings of the Commission) between the American Convention and the Geneva Conventions, capable of leading us to the consolidation of the obligations *erga omnes* of protection of the fundamental right to life, in any circumstances, in times both of peace and of internal armed conflict. It is surprising that neither doctrine, nor case-law, have developed this point sufficiently and satisfactorily up to now; until when shall we have to wait for them to awake from an apparent and prolonged mental inertia or lethargy?

9. It is about time, in this year 2000, to develop with determination the early jurisprudential formulations on the matter, advanced by the International Court of Justice precisely three decades ago, particularly in the *cas célèbre*

of the *Barcelona Traction* (Belgium *versus* Spain, 1970). It is about time, on this eve of the XXIst century, to develop systematically the contents, the scope and the juridical effects or consequences of the obligations *erga omnes* of protection in the ambit of the International Law of Human Rights, bearing in mind the great potential of application of the notion of *collective guarantee*, underlying all human rights treaties, and responsible for some advances already achieved in this domain.

10. The concept of obligations *erga omnes* has already marked presence in the international case-law. [...] Nevertheless, in spite of the distinct references to the obligations *erga omnes* in the case-law of the International Court of Justice, this latter has not yet extracted the consequences of the affirmation of the existence of such obligations, nor of their violations, and has not defined either their legal regime.

11. But if, on the one hand, we have not yet succeeded to reach the opposability of an obligation of protection to the international community as a whole, on the other hand the International Law of Human Rights nowadays provides us with the elements for the consolidation of the opposability of obligations of protection to all the States Parties to human rights treaties (obligations *erga omnes* partes - cf. *infra*). Thus, several treaties, of human rights as well as of International Humanitarian Law, provide for the general obligation of the States Parties to guarantee the exercise of the rights set forth therein and their observance.

12. As correctly pointed out by the *Institut de Droit International*, in a resolution adopted at the session of Santiago of Compostela of 1989, such obligation is applicable *erga omnes*, as each State has a legal interest in the safeguard of human rights (Article 1). Thus, parallel to the obligation of all the States Parties to the American Convention to protect the rights enshrined therein and to guarantee their free and full exercise to all the individuals under their respective jurisdictions, there exists the obligation of the States Parties *inter se* to secure the integrity and effectiveness of the Convention: this general duty of protection (the collective guarantee) is of direct interest of each State Party, and of all of them jointly (obligation *erga omnes partes*). And this is valid in times of peace as well as of armed conflict.

13. Some human rights treaties establish a mechanism of petitions or communications which comprises, parallel to the individual petitions, also the inter-State petitions; these latter constitute a mechanism *par excellence* of action of collective guarantee. The fact that they have not been used frequently (on no occasion in the inter-American system of protection, until now) suggests that the States Parties have not yet disclosed their determination to construct a the international *ordre public* based upon the respect for human rights. But they could - and should - do so in the future, with their growing awareness of the need to achieve greater cohesion and institutionalization in the international legal order, above all in the present domain of protection.

14. In any case, there could hardly be better examples of mechanism for application of the obligations *erga omnes* of protection (at least in the

relations of the States Parties *inter se*) than the methods of supervision foreseen *in the human rights treaties themselves*, for the exercise of the collective guarantee of the protected rights. In other words, the mechanisms for application of the obligations *erga omnes partes* of protection already exist, and what is urgently need is to develop their legal regime, with special attention to the *positive obligations* and the *juridical consequences* of the violations of such obligations.

15. At last, the absolute prohibition of grave violations of fundamental human rights - starting with the fundamental right to life - extends itself, in fact, in my view, well beyond the law of treaties, incorporated, as it is, likewise, in contemporary customary international law. Such prohibition gives prominence to the obligations *erga omnes*, owed to the international community as a whole. These latter clearly transcend the individual consent of the States, definitively burying the positivist-voluntarist conception of International Law, and heralding the advent of a new international legal order committed with the prevalence of superior common values, and with moral and juridical imperatives, such as that of the protection of the human being in any circumstances, in times of peace as well as of armed conflict. [...]

DISCUSSION

1. Was there a violation of the Geneva Conventions? Of Protocol II? If yes, what recourse is there to see the perpetrators judged if the Inter-American Court does not have jurisdiction? Has Colombia fulfilled its obligations as party to the Geneva Conventions by initiating disciplinary, administrative and criminal proceedings?

2. a. On what basis does the Inter-American Commission of Human Rights want to apply International Humanitarian Law (IHL)? On the basis of IHL? On the basis of the American Convention? In your opinion, is the Inter-American Commission of Human Rights competent to apply IHL? In "the light of "the norms embodied in [...] the American Convention""? Those embodied in customary international law?

   b. What about the Court? Does it answer the arguments made by the Commission? Does its judgement mean that it cannot take IHL into account when interpreting the American Convention?

3. What do you think of the Commission's use of the ICJ's Advisory Opinion on the legality of the threat or use of nuclear weapons to justify the application of the Geneva Conventions?

4. Is the right to life absolute (See para. 29)? Do you agree with the Commission's arguments?

5. Why has the "doctrine" and "case-law" brought up by Judge A. A. Cançado Trindade in paras. 8-10 not been developed? Do you agree with his opinion on the development of the concept of *erga omnes* obligations? Does he argue that the Court is necessarily competent to monitor compliance with all *erga omnes* obligations? That Art. 1 common to the Conventions makes the Court competent to apply those Conventions?

XXXI. BURMA

(*See also* **Case No. 87**, Burma, Ko Maung Tin v. U Gon Man. p. 1068.)

Document No. 209, ICRC, Visits to Detainees: Interviews without Witnesses

[N.B.: Since the events related in this Document a new agreement has been reached with the Burmese authorities. Following this agreement the ICRC has resumed its activities within the country. *See* ICRC Press Release, ICRC begins visits to detainees and prisoners in Myanmar, 99/26, May 6,1999.]

A. Withdrawal of the ICRC from Burma in 1995: Newpaper Article

[**Source:** Reuters: "Red Cross shuts office in Burma out of frustration" in *Bangkok Post*, June 20, 1995.]

The International Committee of the Red Cross (ICRC) said yesterday it was closing down its office in Rangoon because it had failed to get proper access to political prisoners in Burma.

The ICRC said in a statement it first requested access to political prisoners in Burma in May last year. The ruling State Law and Order Restoration Council (SLORC) finally responded to that request in March.

"This reply was not satisfactory as it took no account of the customary procedures for visits to places of detention followed by the ICRC in all the countries where it conducts such activities," the statement said.

"The ICRC has tried to persuade the SLORC to reconsider its position, but in vain," it said.

Human rights groups and Rangoon-based diplomats estimate there are several hundred political prisoners in Burma including the 1991 Nobel Peace Prize winner Aung San Suu Kyi and many members of the pro-democracy political party she co-founded

B. ICRC Document

[**Source:** ICRC Action on behalf of prisoners, Geneva, ICRC.]

Private interviews with prisoners: the cornerstone of ICRC action

Conversations in strict privacy between delegates and individual prisoners, without any authorities present, are the cornerstone of ICRC action on behalf of people deprived of their freedom. Such interviews without witnesses, as they are sometimes called, serve a dual purpose: they give the prisoners a break from prison routine, one in which they can speak freely about what matters most to them and be sure of being heard; and they enable the ICRC

to find out all about the conditions of detention and the treatment of prisoners. The interviewing delegate also enquires how the arrest and the subsequent questioning took place, and about the conditions of detention at the various places where the prisoner was temporarily held before arriving at the place visited. In addition, the delegate may be given information about fellow prisoners whose arrest has not yet been notified to the ICRC or whom it has not been able to contact. He or she will ensure that the interview takes place without interference from other prisoners, who might seek to exert pressure.

The task of conducting such interviews is all the more delicate in that giving such an account often revives painful memories of traumatic experiences - and there is no question of subjecting the prisoners to a fresh interrogation. There are no precise rules for interviewing them: it is up to the delegate to assess the situation on a case-by-case basis and adjust to it to create an atmosphere of trust. Sometimes the chance to speak to somebody from outside is enough for the individual prisoners to confide in the delegate, while at others it may take several visits before they will tell their story. Then again, they may open up only to the ICRC doctor. On the strength of the information thus gathered and after cross-checking, the ICRC decides what action should be taken.

Whenever necessary, interpreters are used to communicate with the prisoners. They are recruited by the ICRC itself and, to avoid any pressure, they are never nationals of the country in which the visits take place. If it has no suitable interpreters available, the ICRC may ask the prisoners to appoint one or more from among themselves; this practice is seldom adopted, however, since the prisoner interpreting a fellow inmate's remarks may be endangered by doing so or may distort what he or she says.

A professional code of conduct drawn up with the prisoner's interests in mind

To the ICRC, the interests of the individual prisoners visited prevail over all other considerations. Their situation may lead to diplomatic approaches or some other intervention, but must always be handled with the utmost caution: a risk of reprisals against prisoners if allegations of ill-treatment are reported to the prison authorities may cause the ICRC to postpone its call for an investigation. Delegates will nevertheless contact other officials - often at a higher level - to prevent such situations from recurring. On no account will the ICRC quote a prisoner's statements without his or her express permission. It takes care to see that its interventions do not have any negative impact on the day-today life of inmates, and adapts them accordingly. Where there is overcrowding, for example, the most logical solution would presumably be to transfer some prisoners to other places of detention. But in many cases they might thus be taken far away from their families and deprived of their material support, which is sometimes vital. So delegates make sure that any transfers make due allowance for that consideration.

The ICRC is also careful not to disrupt the prisoners' own internal organization. To withstand the pressures of prison life to the best of its ability, every group of prisoners sets up its own structures which sometimes reflect the social hierarchy and political movements of the outside world. To request the transfer of prisoners from one block to another may upset that internal structure and have serious repercussions such as fights, rivalries between groups or the deprival of certain advantages linked to residence in a given block. On the other hand, the ICRC may ask for prisoners to be transferred because they are being taunted or ill-treated by cellmates for political or other reasons.

XXXII. TURKEY

Case No. 210, Germany, Government Reply on the Kurdistan Conflict

THE CASE

[**Source:** German Bundestag, Document 12/8458, 12th legislative period, September 7, 1994; original in German, unofficial translation.]

REPLY by the Federal Government to the written question submitted by Bundestag member Vera Wollenberger and the parliamentary party of the Alliance 90/Greens

- Document 12/8219 - Kurdistan conflict

[*The reply was issued on behalf of the Federal Government in a letter of the Federal Ministry of Foreign Affairs dated September 5, 1994. The document also sets out - in small type - the text of the questions.*]

The Kurdish war of self-determination in Turkey claimed 4,200 lives on either side in 1993 (*Frankfurter Rundschau*, March 21, 1994). A total of 874 villages were destroyed. According to Prime Minister Tansu Ciller, in the last ten years the civil war has cost the Turkish State alone DM 95 billion (*Frankfurter Rundschau*, March 22, 1994). [...]

On April 28, 1994 the German Bundestag adopted a motion by the Parliamentary Social Democratic Party (in accordance with a resolution of April 12, 1994 put forward by the Foreign Affairs Committee, Document 12/7224), stating that the German Bundestag considers "the Turkish government's policy of attempting to defeat the PKK by military force alone to be hopeless" and that "an escalation of the violence will not resolve the problem, but will simply cause greater harm and render means of reaching a peaceful solution more difficult." [...]

The objective of German foreign policy should be to foster dialogue between the parties in conflict and to promote a peaceful solution. An initial step could, however, be to urge both sides to observe human rights and to comply with international humanitarian law applicable in armed conflict. At present both those principles are increasingly being violated in the conflict zone. [...]

8. To the knowledge and in the estimation of the Federal Government does the PKK satisfy the requirements of Article 1 of the regulations annexed to the Hague Convention of 1907?

If not, which requirements does it fail to satisfy?

If so, how can that fact be reconciled with the accusation that the PKK is a terrorist organization?

The term "belligerent" is defined in Article 1 of the Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land. Under the Convention the laws, rights and duties of war apply not only to armies but also to militia and volunteer corps fulfilling specific conditions listed in Article 1.

Prior to any examination of whether the PKK is to be deemed a belligerent within the meaning of that provision of Article I, it must first be established whether Hague Convention IV is in fact applicable to the Kurdistan conflict. Article 2 of the Convention, known as the all-participation clause, stipulates that the provisions contained therein do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. Therefore, the Convention does not apply to the Kurdish conflict. [...]

12. The "International Conference on North-West Kurdistan", held in Brussels on March 12 and 13, 1994, called upon the PKK (para. 20 of the final resolution) "to submit to the Swiss government - as the depositary of 1977 Protocol I additional to the 1949 Geneva Conventions - a declaration expressing its willingness to be bound by the applicable rules of international law, as provided for in Article 96, para. 3, of said Protocol I." The Secretary General of the PKK, Abdullah Özcalan, stated his willingness to comply with that request.

Is the Federal Government willing to demand the same from the Turkish government, as the very first step towards de-escalation?"

Under Article 96, para, 3, of Protocol I additional to the 1949 Geneva Conventions, an "authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, para. 4," may address a unilateral declaration to the depositary by which it undertakes to apply the Conventions and the Protocol in relation to that conflict.

Conflicts of the type referred to in Article 1, para. 4, include armed conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". Neither of those criteria apply to the Kurdish conflict.

The Federal Government would, however, welcome a move by both parties to the Kurdish conflict to comply with the provisions relating to the law of war contained in the Geneva Conventions and Protocol I. In any event, Article 3 common to all the Geneva Conventions, which sets minimum standards to be observed by all parties to a non-international conflict, does apply. Furthermore, Article 3, para. 2, encourages the parties to an internal conflict specifically to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions.

DISCUSSION

1. Is the situation in Eastern Turkey/Kurdistan an armed conflict? Does IHL cover the situation? How can a declaration by the PKK under Art. 96 (3) of Protocol I be interpreted? Does it oblige Turkey to respect IHL of international armed conflict? How could that declaration be interpreted under the law of non-international armed conflicts? (*Cf.* Art. 3 common to the Conventions.)
2. a. Does the Hague Convention IV apply to the conflict? If Art. 1 of the Hague Regulations does not apply to the PKK, is it because not all parties to the conflict are parties to the Hague Conventions? Because the PKK is not party to that Convention? Because the PKK is not a party to an international armed conflict?
   b. If the PKK is not bound by Art. 1 of the Hague Regulations, does it not have any obligation to distinguish its fighters from the civilian population?
3. If PKK fighters are not covered by Art. 1 of the Hague Regulations or if they do not respect it do they lose any protection under IHL?

XXXIII. AFGHANISTAN

1. War in Afghanistan (1978-1992)

Case No. 211, Afghanistan, Soviet Prisoners Transferred to Switzerland

THE CASE

[**Source:** *International Review of the Red Cross*, No. 241, 1984, pp. 239-240.]

Conflict in Afghanistan

The first three Soviet soldiers, who had been captured in Afghanistan by opposition movements and transferred to Switzerland by the ICRC on May 28, 1982, have reached the end of their two-year period of internment agreed upon with the parties concerned. One of them, who confirmed his desire to be transferred to his country of origin, has returned to the USSR. The other two soldiers informed the Swiss authorities that they did not wish to return to their country. Their status will be determined by the Swiss authorities in accordance with the legislation in force.

The ICRC took this opportunity to make public its position regarding all the victims of the Afghan conflict in the following press release, published on May 20, in Geneva:

"Since 1979, the ICRC has made every effort to provide protection and assistance to the civilian and military victims of the armed conflict in Afghanistan, in accordance with the mandate conferred upon it in the Geneva Conventions and the statutes of the International Red Cross. On several occasions, it has reminded the parties whose armed forces are engaged in the conflict of their obligations under international humanitarian law. However, in spite of repeated offers of services to the Afghan government and representations to the government of the USSR, the ICRC has only on two occasions - during brief missions in 1980 and 1982 - been authorized to act inside Afghanistan. Consequently, the ICRC has to date been able to carry out very few of the assistance and protection activities urgently needed by the numerous victims of the conflict on Afghan territory.

Due to the serious consequences of the situation in Afghanistan, the ICRC decided in 1980 to undertake protection and assistance activities in Pakistan. It opened two surgical hospitals for Afghan war wounded, the first in Peshawar, the second, in July 1983, in Quetta. In addition, being deeply concerned by the plight of persons captured by the Afghan opposition movements and by information to the effect that several such persons had been executed, the ICRC

tried to find a way of protecting the lives of both Afghan and Soviet captured persons.

Negotiations carried out by the ICRC, with successively, the USSR, the Afghan opposition movement, Pakistan and Switzerland led to partial success. The parties agreed to the transfer and internment in a neutral country of Soviet soldiers detained by the Afghan opposition movements, in application, by analogy, of the Third Geneva Convention, relative to the treatment of prisoners of war.

On the basis of this agreement, the ICRC has had access to some of the Soviet prisoners in the hands of the Afghan movements and has informed them, in the course of interviews without witness, of the possibility for transfer by the ICRC to Switzerland, where they would spend two years under the responsibility and watch of the Swiss government before returning to their country of origin.

The ICRC made this proposal to the Soviet prisoners on the basis of the principle worked out at the 1949 Diplomatic Conference and stipulated in the Geneva Conventions, i.e. that repatriation of a prisoner of war signifies the return to a normal situation and is in the best interests of the prisoner. The above-mentioned procedure therefore applies only to Soviet soldiers who consider themselves to be in a situation comparable to that of a prisoner of war in enemy hands. Consequently, the entire operation is based on respect for the principle according to which the ICRC never acts against the wishes of the person it is assisting.

To date, eleven Soviet soldiers have accepted the proposal. The first three were transferred to Switzerland on May 28, 1982. Eight others arrived in August and October 1982, January and October 1983, and February and April 1984. One of them escaped to the Federal Republic of Germany in July 1983.

The first three Soviet soldiers reach the end of their period of internment on May 27, 1984. In conformity with the spirit of the provisions of international humanitarian law in this respect, the Swiss authorities, under whose responsibility the soldiers are, have taken the measures necessary to repatriate those internees still wishing to return to their country of origin.

The ICRC's main concern since the beginning of the conflict has been the unacceptable restriction of its humanitarian activities. In view of the situation, which has inflicted so much suffering on the Afghan population for over four years, the ICRC expects all the parties to the conflict to enable it by all means possible to protect and assist in all places all of the victims of that conflict, and thereby fully respect International Humanitarian Law and its principles."

DISCUSSION

1. How would you qualify the conflict in Afghanistan? What consequences would the qualification of the conflict have upon the parties involved in Afghanistan?
2. When soldiers are captured by the adverse party of the conflict, are they automatically considered POWs? Is the qualification of the conflict crucial in that

regard? Why have Soviet and Afghan authorities signed an agreement stating that after a period of two years the captured soldiers be released? Theoretically, in an international armed conflict, would the parties need to have signed an agreement to solve the problem of the release of POWs during the conflict? Is there a provision in IHL which states that POWs have to be released at the end of the hostilities? During the hostilities? (*Cf.* Arts. 109 and 118 of Convention III.)

3. Which Soviet soldiers consider themselves to be "in a situation comparable to that of prisoners of war"? Would they not be considered automatically as POWs due to the simple fact that one may assert that we are in a situation of international armed conflict? (*Cf.* Arts. 2 and 4 of Convention III.) Which Soviet soldiers do not "consider themselves to be in a situation comparable to that of prisoners of war" ? What is the legal status of those persons? Which provisions of IHL would apply to those in the hands of the Afghan rebels? (*Cf.* Art. 4 of Conventions III and IV.)

4. In which case may a POW be interned in a third country? (*Cf.* Arts. 110 (2) and 111 of Convention III.)

5. Upon which provisions can the ICRC take the initiative as an intermediary between the parties in the Afghan armed conflict? (*Cf.* Art. 3 common to the Conventions, Art. 9 of Conventions I, II, and III, Art. 10 of the Convention IV, and Art. 81 (1) of Protocol I.)

6. What is the status of the Soviet soldiers in Switzerland? Do they have to be treated as POWs? Does the ICRC have the right to visit them? What is the justification for detaining captured combatants under IHL? Under International Human Rights Law? How would you, as a Swiss judge, answer their request for release? (*Cf.* Art. 4 (B) (2) of Convention III.)

7. Under IHL, does Switzerland have the right or perhaps even the obligation not to repatriate POWs who do not wish to be repatriated?

8. a. The ICRC, at the end of the two year agreement, asked the captured soldiers whether or not they wanted to go back to their country of origin, as is common practice of this organization to do: Is this practice foreseen in IHL? Under which premises can it be justified? (*Cf.* Art. 118 of Convention III.)

   b. In this case could the two captured soldiers who refused to go back to the Soviet Union be considered at that point as refugees seeking asylum?

9. Why do you think that the ICRC did not have access to victims in Afghanistan? Was the refusal to give the ICRC access to Afghanistan a violation of IHL? Which means does the ICRC have in making the authority comply with its desire to act inside the country? In addition, which means does the ICRC have in making the parties to the conflict comply with the Convention relating to the treatment of POWs? (*Cf.* Arts. 3 and 126 of Convention III and Arts. 3 and 143 of Convention IV.)

2. The Taliban Regime

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women

THE CASE

[N.B.: After the events related in this case, the policy referred to was no longer applied by the Taliban Afghan authorities. *See* ICRC News: Afghanistan: Women gradually being re-admitted to Kabul Hospitals, 97/47, November 26, 1997.]

A. Women Barred from Kabul Hospitals

[**Source:** Perrin, J.-P., "Les hôpitaux de Kabul interdits aux femmes", in *Libération*, October 23, 1997; original in French, unofficial translation.]

Women Barred from Kabul Hospitals [...]

Taliban prohibiting treatment for sick women and turning them out of the hospitals [...]

First, the women of Kabul were forbidden to work. Next they were forbidden to study or train for a profession. Then it was decreed that they could go out in public only if accompanied by a husband, father or brother. But nobody in Kabul, previously a very Westernized city, would have imagined that the Taliban, who took control of the Afghan capital just over a year ago, would go so far as to prevent women from receiving medical attention. However, this was what the latest directive issued by the "students of Islamic theology" on 6 September ordered in very clear terms. It is now strictly forbidden for any of the town's public hospitals to treat women except in emergencies - a rather theoretical and flimsy proviso. And the few female staff remaining in these hospitals are not allowed to give any treatment at all. From now on, until the (hypothetical) opening of a hospital reserved for women, there is only one establishment to treat all the female inhabitants of Kabul. But, according to the Western doctors who have visited it, "the Central Polyclinic" has no running water, no electricity above the second floor, no laboratory, no functioning operating theatre and only one microscope. What is worse, it has a mere 45 beds available for the entire female population of a city which has almost one and a half million inhabitants and, moreover, is devastated by the war and plagued by shortages of all kinds.

Since the decree was issued, not only are sick women being refused treatment but those already in hospital are being turned out - and this is in a town with a large number of medical facilities. In a recently published document, *Médecins sans frontières* (MSF) reported that 12 female patients, some of them with bullet wounds, had been turned out of one of the major hospitals, Wazir Akbar Khan, on October 19, and only two of them were later found at the Polyclinic. That same day saw the dismissal of the last 15 female employees of the Karte Se hospital, which may soon cease to function because male workers are not willing to take

charge of the laundry. Worse still, the decision whereby hospitals could treat women in emergencies, taken under Western NGO pressure by the Minister of Health, *Mullawi* Abbas, has been widely condemned. Already the emergency departments of two of the four large Kabul hospitals are refusing to admit women. At the beginning of October a woman in a deep coma was turned away and sent home. In September, another woman suffering from a highly contagious form of tuberculosis was also sent home before she had completed her course of treatment, thus exposing her entire family to the risk of infection. And recently a doctor at one of the large hospitals disclosed that he had not dared to treat a woman suffering from 80% burns because he would have had to remove her clothing.

The NGOs present in Kabul are even more "sickened" by the violence with which the ministerial directives are applied. On September 27, the Ministry decided to close down all private clinics with in-patient facilities, and just two days later members of the Taliban entered one of these clinics and violently ejected two women who were in the process of giving birth. "What we are seeing is the total destruction of a health system which until now, in contrast to the education system, has remained relatively unscathed. People should be aware that today women are dying at home in Kabul because the Taliban will not allow them access to treatment. First of all, these women are afraid to go out. And then, when they do pluck up the courage to leave their homes, it is often too late and their condition is irremediable. The same applies to their children", declared Pierre Salignon, the coordinator of the MSF mission in Kabul. [...]

What the military/religious order of the Taliban is endeavouring to establish is a system of health care conforming to the ideal Islamic society which they are advocating, a system in which men and women are kept strictly apart, the women often living a completely cloistered life. The most incredible aspect of the situation is that this policy of apartheid is being financed, initiated even, by the World Health Organization. MSF notes in its report that the notorious directive depriving Kabul's female inhabitants of medical treatment coincided with the beginning of work on the renovation of the Rabia Balkhi hospital, which is destined to become the only "women's hospital" in the capital and might open in a year's time. The main donor for this construction project turns out to be WHO, which has made a contribution of $64,000 for the first six months.

B. Security Council Resolution 1193 (1998)

[**Source:** UN Doc. S/RES/1193 (August 28, 1998).]

The Security Council,

Having considered the situation in Afghanistan,

Recalling its previous resolution 1076 (1996) of October 22, 1996 and the statements of the President of the Security Council on the situation in Afghanistan,

Recalling also resolution 52/211 of the General Assembly,

Expressing its grave concern at the continued Afghan conflict which has recently sharply escalated due to the Taliban forces' offensive in the northern parts of the country, causing a serious and growing threat to regional and international peace and security, as well as extensive human suffering, further destruction, refugee flows and other forcible displacement of large numbers of people, [...]

9. *Urges* all Afghan factions and, in particular the Taliban, to facilitate the work of the international humanitarian organizations and to ensure unimpeded access and adequate conditions for the delivery of aid by such organizations to all in need of it;

10. *Appeals* to all States, organizations and programmes of the United Nations system, specialized agencies and other international organizations to resume the provision of humanitarian assistance to all in need of it in Afghanistan as soon as the situation on the ground permits; [...]

12. *Reaffirms* that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of August 12, 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches; [...]

14. *Urges* the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights as well as violations of international humanitarian law and to adhere to the internationally accepted norms and standards in this sphere;

DISCUSSION

1. Is the armed conflict in Afghanistan an international one or a non-international one? Are the provisions of the Conventions on grave breaches applicable in non-international armed conflicts? Does the Security Council by para. 12 of its resolution qualify the conflict as an international armed conflict? Or does it affirm that the concept of grave breaches applies in non-international armed conflicts? (*Cf.* Arts. 2 and 3 and 50/51/130/147 common to the Conventions and Art. 4 of Convention IV.)

2. a. Does the requirement to separate health facilities for women and men violate IHL? Does your response differ if such separation means that women do not receive equal, less adequate care and treatment? (*Cf.* Art. 3 common to the Conventions.) Is a complete separation between the health systems for men and women compatible with IHL, if both systems provide the same standard of treatment? Is such a separation compatible with International Human Rights Law? (*See* para. 14 of the Security Council Resolution.)

   b. Would the situation under IHL be different if IHL of international armed conflicts were applicable? (*Cf.* Art. 12 of Convention I and Art. 10 of Protocol I.)

   c. In which circumstances does the treatment of women described in the newspaper article amount to a grave breach of IHL, if the law of international

armed conflicts is applicable? (*Cf.* Art. 50 of Convention I, Art. 147 of Convention IV, and Arts. 11 (4) and 85 of Protocol I.)

3. a. Do such restrictions for treatment make humanitarian action impossible in these particular circumstances?

   b. If humanitarian organizations chose not to remain under such circumstances, is their departure a protest against the lack of adequate treatment and care for women? Or against the policy of separating men and women? Is the latter not a cultural judgement? Should not an aid organization respect and adapt to the culture and beliefs of the area in which they are working? Do they always have to adapt and to what extent can they do so? Should they consult the Afghan women whether they agree to or wish separate treatment? Should they always respect such will of those concerned?

   c. If a humanitarian organization chose to leave the region in protest of such circumstances would not this, in effect, punish the women, as they would receive even less aid?

Case No. 213, Afghanistan, Destruction of the Bamiyan Buddhas

THE CASE

[**Source:** MATSUURA Koïchiro, "Les crimes contre la culture ne doivent pas rester impunis", in *Le Monde*, Paris, 16 March 2001. Original in French, unofficial translation.]

Crimes against culture must not go unpunished

A crime against culture has just been committed. By destroying the huge Buddha statues that had been watching over the Bamiyan Valley for 1,500 years, the Taliban have done irreparable damage. They have destroyed not only part of Afghanistan's historical legacy, but also exceptional evidence of the meeting of several civilizations and a heritage that belonged to the whole human race.

This crime was perpetrated coolly and deliberately. No military action under way in that part of Afghanistan can be invoked as an excuse. In recent years, the caves surrounding the Buddhas - with wall-paintings by the monks - were defiled and defaced by the soldiers of the various factions that had bivouacked there. Arms were stored there, at the very feet of the Buddhas, which were reduced to the level of shields. During those years, the statues were also targeted several times. That was intolerable enough but war might explain those attacks - even if it cannot justify them. The systematic destruction recently carried out cannot even find that feeble excuse.

This crime against culture was committed in the name of religion - or rather, in the name of a religious interpretation that is both questionable and controversial. Some of the leading theologians in Islam have challenged that interpretation. By ordering the destruction of masterpieces of Afghan heritage in the name of his faith, Mullah Omar claims to know more about that faith than all the generations of

Muslims down the last 15 centuries, all the Muslim conquerors and leaders who spared Carthage, Abu Simb] or Taxil - more even than the prophet Mohammed himself, who chose to preserve the architecture of the Kaaba at Mecca.

[...] Apart from these Buddhas being a huge loss, what has just been done is unprecedented. For the first time, a central authority - albeit unrecognized - has usurped the right to destroy part of our common heritage. It is the first time that UNESCO, mandated by its constituent act to preserve our universal heritage, has been confronted by such a situation. [...]

UNESCO had largely contributed to it by working in three main directions: the protection of cultural assets in case of armed conflict pursuant to the Hague Convention [1954, *See* **Document No. 3**. [*Cf.* A.] p. 525.]; the fight against illegal trading in those same goods pursuant to various normative measures; and since 1972, the promotion of the very concept of universal heritage. Moreover, the success of the World Heritage List aptly illustrates the extent of this awareness of and new concern for our heritage.

[...] It is not mere stones that have been destroyed. It was an attempt to wipe out a history, a culture or rather testimonies to the possibility of a meaningful encounter between two great civilizations and a lesson in intercultural dialogue.

That is why the act of madness perpetrated by the Taliban in Bamiyan or against the pre-Islamic statues in the museums in Afghanistan must be defined as a crime. A backward cultural step of this kind must not be permitted. This crime calls for a new type of sanctions. Just a few days ago, the International Criminal Tribunal for the former Yugoslavia set us an example by including the destruction of historic monuments in the 16 charges in its undertaking in respect of the 1991 attack against the historic port of Dubrovnik in Croatia [*See* ICTY, The Prosecutor v. Strugar, **Case No. 188**. [*Cf.* B.] p. 2020.].

The international community must not remain passive; it must not tolerate crimes against cultural assets any longer. What the Taliban has done was an isolated act but one replete with danger and UNESCO will respond with appropriate measures. In particular, by combating the trade in Afghan cultural assets, which is unfortunately sure to increase, and by saving the rest of that country's heritage - pre-Islamic or Islamic - as well as by considering, within the framework of the World Heritage Committee, reinforcing protection. The international community has lost the Bamiyan Buddhas; it must not lose anything else.

Koïchiro Matsuura is Director-General of UNESCO.

DISCUSSION

1. Given that, at the time, an armed conflict was under way between the Taliban regime and the forces of the internationally recognized government, but that the fighting was not the cause of the Buddhas' destruction, do you think that International Humanitarian Law is applicable? (*See* Art. 19 of the Hague Convention of 1954 (*See* **Document No. 3**. [*Cf.* A.] p. 525.); Art. 16 of Protocol II.)

2. What are the rules of IHL protecting cultural property? Is destroying such property allowed? If yes, in what circumstances? Can weapons be stored in cultural property? Can cultural property be used to protect a military objective? (*Cf.* Art. 27 of the Hague Regulations; Arts. 4, 9 and 19 of the Hague Convention of 1954; Art. 53 of Protocol I; Art. 16 of Protocol II; the 1999 Protocol to the Hague Convention of 1954 (*See* **Document No. 3**. [*Cf.* C.] p. 525.).

3. Are these rules applicable in the event of a non-international armed conflict? Is the protection of cultural property part of customary International Humanitarian Law (*See* **Case No. 29**, ICRC, Customary International Humanitarian Law. [Rules 38-41.] p. 730.)? Are these rules applicable even if Afghanistan is not party to some of the instruments of IHL prohibiting the destruction of cultural property?

4. From what additional legal protection would the Buddhas of Bamiyan have benefited if they had been included in the "World Heritage List" established by the Convention concerning the Protection of the World Cultural and Natural Heritage of 1972 (http://www.unesco.org/whc)? Or if they had been the subject of "special protection" or "enhanced protection"? (*Cf.* Arts. 8 ff. of the Hague Convention of 1954; Arts. 10 ff. of the 1999 Protocol to the Hague Convention of 1954.)

5. To what extent could destruction of this kind be considered a crime, or a war crime? Are the conditions for such offences met in this case? (*Cf.* Art. 28 of the Hague Convention of 1954; Art. 85 (4) of Protocol I; Art. 8 (2) (b) (ix) and (e) (iv) of the ICC Statute. (*See* **Case No. 15**, The International Criminal Court. [*Cf.* A., The Statute.] p. 608.)

3. US Intervention in Afghanistan

Case No. 214, Afghanistan, Operation "Enduring Freedom"

THE CASE

A. The United States Uses Cluster Bombs

[**Source:** GARDAZ, Samuel, "Les États-Unis utilisent des bombes à fragmentation", in *Le Temps*, Geneva, 26 October 2001. Original in French, unofficial translation.]

The United States uses cluster bombs

The United Nations confirmed on Thursday that nine Afghan civilians had been killed by controversial weapons. [...]

The United States each day unleashes a little more of its range of weapons against the Taliban and seems to have gone one step further this week. On the twentieth day of the bombing of Afghanistan, US aircraft are said to have dropped cluster bombs on targets close to Herat in the west and on the fronts north of Kabul and near Mazar-i-Sharif. On Thursday a Pentagon official admitted anonymously that such weapons had been used.

Victims in Herat

According to the United Nations spokesperson in Islamabad, these missiles - which scatter hundreds of bomblets if they open before they touch the ground (see below) - have claimed the lives of nine civilians in Herat since the start of the week. For technical reasons, these sub-munitions, which are the size of a soft drink can, do not necessarily explode when they hit the ground and turn into *de facto* mines. One of the nine victims is said to have set off one of these sub-munitions by handling it.

The UN wants explanations

The United States' use of cluster bombs, a controversial weapon which has not been formally prohibited by international treaty, has angered several humanitarian organizations. The United Nations, which is carrying out de-mining campaigns in Afghanistan, asked Washington for clarification. The International Committee of the Red Cross (ICRC) did not give an opinion. In an "official statement" issued on Wednesday, it merely expressed its increasing concern "about the impact in humanitarian terms of the war in Afghanistan". Darcy Christen, deputy ICRC spokesman, pointed out that "the ICRC only gives an opinion about the legitimacy of military means employed as a last resort and always bases its views on its own intelligence gathered in the field". Like the other international organizations, the ICRC has evacuated its expatriate staff from Afghanistan.

An ICRC project

Cluster bombs, which were last used by the United States in Kosovo in 1999, are controversial. According to a Human Rights Watch report dated January 2000, in May 1999 the US supreme command issued a secret order prohibiting their use by its armed forces. Next December in Geneva, when the United Nations Convention on Certain Conventional Weapons of 1980 is reviewed, the ICRC will propose, among other recommendations, that it be prohibited to use sub-munitions, including cluster bombs, against military targets near populous civilian areas.

A bomb which splits into many others [...]

Cluster bombs are tubes which each contain 200 to 300 sub-munitions. Dropped by plane or fired by the artillery, the bombs release these sub-munitions, each the size of a soft drink can, at an altitude of between 100 and 1,000 metres. These sub-munitions can cover an area of 200 metres by 400 metres, the equivalent of eight football pitches. By scattering shrapnel over a range of 76 metres, each bomblet has an explosive force capable of piercing through armour plating, wiping out troop concentrations or neutralising minefields. Cluster bombs were used during the Viet Nam war and turn into mines when their sub-munitions do not explode: according to NATO, 29,000 sub-munitions did not explode in Kosovo.

B. Bombing of ICRC Warehouses

1. ICRC, Press Release of 16 October 2001

[**Source:** ICRC, Press Release, 01/43, 16 October 2001; available on http://www.icrc.org]

ICRC warehouses bombed in Kabul

Geneva (ICRC) - Shortly after 1.00 p.m. local time today, two bombs were dropped on an ICRC compound in Kabul, wounding one of the organization's employees who was guarding the facility. He was taken to hospital and the latest reports from ICRC staff in the Afghan capital indicate that he is in stable condition.

The compound is located two kilometres from the city's airport. Like all other ICRC facilities in the country, it is clearly distinguishable from the air by the large red cross painted against a white background on the roof of each building.

One of the five buildings in the compound suffered a direct hit. It contained blankets, tarpaulins and plastic sheeting and is reported to be completely destroyed. A second building, containing food supplies, caught fire and was partially destroyed before the fire was brought under control.

The ICRC strongly regrets this incident, especially as one of its staff was wounded. It has approached the United States authorities for information on the exact circumstances.

International humanitarian law obliges the parties to conflict to respect the red cross and red crescent emblems and to take all the precautions needed to avoid harming civilians.

2. ICRC, Press Release of 26 October 2001

[**Source:** ICRC, Press Release, 01/48, 26 October 2001; available on http://www.icrc.org]

Bombing and occupation of ICRC facilities in Afghanistan

Geneva (ICRC) - The International Committee of the Red Cross (ICRC) deplores the fact that bombs have once again been dropped on its warehouses in Kabul. A large (3X3 m) red cross on a white background was clearly displayed on the roof of each building in the complex. Initial reports indicate that nobody was hurt in this latest incident.

At about 11.30 a.m. local time, ICRC staff saw a large, slow-flying aircraft drop two bombs on the compound from low altitude. This is the same compound in which a building was destroyed in similar circumstances on 16 October. In this latest incident, three of the remaining four buildings caught fire. Two are said to have suffered direct hits.

Following the incident on 16 October, the ICRC informed the United States authorities once again of the location of its facilities.

The buildings contained the bulk of the food and blankets that the ICRC was in the process of distributing to some 55,000 disabled and other particularly vulnerable persons. The US authorities had also been notified of the distribution and the movement of vehicles and gathering of people at distribution points.

The ICRC also deplores the occupation and looting of its offices in Mazar-i-Sharif which were taken over by armed men three days ago. Office equipment, including computers, and vehicles were stolen. ICRC representations both to local authorities and to the Taliban ambassador in Pakistan have had no effect.

The ICRC reiterates that attacking or occupying facilities marked with the red cross emblem constitutes a violation of international humanitarian law.

3. Release from the Central Command of the United States of America

[**Source:** *U.S. inadvertently strikes residential area and ICRC warehouses*, Centcom release number 01-10-06, 26 October 2001.]

October 26, 2001
Release number: 01-10-06
For immediate release
U.S. Inadvertently strikes residential area and ICRC warehouses

Macdill AFB, FL - At approximately 8 p.m. EDT yesterday (Oct. 25), two U.S. Navy F/A-18C Hornets each dropped one 2,000-pound GPS-guided Joint Direct Attack Munition (JDAM) on warehouses used by the International Committee of the Red Cross (ICRC) in Kabul, Afghanistan.

At approximately the same time, an F/A-18C intending to strike the warehouses inadvertently dropped one 500-pound GBU-12 bomb in a residential area approximately 700 feet south of the warehouses.

At 4 a.m. EDT today (Oct. 26), two B-52H Stratofortress bombers each dropped three 2,000- pound JDAMs on the same warehouse complex.

The ICRC in Geneva has issued a statement indicating that no one was hurt in this incident. The U.S. sincerely regrets this inadvertent strike on the ICRC warehouses and the residential area.

Although details are still being investigated, preliminary indications are that the warehouses were struck due to a human error in the targeting process. Tow of the six warehouses hit had been inadvertently struck by the U.S. aircraft on Oct. 16 because the Taliban had used them previously for storage of military equipment, and military vehicles had been seen in the vicinity of these warehouses. Regarding he F/A-18C that inadvertently struck the residential area, initial indications are that the bomb's guidance system malfunctioned.

U.S. forces intentionally strike only military and terrorist targets. The U.S. is the largest donor of food and other humanitarian aid in Afghanistan, and U.S. forces are aggressive supporters of the worldwide effort to help the Afghan people. The U.S. has been a strong and longstanding supporter of the ICRC.

4. Fannie, 8 years old, on Radio-Canada.

[**Source:** Commentary by Fannie, 8 years old, Montréal, Canada, during the programme "Le Point", Télévision de Radio-Canada, 13 November 2001; unofficial translation.]

They made mistakes; this morning they launched missiles. I heard that they had launched them into a Red-Cross building. I think that it is true we can make mistakes, but I think that they should have made the mistake elsewhere.

DISCUSSION

1. a. Although the use of cluster bombs is not specifically prohibited, is it authorized in all circumstances? In what circumstances could the use of such a weapon constitute a violation of International Humanitarian Law (IHL)? (*Cf.* Arts. 35 and 51 (4) of Protocol I.)

   b. Is the use of a weapon that in most cases affects the civilian population indiscriminately prohibited in all circumstances?

   c. Is the fact that the submunitions of such a weapon are transformed *de facto* into anti-personnel mines sufficient to prohibit this weapon by virtue of the rules banning the use of mines? Does the fact that the United States of America is not party to the Ottawa Convention authorize it to use anti-personnel mines? If it were party to the Convention, could it still use cluster bombs? Is the use of such weapons prohibited by the fact that the United States is party to Protocol II to the 1980 Convention on Certain Conventional Weapons? (*See* **Document No. 8**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on

3 May 1996 (Protocol II to the 1980 Convention). p. 547, and **Document No. 10**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. p. 560.)

2. a. Was it against IHL to attack the ICRC warehouses? If so, is the reason because the red cross emblem was displayed on the warehouses? Because they were used by the ICRC? Because they contained relief supplies intended for civilians? Because they were not military objectives? (*Cf.* Arts. 9, 19, 38 and 44 of Convention I; Arts. 10, 18, 142 and 143 of Convention IV; Arts. 48, 50, 51 (2) and 52 (2) of Protocol I.)

   b. What is the purpose of the emblem displayed on the ICRC warehouses? Would it have been lawful to attack the warehouses if the emblem had not been displayed on them? How would your legal opinion of the attack be different if the emblem had not been displayed on the warehouses? (*Cf.* Arts. 48, 50, 51, 52 (2), 52 (3) and 57 of Protocol I.)

   c. According to IHL, was Fannie right to think that the United States should not have made a mistake? Would it have been more acceptable if it had made a mistake elsewhere? Does an attack targeting or affecting civilian property "by mistake" (i.e., where the attacker does not intend to target or affect civilian property) violate IHL? Could this attack in particular, like any other attack carried out by mistake, be a violation of IHL? A war crime? (*Cf.* Arts. 57 and 85 (3) of Protocol I; Arts. 30 and 32 of the ICC Statute.)

   d. What precautions must the attacker take to avoid mistakes? What could indicate, in this case, whether the United States took or failed to take such precautions? (*Cf.* Arts. 51, 52 (2), 52 (3) and 57 of Protocol I.)

   e. If an attacker takes all precautions prescribed by IHL but nonetheless hits or affects civilian objects, does he violate IHL?

   f. What did the ICRC mean when it drew attention to the distance between the warehouses and the airport? Is it important that the aircraft was flying at low altitude and that the US authorities had been notified of the location of the warehouses and of the possible movement of vehicles and gathering of people? What additional evidence would you like to see clarified in order to determine whether the attack was or was not a violation of IHL? (*Cf.* Arts. 51, 52 (2), 52 (3) and 57 of Protocol I.)

   g. Was the ICRC entitled to display the red cross on the warehouses? Even though they did not contain medical supplies (only)? Why does the ICRC use the red cross and not the red crescent in Afghanistan? (*Cf.* Arts. 9, 19, 38, 42 and 44 (3) of Convention I.)

3. a. Were the occupation and looting of ICRC offices in violation of IHL? If so, is this because the offices displayed the red cross emblem? Because they were used for ICRC activities? Because they were not a military objective? (*Cf.* Arts. 4, 10, 33 (2), 142 and 143 (5) of Convention IV.)

   b. What additional evidence would you like to see clarified in order to determine whether the occupation and looting were or were not in violation of IHL?

Case No. 215, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners

THE CASE

[**Source:** ICRC, Press release, 01/69, Geneva, 12 December 2001; available on http://www.icrc.org]

Afghanistan: ICRC position on alleged ill-treatment of prisoners

Geneva (ICRC) - Allegations regarding massacres and serious ill-treatment of prisoners continue to emerge in connection with the war in Afghanistan despite repeated reminders to all parties of their obligations under international humanitarian law. The International Committee of the Red Cross (ICRC) has been asked many times whether it intends to carry out a public investigation of these allegations. To avoid any misunderstandings on this issue, the ICRC wishes to state the following:

- As the guardian of international humanitarian law, the ICRC takes any allegation of massacre or ill-treatment very seriously. Nothing can excuse wilful disregard for the basic humanitarian rules applicable to all individuals, whether they are foreign nationals in a country at war or not. These rules stipulate that prisoners must be treated humanely and their dignity respected.
- The ICRC has ceaselessly reminded all parties of their obligations under international humanitarian law, in particular the Geneva Conventions, as it applies to the Afghan conflict. It has received assurances in this connection from the highest authorities.
- The ICRC is currently collecting information on all allegations of ill-treatment. In accordance with the organization's standard procedure in such cases, this information will not be made public but will serve, depending on the findings, as the basis for representations to the relevant authorities.
- The international community has recognized the special role played by the ICRC in connection with armed conflicts and other situations of violence. Accordingly, the organization is not expected to take part in public enquiries or tribunals set up to assess the veracity of any given allegations, as this could jeopardize its access to vulnerable communities and individuals. The ICRC nonetheless welcomes all initiatives that may lead to greater compliance with international humanitarian law.
- To date, ICRC delegates have registered and visited over 1,000 prisoners in Afghanistan in order to check on the conditions of their arrest and detention. During these visits, which are ongoing, delegates provide basic medical care and offer the detainees a chance to write to their families.

DISCUSSION

1. What is involved in the ICRC's recognized role as "guardian of the Geneva Conventions"? (*Cf.* Arts. 9/9/9/10 common to the Conventions; Art. 126 of Convention III; Art. 143 of Convention IV; Art. 5.2 (c) and (g) of the Statutes of the International Red Cross and Red Crescent Movement; **Document No. 20**. p. 648.)

2. Because of this role, must (can) the ICRC publicly condemn any ill-treatment of prisoners? What do you think are the considerations and criteria that will determine the ICRC's attitude in this respect? Would the ICRC still be able to visit prisoners if it publicly condemned any ill-treatment they were subjected to?

3. From what fundamental principles of the Red Cross are the ICRC's working procedures derived?

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base

THE CASE

A. ICRC Visits to the Prison Camps of Guantánamo Bay

[**Source:** First ICRC visit to Guantánamo Bay prison camp, ICRC Geneva, 18-01-2002 Press Release 02/03. Available on http://www.icrc.org]

First ICRC Visit to Prisoner Camps of Guantanamo Bay

Geneva (ICRC) - On 18 January 2002, four delegates of the International Committee of the Red Cross (ICRC), including a medical delegate, started visiting the prisoners transferred from Afghanistan and detained by US forces at Guantanamo Bay Naval Station. The delegates will register the prisoners and document the conditions of their arrest, transfer and detention.

Under an agreement with the US authorities, the visits are being conducted in accordance with the ICRC's standard working procedures, which involve talking to the prisoners in private and giving them the opportunity to exchange news with their families by means of Red Cross messages.

These procedures include submitting strictly confidential written reports on the delegates' findings to the detaining authorities. In no circumstances does the ICRC comment publicly on the treatment of detainees or on conditions of detention. The ICRC delegates will discuss their findings directly with the detaining authorities, submit their recommendations to them, and encourage them to take the measures needed to solve any problems of humanitarian concern.

B. "The Red Cross Needs to Get Real"

[**Source:** ROSETT Claudia, "The Red Cross Needs to Get Real", in *The Wall Street Journal*, New York, 23 January 2002, http://opinionjournal.com/columnists/cRosett/?id=95001764.]

The Red Cross Needs to Get Real
It's time to rethink the Geneva Conventions
by Claudia Rosett

Wednesday, January 23, 2002 12:01 a.m. EST

The real shame of Guantanamo Bay has nothing to do with U.S. treatment of captured Taliban and al Qaeda fighters now held there. It has everything to do with the International Committee of the Red Cross rushing to the scene, waving the Geneva Conventions as if riding to the rescue of those lovable old POWs on "Hogan's Heroes" - demanding that modern disciples of terrorism be handled simply as good old conventional prisoners of war.

The real issue is not the size of the chain-link cells for the detainees, the colour of their jumpsuits or the calorie content of their Froot Loops, but whether the venerable Red Cross, still reliving yesterday's conflicts, can catch up with the terrorist shift now redefining modern war. If it can't, the U.S. - which provides more than 25% of the ICRC's funding - might do well to rethink its ties to the Red Cross.

Should the detainees be designated prisoners of war, which is what the Red Cross wants, then under the Geneva Conventions they would be required to divulge no more than name, rank, serial number and birthdate. That could be a problem, because these men are not garden-variety captured conscripts. Secretary of Defense Donald Rumsfeld has described them as "hardcore terrorists." Given what Sept. 11 told us about the hatcheries of horror in Afghanistan, there is a case for giving the U.S. government some benefit of the doubt. It is plausible, not least, that the detainees at Guantanamo may have information which, obtained in time, could prevent further mass murder of civilians.

Because the ICRC is the world's flagship relief agency, its fuss over Guantanamo Bay has become an open invitation for every player in the humanitarian aid game to pile on - running the Geneva Conventions up the flagpole and demanding that America salute. By now this circus includes Amnesty International, Human Rights Watch, the U.N. Human Rights commissioner, officials of the European Union, assorted British tabloids and a group of U.S. activists who want the whole show moved to a California court.

Meanwhile, the Red Cross has been fuelling the frenzy with disapproving comments, such as criticism by ICRC spokesman Darcy Christen that the release by the U.S. government of photos of detainees was "incompatible with the Geneva Convention" because it exposed them to "public curiosity" (though the U.S. has also come under fire from rights groups for not exposing enough). In an effort to cooperate, the U.S. government is allowing ICRC delegates to inspect conditions at Guantanamo Bay. They are doing it now. But in explaining this mission to the press, another ICRC spokesman, Kim Gordon-Bates, chose

phrases that pretty much damned the U.S. by insinuation: "They will look at the premises very, very carefully. They'll check the water supply. They'll check the food. They'll check the living conditions, whether they have access to proper medical treatment if required, and whether they can communicate with their families." What the ICRC itself seems to be violating is its own policy of discretion, stressed in a Jan. 18 press release, that "In no circumstances does the ICRC comment publicly on the treatment of detainees or on the conditions of detention."

So why the hoopla over Guantanamo? Perhaps because the relief business, pioneered by the ICRC, has mushroomed into a global industry entailing rivalry for attention, funding, access and authority. Humanitarian aid is in many ways a business like any other: The field has become crowded, and there's a lot of jockeying to hitch relief wagons to headlines. The ICRC itself alludes to such problems in a 1997 report pondering its own future, in which it notes that the proliferation of humanitarian agencies, though "a welcome development in itself," gives rise to "competition and confusion" that causes problems in "ethical and operational terms."

Even without Guantanamo, there would be no dearth of work for humanitarians. But now that they've turned it into a media event, what leaps to light is that with the spread of terrorism, the respected old ICRC - and the conventions it tries to uphold - are woefully out of date. The problem goes way beyond such quaint stuff as the clause that POWs be allowed free postage to send cards and letters to their families - a stipulation not geared to an age in which Mohammed Atta worked by email. No, the hubbub over Guantanamo springs from an entire set of assumptions about the customs of conventional warfare. There's no clear mechanism designed to help the ICRC, in reasonable fashion, provide pigeonholes for detainees suspected of ties to such activities as terrorist mass murder, accomplished at long distance by suicide bombers flying hijacked jets into buildings.

There is plenty of precedent for revising the Geneva Conventions. The ICRC's origins go back to 1859, when Swiss citizen Henri Dunant observed the suffering of the wounded left untended on the field after the Battle of Solferino. Dunant founded a movement that, from a simple agreement to help the war-wounded, grew into a series of treaties. It is has been an adapt-as-you-go process. As the Geneva Conventions stood during World War II, there was no provision for delegates to visit the concentration camps in which millions of Jews and others died. After the war, in 1949, the conventions were revised to address this problem, giving us the version now being invoked. It seems high time to adapt yet again.

What a good set of revisions might look like is a tough call. The ICRC's basic role has long been to serve as a broker between warring parties - trading on whatever interest both sides may have in ensuring decent treatment of prisoners and civilians. This is what earned the Red Cross high marks in dealing with the POW camps of World War II, and in many of their doings since. But such humanitarian wheeling and dealing doesn't always work. The ICRC has a mandate to try to persuade, but it has no actual power to enforce - all it can do is register protest

and maybe leave. Does anyone think that banging the drum for civilized values will alter the ways of Osama bin Laden and his ilk? Recall the video footage of bin Laden sniggering as he described dispatching his own followers as suicide bombers.

The ICRC Web site details the need in handling POWs to respect their "convictions" along with their "personal rights." But if these convictions include the idea that it is good to engage in mass murder of civilians, we have a large problem. Nor is it even clear that tight security measures - including, if necessary, shackles and floodlights - are misguided. We have already seen one uprising of such prisoners in Afghanistan last November. Those prisoners killed a CIA agent, then fought and died in large numbers before the revolt could be put down. Had there been Guantanamo-level security, all those people might be alive today.

As it stands, the ICRC's harping on Guantanamo has elements not of serious policy, but of a sick joke. It has already served as grist for a scathing skit on last week's "Saturday Night Live," in which actor Jimmy Fallon asked why the Red Cross is so fixated on the detainees' living conditions: "They're suicide bombers. They hate living conditions."

If the ICRC and fellow humanitarians could stop their huffing over Guantanamo long enough to catch up with the shift in the nature of warfare, they might spot an opportunity. There may well be a role for independent monitors as this war against terrorism goes on. But for that, the ICRC would have to get beyond the current tempest in a holding tank, and urge the international community to focus with wisdom and imagination on devising conventions the ICRC could proudly uphold - not as a joke, not as a throwback, but as an important contribution in a new age of warfare.

C. Human Rights Watch, U.S. Officials Misstate Geneva Convention Requirements

[**Source:** ROTH Kenneth, *U.S Officials misstate Geneva Convention requirements*, Human Rights Watch, New York, 28 January 2002, http://www.hrw.org]

Human Rights Watch
January 28, 2002
The Honourable Condoleezza Rice
National Security Advisor
The White House
Washington, DC

Dear Ms. Rice,

We write concerning the legal status of the Guantanamo detainees. Our views reflect Human Rights Watch's experience of over twenty years in applying the Geneva Conventions of 1949 to armed conflicts around the world. We write to address several arguments advanced for not applying Article 5 of the Third Geneva Convention of 1949, which, as you know, requires the establishment of a "competent tribunal" to determine individually whether each detainee is entitled to

prisoner-of-war status should any doubt arise regarding their status. Below we set forth each of the arguments offered for ignoring Article 5 as well as Human Rights Watch's response.

Argument: The Geneva Conventions do not apply to a war against terrorism.

HRW Response: The U.S. government could have pursued terrorist suspects by traditional law enforcement means, in which case the Geneva Conventions indeed would not apply. But since the U.S. government engaged in armed conflict in Afghanistan - by bombing and undertaking other military operations - the Geneva Conventions clearly do apply to that conflict. By their terms, the Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Both the United States and Afghanistan are High Contracting Parties of the Geneva Conventions.

Argument: A competent tribunal is unnecessary because there is no "doubt" that the detainees fail to meet the requirements of Article 4(A)(2) for POW status.

HRW response: Article 5 requires the establishment of a competent tribunal only "[s]hould any doubt arise" as to whether a detainee meets the requirements for POW status contained in Article 4. The argument has been made that the detainees clearly do not meet one or more of the four requirements for POW status contained in Article 4(A)(2) - that they have a responsible command, carry their arms openly, wear uniforms with distinct insignia, or conduct their operations in accordance with the laws and customs of war. However, under the terms of Article 4(A)(2), these four requirements apply only to militia operating independently of a government's regular armed forces - for example, to those members of al-Qaeda who were operating independently of the Taliban's armed forces. But under Article 4(A)(1) these four requirements do not apply to "members of the armed forces of a Party to the conflict as well as members of militia forming part of such armed forces." That is, this four-part test would not apply to members of the Taliban's armed forces, since the Taliban, as the de facto government of Afghanistan, was a Party to the Geneva Convention. The four-part test would also not apply to militia that were integrated into the Taliban's armed forces, such as, perhaps, the Taliban's "55th Brigade," which we understand to have been composed of foreign troops fighting as part of the Taliban.

Administration officials have repeatedly described the Guantanamo detainees as including both Taliban and al-Qaeda members. A competent tribunal is thus needed to determine whether the detainees are members of the Taliban's armed forces (or an integrated militia), in which case they would be entitled to POW status automatically, or members only of al-Qaeda, in which case they probably would not be entitled to POW status because of their likely failure to meet the above-described four-part test. Until a tribunal makes that determination, Article 5 requires all detainees to be treated as POWs.

Argument: Even members of the Taliban's armed forces should not be entitled to POW status because the Taliban was not recognized as the legitimate government of Afghanistan.

HRW response: As Article 4(A)(3) of the Third Geneva Convention makes clear, recognition of a government is irrelevant to the determination of POW status. It accords POW status without qualification to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power." That is, the four-part test of Article 4(A)(2) applies only to militia operating independently of a government's armed forces, not to members of a recognized (Article 4(A)(1)) or unrecognized (Article 4(A)(3)) government's armed forces. Thus, whether a government is recognized or not, members of its armed forces are entitled to POW status without the need to meet the four-part test.

This reading of the plain language of Article 4 is consistent with sound policy and past U.S. practice. As a matter of policy, it would undermine the important protections of the Third Geneva Convention if the detaining power could deny POW status by simply withdrawing or withholding recognition of the adversary government. Such a loophole would swallow the detailed guarantees of the Third Geneva Conventions - guarantees on which U.S. and allied troops rely if captured in combat. This reading is also consistent with past U.S. practice. During the Korean War, the United States treated captured Communist Chinese troops as POWs even though at the time the United States (and the United Nations) recognized Taipei rather than Beijing as the legitimate government of China.

Argument: Treating the detainees as POWs would force the United States to repatriate them at the end of the conflict rather than prosecuting them for their alleged involvement in terrorist crimes against Americans.

HRW response: POW status provides protection only for the act of taking up arms against opposing military forces. If that is all a POW has done, then repatriation at the end of the conflict would indeed be required. But as Article 82 explains, POW status does not protect detainees from criminal offences that are applicable to the detaining powers' soldiers as well. That is, if appropriate evidence can be collected, the United States would be perfectly entitled to charge the Guantanamo detainees with war crimes, crimes against humanity, or other violations of U.S. criminal law - more than enough to address any act of terrorism against Americans - whether or not a competent tribunal finds some of the detainees to be POWs. As Article 115 of the Third Geneva Convention explains, POWs detained in connection with criminal prosecutions are entitled to be repatriated only "if the Detaining Power [that is, the United States] consents."

Argument: Treating the detainees as POWs would preclude the interrogation of people alleged to have information about possible future terrorist acts.

HRW response: This is perhaps the most misunderstood aspect of the Third Geneva Convention. Article 17 provides that POWs are obliged to give only their name, rank, serial number, and date of birth. Failure to provide this information subjects POWs to "restriction" of their privileges. However, nothing in the Third Geneva Convention precludes interrogation on other matters; the Convention only relieves POWs of the duty to respond. Whether or not POW status is granted, interrogators still face the difficult problem of encouraging hostile detainees to provide information, with only limited tools available for the task. Article 17 states

that torture and other forms of coercion cannot be used for this purpose in the case of POWs. But the same is true for all detainees, whether held in time of peace or war. (See, e.g., Article 2 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which the U.S. has ratified: "No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." See also Articles 4 and 5, making violation of this rule a criminal offence of universal jurisdiction.)

Article 17 of the Third Geneva Convention provides that POWs shall not be "exposed to any unpleasant or disadvantageous treatment of any kind" for their refusal to provide information beyond their name, rank, serial number, and date of birth. That would preclude, for example, threats of adverse treatment for failing to cooperate with interrogators, but it would not preclude classic plea bargaining - that is, the offer of leniency in return for cooperation - or other incentives. Plea bargaining and related incentives have been used repeatedly with success to induce cooperation from members of such other violent criminal enterprises such as the mafia or drug traffickers. These would remain powerful tools for dealing with the Guantanamo detainees even if a competent tribunal finds some of them to be POWs.

Argument: The detainees are highly dangerous and thus should not be entitled to the more comfortable conditions of detention required for POWs.

HRW response: In light of the two prisoner uprisings in Afghanistan, we do not doubt that at least some of the Guantanamo detainees might well be highly dangerous. Nothing in the Geneva Conventions precludes appropriate security precautions. But if some of the detainees are otherwise entitled to POW status, the Conventions do not allow them to be deprived of this status because of their feared danger. Introducing unrecognized exceptions to POW status, particularly when done by the world's leading military power, would undermine the Geneva Conventions as a whole. That would hardly be in the interest of the United States, since it is all too easy to imagine how that precedent will come back to haunt U.S. or allied forces. Enemy forces who might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying POW protections.

In conclusion, we hope the U.S. government will agree to establish the "competent tribunal" required by Article 5 of the Third Geneva Convention for the purpose of determining case by case whether each detainee in Guantanamo is entitled to prisoner-of-war status. That decision would uphold international law, further U.S. national interests, and not impede legitimate efforts to stop terrorism.
[...]

Kenneth Roth
Executive Director

D. United States of America, Press Conference of Donald H. Rumsfeld

[**Source:** U.S. Department of Defence News Briefing, Secretary Rumsfeld and Gen. Myers, Washington, 8 February 2002, http://www.defenselink.mil/news/FEB2002/t02082002_t0208sd.html]

United States Department of Defense
News Transcript

Presenter: Secretary of Defense Donald H. Rumsfeld
Friday, February 08, 2002 - 1:30 p.m. EST

DoD News Briefing - Secretary Rumsfeld and Gen. Myers
(Also participating: General Richard Myers, Chairman, Joint Chiefs of Staff)

Rumsfeld: Good afternoon. The United States, as I have said, strongly supports the Geneva Convention. Indeed, because of the importance of the safety and security of our forces, and because our application of the convention in this situation might very well set legal precedence that could affect future conflicts, prudence dictated that the U.S. government take care in determining the status of Taliban and Al Qaeda detainees in this conflict.

The president has, as you know, now determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status.

When the Geneva Convention was signed in the mid-20th century, it was crafted by sovereign states to deal with conflicts between sovereign states. Today the war on terrorism, in which our country was attacked by and is defending itself against terrorist networks that operate in dozens of countries, was not contemplated by the framers of the convention.

From the beginning, the United States armed forces have treated all detainees, both Taliban and al Qaeda, humanely. They are doing so today, and they will do so in the future. Last month I issued an order to our military, which has been reaffirmed by the president, that all detainees - Taliban and al Qaeda alike, will be treated humanely and in a manner that's consistent with the principles of the Geneva Convention.

As the president decided, the conflict with Taliban is determined to fall under the Geneva Convention because Afghanistan is a state party to the Geneva Convention. Al Qaeda, as a non-state, terrorist network, is not. Indeed, through its actions, al Qaeda has demonstrated contempt for the principles of the Geneva Convention. The determination that Taliban detainees do not qualify as prisoners of war under the convention was because they failed to meet the criteria for POW status.

A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and non-combatants. This is why the convention requires soldiers to wear uniforms that distinguish them from the civilian population. The Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves

from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas. They were not organized in military units, as such, with identifiable chains of command; indeed, al Qaeda forces made up portions of their forces.

What will be the impact of these decisions on the circumstances of the Taliban and al Qaeda detainees? And the answer, in a word, is none. There will be no impact from these decisions on their treatment. The United States government will continue to treat them humanely, as we have in the past, as we are now, and in keeping with the principles of the Geneva Convention. They will continue to receive three appropriate meals a day, medical care, clothing, showers, visits from chaplains, Muslim chaplains, as appropriate, and the opportunity to worship freely. We will continue to allow the International Committee of the Red Cross to visit each detainee privately, a right that's normally only accorded to individuals who qualify as prisoners of war under the convention.

In short, we will continue to treat them consistent with the principles of fairness, freedom and justice that our nation was founded on, the principles that they obviously abhor and which they sought to attack and destroy. Notwithstanding the isolated pockets of international hyperventilation, we do not treat detainees in any manner other than a manner that is humane. [...]

Q: Mr. Secretary, how do you respond to criticism from people who say that the reason you won't call these detainees prisoners of war is because, as prisoners of war, they might be tried by military courts martial, where their rights would be much more carefully spelled out, as opposed to possible tribunals, which the president has authorized?

Rumsfeld: Well, I'll respond factually, by saying that that's not correct. Those issues have never been discussed, nor have they ever been any part of the consideration in the determination. The considerations have been continuously, as they've been discussed by the lawyers, issues as to precedent, what is the right thing to do, what is consistent with the conventions, and what establishes a precedent that is appropriate for the future. We could try them any number of ways. And that has not been a factor at all.

The convention created rules to make soldiers distinguish themselves from civilians, and the reason for that was so that civilians would not be unduly endangered by war. The convention created, in effect, an incentive system, and it was an extremely important part of the conventions, that soldiers who play by the rules get the privileges of prisoner-of-war status. To give a POW status to people who did not respect the rules clearly would undermine the conventions' incentive system and would have the non-intuitive effect of increasing the danger to civilians in other conflicts. [...]

Q: Are you considering any limitations, new limitations or an outright ban on TV or photo coverage of Camp X-ray?

Rumsfeld: Am I currently considering anything like that? I don't know that we are. I must say, I have found the misrepresentation of those photos to be egregious, notwithstanding the fact that we had a caption under that, I'm told, from the outset.

Q: You're talking about the original photo?

Rumsfeld: The original photo. And it has - those people were there in the circumstance when they came out of the airplane, off the bus, off the ferry, off the bus, into that area. They were in there somewhere between 10 and 60 or 80 minutes at the maximum as they were taken individually and processed in a tent right nearby, where they were met, data gathered, and then they were placed in individual cells.

The newspaper headlines that yelled, "Torture! What's next? Electrodes?" and all of this rubbish was so inexcusable that it does make one wonder, as I said to Jamie, [Note: Jamie McIntyre, CNN Correspondent for Military Affaires.] why we put out any photographs, if that's the way they're going to be treated, so irresponsibly.

Jamie's contention was we should put out more photos with captions. I'm not sure - I almost always agree with Jamie, but in this case I'm not quite sure. One thought that someone has suggested, I don't know if it's still under consideration, is that we release photos but with a mandatory caption, that the caption we supply be used if someone wants to use the picture. But I haven't thought about that. I don't know if that's a good idea or a bad idea. [...]

Q: I'm asking you about independent news organizations' coverage by photo or TV. Is there any?

Rumsfeld: Well, as you know, there is a - there are - I'm not going to say there are not rules, but there are certainly patterns and practices that have evolved since the Geneva Convention where it is frowned upon to allow photos that could be seen as being embarrassing or there's a couple other words they use, invasive of their privacy, what?

Victoria Clarke, Assistant Secretary of Defense for Public Affairs: Curiosity - holding them up for public -

Rumsfeld: Holding them up for public curiosity. So we have to be careful about photographs that are taken. [...]

Q: Can you explain - I know the administration has said that the Taliban do not qualify for POW status because of these four criteria - (inaudible) - uniforms, special insignia - [...] and yet there's another part of that that says the armed forces of any party in the conflict should qualify as a POW. Why would you not put the Taliban under that category, which does not have those four criteria?

Rumsfeld: Well, the president has said the Taliban does apply - the convention does apply to the Taliban.

Q: It applies to the Taliban - but not POW status. [?]

Rumsfeld: Well, that's a different set of criteria for that.

Q: Exactly, and that's what I'm saying. The second criteria - you have four criteria, and it's outside - [...] One of the articles says that you qualify for POW status if you are a member of the armed forces of a party in conflict. Why does the Taliban not qualify as POW under that? Why have you put them in this separate category, where they would be militia?

Rumsfeld: I think you're - I may not be following the question, but I think we're mixing apples and oranges. [...]

Q: But there is another category that says they qualify for POW status if they are a member of the armed forces of the party to a conflict. I don't want to get in these big legal issues -

Rumsfeld: Yeah, because I'm not a lawyer, and -

Q: - but that's written exactly above the militia, where the four -

Rumsfeld: We'll ask the lawyers. This was a decision not made by me, not made by the Department of the Defense. It was made by the lawyers and by the president of the United States. And we'll -

Q: But would you say the Taliban is the armed forces of that country?

Rumsfeld: We will take your question and see if the lawyers that made the decision would like to address it. [...]

Q: [...] In Geneva, a spokesman for the International Red Cross is saying that the decision falls short because the International Red Cross says that all al Qaeda or Taliban are POWs unless a competent tribunal decides otherwise. What would be your reaction to that?

And also, you didn't mention how this decision would affect them legally, such as their access to legal counsel, the way they're interrogated. Two angles to that, first the International Red Cross.

Rumsfeld: With respect to the second part of the question, I'm told it doesn't affect their legal status at all, nor does it affect how they'd be treated. And - that is to say, it does not affect their status from the way they have been being handled prior to the decision by the White House or now. There's no change either - to my knowledge - in their status or how they'll be treated.

Q: Or answer questions like - they may not give any more than their name, rank, serial number? Does it affect how they're interrogated?

Rumsfeld: That, I believe, applies to a prisoner of war, under the Geneva Convention.

With respect to the International Committee of the Red Cross, my guess is that if they have lawyers who encourage them to say what they say, that very likely the lawyers that came to the opposite conclusion will have something to say about what they said. And that's the way the world works. These kinds of things - if we begin with the truth, and that is that it's not affecting how they're being treated, and then take this whole issue and say that it really revolves around a discussion between lawyers as to precedents for the future, it seems to me that it's appropriate to let the lawyers discuss those things. The announcement was made by the White House - Ari Fleischer - and I suppose that the answers to those kinds of legal questions should come from Ari Fleischer as well. [...]

Q: Have you made any progress that you can share with us in deciding the next step? In other words, will these people be sent to commissions, to tribunals, to the civilian justice system, back to their countries? Have you made any progress in any of that?

Rumsfeld: Sure. Sure. Sure. We are interviewing them. They've - I forgot what the number is, but it's something like, if there were 158 down there prior to the latest [look], I think something like 105 of those have been interrogated and met with,

and the intelligence information is being gathered from them. The question as to whether any of them will be subject to the presidential military order for a military commission, some people call it tribunal, but commission I think is in the order, the answer is that's up to the president. He decides whom - which among these people - he would want to put into the category, and he has not made any decision with respect to anyone being dealt with in that manner.

Q: But I believe you were working on a plan here at the Defense Department on what the standards were for how these people would be sorted out and treated.

Rumsfeld: We have been, you're right.

Q: Is there anything you could share with us about any progress you've made in those decisions?

Rumsfeld: Except to say we've made a lot of progress, we've cleared away a lot of underbrush, we have four or five things that I think we're reasonably well settled on that we would use. And there, obviously, has to be then discretion - a degree of discretion - left to the individual commissions as to how they deal with a variety of different issues. [...]

Q: Mr. Secretary, the Geneva Conventions of course cover many other things besides prisoners of war. They govern, for example, what's a legitimate target, what's not a legitimate target. As U.S. military operations go forward against al Qaeda in the future, will those operations be governed by any or bounded by any international legal constraints at all?

Rumsfeld: Well, I guess the phrase is, "In accordance with the laws and customs of war, that's how the men and women in the armed services are trained. That's how they conduct themselves" - I think is the appropriate answer.

Q: Because it's your own will to conduct that way. But you don't see any laws that actually would apply to U.S. military operations against al Qaeda, I mean international laws of war that would apply to military operations against al Qaeda?

Rumsfeld: We've not noted that the al Qaeda have adhered to any international laws of war or customs. The United States does, has and will. That is how every single man and woman in the United States armed forces is trained, and they understand that. [...]

Q: Whether it's obligated to or not?

Rumsfeld: Yeah. I mean, we have said that as a matter of policy, that's the way we behave, that's the way we will handle people, that's the way we will function, and have been.

Q: Mr. Secretary, you mentioned one of the principles from the Geneva Convention that soldiers should be distinguishable from civilian populations. But isn't it true that you have Special Forces in Afghanistan have grown beards, they're not wearing insignia uniform? And how would you feel if a member of the U.S. Special Forces - God forbid - were captured in Afghanistan, but were treated humanely, would you object if they were not given prisoner of war status?

Rumsfeld: The short answer is that U.S. Special Forces - I don't know that there's any law against growing a beard. I mean, that's kind of a strange question.

Q: Yeah, what about not wearing insignia - [...]

Rumsfeld: [...] They do wear insignia, they do wear uniforms. Those photographs you saw of U.S. Special Forces on horseback, they were in the official uniform of the United States Army, and they wear insignia and they do carry their weapons openly, and they do behave as soldiers. That's the way they're taught, that's what they do. They may have a beard, they may put a scarf over their head if there's a stand storm, but there's no rule against that.

They certainly deserve all of the rights and privileges that would accrue to somebody who is obeying the laws and customs of war. And they carry a card. You've probably got one in your pocket right now, of their Geneva Convention circumstance.

Myers: Yeah, the ID they carry are Geneva Convention cards. I mean, that's the standard.

Rumsfeld: And they all have that. [...]

Q: Can you say how many of the detainees are al Qaeda, how many are Taliban?

Rumsfeld: I don't know. I've looked at several of the forms that are being used to begin to accumulate the data. They have photographs, they have identifying features. Then they have the information that the individual has given us, that is to say their nationality, roughly when they were born, what languages they speak so you can talk to them, and a whole series of things like that. Whether they say they're al Qaeda, whether they say they were Taliban, what units - activities they were doing, where they were trained - those types of things. There's a form that they fill out that's the preliminary information. Whether it's true or not - there's a lot of them who don't tell quite the truth.

Q: But haven't they been screened at this point?

Rumsfeld: Yes.

Let's - you want to go through the screening process. Let's ... it might be useful.

Someone who is detained - and they may be detained by Afghan forces, Pakistani forces, U.S. forces - a sort is then taking place. The ones that we have, they will be interviewed by a team of people, three or four or five people - sometimes Department of Justice, sometimes Army, mixture of Army, sometimes CIA, sometimes whatever. And they're met with, and they're talked to, and they're interviewed. And a preliminary discussion takes place and a preliminary decision is made.

In some cases, they just let them go. They're foot soldiers, and they - they're going to go back into their village, and they're not going to bother anybody. In some cases, they're al Qaeda, senior al Qaeda, in which case they're treated in a totally different way, in a very careful way. In some cases, it's unclear, and they then are sent someplace, if we have custody of them, and they will go either to Bagram or they'll go to Kandahar. In one or two cases, they've gone to a ship for medical treatment. And then, in some cases, they end up at Guantanamo Bay.

If the Afghans hold them, they'll tell us what they've got, what they think they've got. And as we have time, we then send these teams in and do the same kind of a screening and make a judgment. Same thing with the Pakistanis when they have clusters of them.

There are, you know, 3(,000) or 4(,000), 5(,000), 6(,000), thousands of these people. We have relatively few that we have taken and retained custody over.

Q: But have you determined the - of the ones that you do have, have you determined their status individually, on an individual?

Rumsfeld: Yes, indeed, individually.

Q: So you know which are al Qaeda and which are Taliban?

Rumsfeld: "Determined" is a tough word. We have determined as much as one can determine when you're dealing with people who may or may not tell the truth. [...] So yes, we've done the best we can.

Q: So there's no need for status tribunals to decide who's Taliban and who's al Qaeda?

Rumsfeld: My understanding is that when there's - when doubt is raised about it - a process then is a more elaborate one, where they then are brought back into discussion and interrogation, and other people will ask about them. Well, we will ask other people in the mix who these people are and try to determine what the story is. But - and now, once they've gone through one or two sorts like that and they're determined to be people we very likely will want to have a longer time to interrogate and want to get out of the imperfect circumstance they're in - they may be in - that the Pakistanis would like to get rid of them or the Afghans would like to get rid of them, or there's not enough room in Kandahar - we take them to Guantanamo Bay as soon as the cells are made fast enough.

And there they will go through a longer process of interrogation. [...]

Q: And on the question of POW status, are you confident that you're not setting a precedent here that could rebound to the disadvantage of American troops captured sometime in the future in another conflict?

Rumsfeld: Of that I - again - first of all, to know what kind of a precedent you're setting you have to be very, very smart and see into the future. That's hard to do. It's hard even for very smart lawyers - which I'm not.

I am very confident that we are not doing anything to - in any way disadvantage the rights and circumstances of the U.S. military. I think that the decision was made by the president with that very much in mind, and it was expressed by a number of the people in the deliberative process, and it was expressed over a period of time because it was very carefully dealt with. It was not a hasty decision. This took us some days.

What I cannot say about the precedent is that that decision, or any other decision, conceivably could end up having an effect, a precedental effect down the road that is difficult to anticipate now. And it was because of that caution and that concern that they wanted to apply it very carefully that so much time was taken in attempting to make that judgment. But the one thing that I am reasonably satisfied with is the question you asked, and that is that we have taken every care to ensure that the decision would not in any way adversely affect U.S. armed forces. [...]

Q: Are the Afghan forces that are participating with the U.S. troops wearing clear uniforms, insignia and the other parts of that Geneva Convention?

Rumsfeld: You know, I can't speak to all of those units. But I certainly have seen Afghan forces that had uniforms on, and insignia, and were carrying their weapons openly, and were part of one of the various Northern Alliance elements. Have I seen them all in Afghanistan? No, so I can't answer your question as to whether there might be some. But I certainly have seen Afghan forces that do in fact comport themselves in a manner that would be consistent with the Geneva Convention. [...]

Q: ... are there not CIA agents or intelligence agents of some kind on the ground who are not wearing uniforms and insignia? And are they not in a combatant role, in other words, helping to coordinate things such as airstrikes?

Rumsfeld: I don't know of people doing that who are coordinating airstrikes. (...)

Q: And secondly, on the photos, a number of lawyers who deal in international law have suggested that this is kind of an unprecedented interpretation of the restriction on photographs. In other words, that the idea was that you not parade prisoners out to a jeering public.

Rumsfeld: Right.

Q: It wasn't intended to bar incidental news photos.

Rumsfeld: Yeah, so that's why you have to be somewhat careful. And that's why we've tried to be somewhat careful. You know, should the pendulum be over here or over here? It's hard to know. This is - this is a new set of facts for us. It's a new situation. They've been down there, these prisoners, detainees, what?, I don't know, 20 days. Something like that, 25? Not long.

Myers: And just to remind you, we have the International Committee of the Red Cross down there essentially continuously talking to the detainees. [...] You know, we get pretty far down on these arguments. We go down to the third and fourth level of detail on these arguments about the Geneva Convention and treatment and so forth, and I think we've answered those forthrightly and we've taken lots of people down. In fact, I think there's a congressional delegation down there today. But let's never forget why we have them in the first place. We have them because probably there's a good chance that one or two or all of them know of the next event. And that's - it's our obligation, consistent with humane treatment and the Geneva Convention, to try to find that out. And I think as we have these, in some cases, more esoteric debates on this business, we're trying to find out what's going to keep another incident from happening, in this country or in our friends' and partners' countries. [...]

Q: On the four criteria, and your description of why you believed the Taliban forces did not meet the criteria for POW status - you talked about lack of differentiation from civilians, no proper unit, no real hierarchy - but I wish we all had a dollar here for every briefing we heard during Enduring Freedom when we were told that we were attacking Taliban command and control, we were attacking identifiable Taliban forces, and that these were clearly differentiable by our Special Forces from civilians. Those seem to be rather different from your entire statement.

Rumsfeld: Well of course it's because it's of a different order. The kinds of things that the Geneva Convention talks about are the kinds of things you see when you're standing right next to a person looking at how they're handling themselves.

The kind of things that we were talking about on command and control would be communication intercepts, it would be people firing at Northern Alliance forces and attacking them, it would be concentrations of artillery or surface-to-air missiles, and those types of things that would - and knowledge that they are not Northern Alliance. And yet you see them there and you can identify a series of things that tell you they are combatant forces that are engaged in fighting against the Northern Alliance forces, and it enabled the people on the ground and the people in the air to make those kinds of judgments.

Is that pretty -

Q: But just to pursue, wasn't it clear that the Taliban forces were operating as units? Whether they call themselves companies or platoons or ... is another matter, but they were operating as coherent military, which our air strikes could attack, and it's clear they were receiving orders down the chain of command and control, which is why we're attacking command and control.

Rumsfeld: There's no question but that on any one of those things, you might be exactly right, that you could make that case. No one, I think, could make the case on all four of those criteria.

Q: But were they the armed forces of Afghanistan at the time that the United States was attacking them? Were they considered?

Rumsfeld: That's a legal question. The president has said he is going to - I shouldn't repeat what he said, what the statement from the White House said. You know what it said. And he applies the convention to the Taliban. And the answer to your question is, either as a matter of policy or a matter of law, they are being considered as being covered by the Geneva Convention. I don't know why you would ask the question. [...]

E. Inter-American Commission on Human Rights

1. Request for Precautionary Measures

[**Source:** Organisation of American States, Detainees in Guantánamo Bay, Cuba. Request for Precautionary Measures, decision published in *International Legal Materials*, vol. 41, no. 3, May 2002, p. 532-535; footnotes not reproduced.]

[Note: The Organization of American States Charter is available on http://www.oas.org; The Inter-American Commission Statute on Human Rights, The American Declaration on the Rights and Duties of Man and the American Convention Relative to Human Rights are available on http://www.cidh.org/basic.eng.htm]

ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 2 0 0 0 6 U.S.A.

March 13, 2002

Ref.
Detainees in Guantánamo Bay, Cuba
Request for Precautionary Measures

[...]

After careful deliberation on this request, the Commission decided during its 114th regular period of sessions to adopt precautionary measures, according to

which we ask Your Excellency's government to take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal. Given the significance and implications of this request to and for the United States and the detainees concerned, the Commission wishes to articulate the basis upon which it reached this decision.

[...]

The mandate given to the Commission by OAS member states, including the United States, under Article 106 of the Charter of the Organization of American States and Articles 18, 19 and 20 of the Commission's Statute is in turn central to the Commission's consideration of the matter presently before it. Through the foregoing provisions, OAS member states have charged the Commission with supervising member states' observance of human rights in the Hemisphere. These rights include those prescribed under the American Declaration of the Rights and Duties of Man, which constitutes a source of legal obligation for all OAS member states in respect of persons subject to their authority and control. The Commission has been directed to pay particular attention to the observance of Articles I (right to life), II (right to equality before law), III (right to religious freedom and worship), IV (right to freedom of investigation, opinion, expression and dissemination), XVIII (right to a fair trial), XXV (right to protection from arbitrary arrest), and XXVI (right to due process of law) of the American Declaration.

In addition, while its specific mandate is to secure the observance of international human rights protections in the Hemisphere, this Commission has in the past looked to and applied definitional standards and relevant rules of international humanitarian law in interpreting the American Declaration and other Inter-American human rights instruments in situations of armed conflict.

In taking this approach, the Commission has drawn upon certain basic principles that inform the interrelationship between international human rights and humanitarian law. It is well recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. In contrast, international humanitarian law generally does not apply in peacetime and its principle purpose is to place restraints on the conduct of warfare in order to limit or contain the damaging effects of hostilities and to protect the victims of armed conflict, including civilians and combatants who have laid down their arms or have been placed hors de combat. Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.

Accordingly, where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their

fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.

This basic precept is reflected in the Martens clause common to numerous long-standing humanitarian law treaties, including the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land, according to which human persons who do not fall within the protection of those treaties or other international agreements remain under the protection of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. And according to international norms applicable in peacetime and wartime, such as those reflected in Article 5 of the Third Geneva Convention and Article XVIII of the American Declaration of the Rights and Duties of Man, a competent court or tribunal, as opposed to a political authority, must be charged with ensuring respect for the legal status and rights of persons falling under the authority and control of a state.

Specifically with regard to the request for precautionary measures presently before it, the Commission observes that certain pertinent facts concerning the detainees at Guantánamo Bay are well-known and do not appear to be the subject of controversy. These include the fact that the government of the United States considers itself to be at war with an international network of terrorists, that the United States undertook a military operation in Afghanistan beginning in October 2001 in defending this war, and that most of the detainees in Guantánamo Bay were apprehended in connection with this military operation and remain wholly within the authority and control of the United States government.

It is also well-known that doubts exists as to the legal status of the detainees. This includes the question of whether and to what extent the Third Geneva Convention and/or other provisions of international humanitarian law apply to some or all of the detainees and what implications this may have for their international human rights protections. According to official statements from the United States government, its Executive Branch has most recently declined to extend prisoner of war status under the Third Geneva Convention to the detainees, without submitting the issue for determination by a competent tribunal or otherwise ascertaining the rights and protections to which the detainees are entitled under US domestic or international law. To the contrary, the information available suggests that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State.

In light of the foregoing considerations, and without prejudging the possible application of international humanitarian law to the detainees at Guantánamo

Bay, the Commission considers that precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights. On this basis, the Commission hereby requests that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.

[...]

2. United States of America's response

[**Source:** International Law in Brief, 4 June 2002, ASIL, http://www.asil.org/ilibindx.htm]

United States: Response of the United States to Request for Precautionary Measures - Detainees in Guántanamo Bay, Cuba (April 12, 2002)

The United States responded to the Inter-American Commission on Human Rights' ("Commission") decision, of March 12, 2002, on precautionary measures regarding the Guantánamo Bay detainees [...], claiming that the Commission acted without basis "in fact or law" in requesting precautionary measures in the case. The United States also argued that the Commission did not have the requisite jurisdictional competence to apply international humanitarian law. Alternatively, the United States claimed that the precautionary measures were neither necessary nor appropriate in the current case.

The United States contends that it is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in armed conflict. The United States, therefore, argues that the Commission, "whose mission ... is to interpret human rights under the [American Declaration of the Rights and Duties of Man]," lacks the jurisdictional competence to interpret and apply humanitarian law. Alternatively, the United States pointed out that it is not a member to either American Convention on Human Rights or any other convention giving competence to the Commission to consider the application of international humanitarian law.

The United States argued that the precautionary measures were unnecessary, inter alia, because the legal status of the detainees was clear. It was the matter of public record, the United States suggested, that the Guantánamo detainees are not prisoners of war ("POWs") because they "do not meet the criteria applicable to lawful combatants." The United States further argued that, pursuant to international humanitarian law, states engaged in armed conflict have a right to capture and detain enemy combatants, "whether or not" they are POWs. Alternatively, the United States claimed that Guantánamo detainees are treated humanely and that they are not facing any "peril or irreparable harm," which would have been a precondition for imposition of provisional measures pursuant to Article 19(c) of the Commission's Statute.

F. United States of America, President's Military Order

[**Source:** "President's Military Order", 13 November 2001, *in* Federal Registrar, vol. 66, no. 222, 16 November 2001, p. 57833-57836. Available on http://www.state.gov/coalition/cr/prs/6077.htm]

White House Press Release
Office of the Spokesman
Washington, DC
November 13, 2001

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

Military Order

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, [...] it is hereby ordered as follows:

Section 1. Findings

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks [Available on http://www.whitehouse.gov/news/proclamations].).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, [Available on http://uscode.house.gov] that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be -

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
(d) allowed the free exercise of religion consistent with the requirements of such detention; and
(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.
(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.
(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for -
    (1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;
    (2) a full and fair trial, with the military commission sitting as the triers of both fact and law;
    (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;
    (4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;
    (5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;
(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.
(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums

(a) Nothing in this order shall be construed to -
  (1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;
  (2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or
  (3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.
(b) With respect to any individual subject to this order -
  (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
  (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.
(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001

DISCUSSION

1. a. Does the ICRC have the right to visit prisoners held following an international armed conflict? Is the detaining power obliged to accept these visits? Is it obliged to accept all the visiting procedures (Interviews without witnesses, etc.)? (*Cf.* Art. 126 (4) of Convention III; Art. 143 (5) of Convention IV.)

   b. Does this right vary depending on the status of the detainee?

2. How would you qualify the conflict in Afghanistan between the Taliban and the United States of America? Does the non-recognition of the Taliban regime as constituting the legitimate government of Afghanistan influence the qualification of the conflict? Can the Taliban be seen as a rebel group opposing an internationally recognised government, even thought they had *de facto* control over most of the country including the capital?

3. How would you qualify the fighting between Al-Qaida and the United States in Afghanistan? As an international police operation? An armed conflict? An international armed conflict?

4. a. Under IHL are the captured members of Taliban armed forces combatants? Under which conditions? If they are captured, do they benefit from prisoner of war status? In case of doubt how should they be treated? Is your answer different depending on whether they have been captured by the Northern Alliance or the United States? (*Cf.* Arts. 4 (A) and 5 of Convention III; Arts. 43-45 and 75 of Protocol I.)

   b. When the United States consider that the conflict opposing them to the Taliban is covered by the Geneva Conventions, but that members of the Taliban armed forces "do not meet the criteria for prisoner of war status" (Document D.), what criteria are they talking about? Do the members of the Taliban armed forces have to comply with the criteria of Art. 4 (A) (2) of the Third Convention? Even if they fall under Art. 4 (1) or (3)? (*Cf.* Document C.)

c. Regarding prisoners that are not members of the Taliban forces, do your answers to question 4a change? If they could be members of Al-Qaeda?

d. Is the decision on the status of a Taliban by a competent tribunal obligatory if the detaining Power has doubts on their status? If the detaining power considers that there is no doubt as to the fact that a category of detainees does not benefit from prisoner of war status, but an objective evaluation raises doubts on this? Who decides on the status attributed to prisoners, and the possible necessity to determine this status before a competent tribunal? If it is the detaining Power's decision as to whether there is doubt, what is the significance and effect of Art. 5 of the Third Convention? (*Cf.* Art. 5 of Convention III; Art. 45 of Protocol I.)

e. According to IHL how should prisoners of war be treated? How should civilian internees be treated? (*Cf.* Arts. 17-81 of Convention III; Arts. 79-116 of Convention IV.)

f. What does IHL say about the publication of photos of detainees that could expose them to public curiosity? Does this publication represent a grave breach of IHL? (*Cf.* Art. 13 (2) of Convention III; Art. 27 (1) of Convention IV.) What does IHL say in regard to the detainees practising their religion? (*Cf.* Arts. 34-37 of Convention III; Art. 93 of Convention IV.)

5. a. In case you consider that alleged members of Al-Qaeda or Taliban detained following the conflict in Afghanistan are not prisoners of war, what would their status be under IHL? Are they civilian internees under the Fourth Convention? Are they "unlawful combatants"? Is this category foreseen by IHL? What is your response to the ICRC Commentary of Art. 4 of Convention IV, that says that "there is no intermediate status; no individual in the hands of the enemy can be outside the law"? Does your response vary depending on the nationality of the detainee? (*Cf.* Arts. 4 and 5 of Convention IV, the Commentary is available on http://www.icrc.org/ihl.)

b. Do you agree with Ms Rosett when she states, "it's time to rethink the Geneva Conventions" (Document B.)? Do you think that IHL brings answers to the questions raised by the determination of the detainee's status?

6. a. According to IHL, did the United States have the right to transfer detainees arrested in Afghanistan out of the country? If they are prisoners of war? If they are civilians? Prisoners without clearly defined status? Do they have the right to transfer them to the territory of a State not party to the conflict (Cuba)? If it is a military base controlled by the United States army? (*Cf.* Arts. 12, 21, 22 and 46-48 of Convention III; Arts. 49 (1), 76 and 127-128 of Convention IV.)

b. Could Afghanistan be considered as a territory occupied by the United States? Only the areas under direct control of the United States (Military bases, detention centres)? Are the rules of IHL regarding occupied territories applicable? Is the Afghan territory "effectively placed under the authority of the enemy army"? Does the fact that the United States captured individuals in Afghan territory imply the automatic application of these provisions, especially Art. 49? If section III of part III of Convention IV on occupied territories is not applicable, were civilian Afghans arrested by the United

States still protected civilians? Were they covered by section II? Can there be protected civilians covered neither by section II nor by section III, but only section I? (*Cf.* Art. 42 of the Hague Regulations; *see* **Document No. 1**. p. 517; Arts. 4, 27-78 and 126 of Convention IV.)

c. According to IHL, when should the Guantánamo detainees arrested in Afghanistan be repatriated? If they are prisoners of war? Civilian internees? If they have not been attributed any of these statuses? If they are subject to penal prosecution? (*Cf.* Arts. 118 and 119 of Convention III; Arts. 132-135 of Convention IV.)

d. May detainees who are nether neither Afghan nor US nationals but were arrested in Afghanistan be repatriated to their country of origin? Under what conditions? What if, because of their supposed affiliation with Al-Qaida, they risk persecution? Must the United States ensure that they will not be tortured, that they will, if need be, benefit from a fair trial and treatment in conformity with human rights? Is the principle on non-refoulement prescribed by IHL? Is this customary law? (*Cf.* Art. 12 of Convention III; Arts. 45 and 134 of Convention IV.)

7. Does recognising an individual as prisoner of war prevent the detaining power from judging this detainee for crimes he is accused of? From questioning him? Is it true that prisoners of war are only obliged to give "name, rank, serial number and birth date" (Document B.)? (*Cf.* Arts. 49 (2)/50 (2)/129 (2)/146 (2) respectively of the Conventions; Art. 17 (1) and (4), 82, 85, 99 and 102 of Convention III; Art. 85 (1) of Protocol I.)

8. a. Why does IHL concern the Inter-American Commission of Human Rights (IACHR) (*Cf.* Document E (1))? Because IHL is part of international law? Because it is binding on the United States? Because it gives a more detailed definition of the rights protected by the American Declaration of the Rights and Duties of Man in regards to armed conflicts? Because it must apply all rules that offer more complete protection than the American Declaration? Because derogations from rights protected by the American Declaration are only allowed if they do not violate the other obligations of the State concerned? (*Cf.* American Declaration of the Rights and Duties of Man, available on http://www.cidh.org/basic.eng.htm)

b. Do you agree with the United States when they state in their answer to the IACHR "It was the matter of public record, [...] that the Guantánamo detainees are not prisoners of war" (*Cf.* Document E (2))? Is the decision of the IACHR asking the United States to take "the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal" thereby irrelevant?

9. a. Is the President of the US's military order in conformity with IHL? In regard to the detainees in the hands of the US following the conflict in Afghanistan, what are the rules of IHL for penal prosecution and judicial guarantees that would be applicable? (*Cf.* Art. 3 (1) (1) (d) common to the Conventions; Arts. 99-108 of Convention III; Arts. 66-68, 70-76 and 126 of Convention IV; Art. 75 (4) of Protocol I; Art. 6 of Protocol II.)

b. Does the creation of military commissions to judge acts of terrorism violate the prohibition of retroactive criminal legislation? According to the text of this presidential order, are these military commissions independent? (*Cf.* for example Art. 75 (4) of Protocol I.) Can they be considered as regularly constituted?

Case No. 217, US, Military Commission Instructions

THE CASE

[**Source:** US Department of Defense, Military Commission Instructions, available on http://www.defenselink.mil/releases/2003/b05022003_bt297-03.html]

[The present instruction is addressed to the Military Commissions that were established following Section 4 of the US President's Military Order of 13 November 2001 (*See* **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf.* F., US, President's Military Order] p. 2309.), for the purpose of trying foreign "enemy combatants" in the "war against terrorism". On the legality of such trials *see* **Case No. 220**, US, Hamdan v. Rumsfeld. p. 2346.]

Department of Defense
Military Commission Instruction No. 2
30 April 2003

Subject: Crimes and Elements for Trials by Military Commission

[...]

5. DEFINITIONS

C. *In the context of and was associated with armed conflict* [To fall under the jurisdiction of the Commission, a crime has to be committed in such a context]. Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (e.g., murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war" or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

D. *Military Objective.* "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

E. *Object of the attack.* "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death. [...]

6. CRIMES AND ELEMENTS

A. *Substantive Offenses-War Crimes.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged. [...]

B. *Substantive Offenses-Other Offenses Triable by Military Commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged. [...]

2) Terrorism

a. Elements

(1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(2) The accused:

(a) intended to kill or inflict great bodily harm on one or more persons;

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) he killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(4) The killing, harm or destruction took place in the context of and was associated with armed conflict.

b. Comments

(1) Element (1) of this offense includes the concept of causing death or bodily harm, even if indirectly.

(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

3) Murder by an Unprivileged Belligerent

a. Elements

(1) The accused killed one or more persons;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.

b. Comments

(1) The term "kill" includes intentionally causing death, whether directly or indirectly.

(2) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity." [...]

5) Aiding the Enemy

a. Elements

(1) The accused aided the enemy;

(2) The accused intended to aid the enemy; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. Comments

(1) Means of accomplishing Element (1) of this offense include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(2) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(3) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged. [...]

DISCUSSION

1. a. What is the definition of an armed conflict? When can one say that an armed conflict has begun? Is a declaration of war necessary? (*Cf.* Arts. 2 and 3 common to the Conventions, Art. 1 of Protocol II.)

   b. Can an act of terrorism constitute an armed conflict? The beginning of an armed conflict? Such as the explosion of a bomb in the Paris or London subway or a Madrid commuter train? The September 11 2001 attacks? Does a single attempted hostile act constitute an armed conflict, so long as its magnitude or severity rises to the level of an "armed attack"? Is international humanitarian law (IHL) applicable to these acts? Only if the armed forces of the country where the terrorist act was committed enter into an armed conflict against the State or the non-state group believed to be at the origin of this terrorist act? Do they constitute "acts of war"? Or "armed attacks"? In what circumstances?

   c. For an act to fall under IHL or to be classified as a war crime, is it sufficient that e.g. a murder has a nexus to an armed conflict (even if it occurs geographically or temporarily far away from the armed conflict)? Is such a nexus necessary to subject an act to IHL or to classify it as a war crime, even if the act occurs on the territory of a State party to an armed conflict during such a conflict? (*See also* **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Appeals Chamber, Jurisdiction, paras. 68-69.] p. 1804 and **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* B., Appeals Chamber, paras. 425-446.] p. 2171.)

2. What is the definition of a "military objective" under IHL? Compare the definition given by the US Department of Defense (DoD) and the one given by IHL. Is a contribution to the enemy's "war-sustaining capability" sufficient to make an object a military objective? Is every object which contributes to the ability or willingness of the enemy State, government or population to continue the armed conflict a legitimate target of attacks? What are the advantages and risks of such a broad definition? For the jurisdiction of the Military Commissions? (*Cf.* Art. 52 of Protocol I.)

3. a. What does IHL say about terrorism? What is the definition of "terrorism"? What do you think about the "elements" of terrorism given by the US DoD in this document? Does IHL specifically mention terrorism? If not, does this mean that acts of terrorism can only be committed in peacetime? Identify all the rules of IHL that might be violated by an act of terrorism. Can such an act be qualified as a war crime? (*Cf.* Art. 33 (1) of Convention IV; Arts. 51 (2) and 85 (3) (a) of Protocol I; Arts. 4 (2) (d) and 13 (2) of Protocol II.)

   b. Why does the DoD not mention rules of IHL that prohibit acts of terrorism? Why is the paragraph on terrorism not under the section "A" on war crimes but under section "B" on "other offenses"?

   c. May an attack against a military objective be qualified as a "terrorist" attack? Only if it has been committed by non-state groups (see point (2) under

Comments on terrorism)? Must an attack be directed against civilians or civilian objects to be qualified as an act of terrorism?

4. a. What is an "unprivileged belligerent"? Does this category exist in IHL? What is the "combatant immunity" mentioned in this document? In time of war, who may kill soldiers of the opposing army without violating the law? Only regular members of the armed forces wearing uniforms? Special forces using civilian clothes and/or techniques of camouflage? Spies? Mercenaries? Do you think it depends on the way the "murder" is committed? Does an unprivileged belligerent who kills enemy soldiers violate IHL or domestic law? (*Cf.* Art. 4 (A) of Convention III; Arts. 43-44 of Protocol I.)

   b. What is the status of this "unprivileged belligerent" if captured by the enemy during an international armed conflict? Is he a "prisoner of war"? A protected civilian? Neither a prisoner of war nor a civilian? Is it possible that a person captured during an international conflict does not enter into the categories defined by IHL? What are the criteria for granting prisoner of war status? What are the advantages of this status? Can people benefiting from this status be prosecuted for having killed enemy soldiers without violating IHL? Can people benefiting from this status be prosecuted for the war crimes they may have committed? If yes, then what is the advantage for the detaining power to deny this status? (*Cf.* Art. 49 (2) of Convention I; Art. 50 (2) of Convention II; Arts. 4-5, 17, 84-85, 99, 102 and 129 of Convention III; Arts. 4-5 and 146 of Convention IV; Arts. 43-45, 75 and 85 (1) of Protocol I.)

   c. What is the status of this "unprivileged belligerent" if captured by the enemy during a non-international armed conflict? What are the rules applicable if the detaining power wants to prosecute this detainee for the crimes he committed? May such a person be prosecuted for having killed enemy fighters without violating IHL? (*Cf.* Art. 3 common of the Conventions; Art. 6 of Protocol II.)

   d. What is the status of this "unprivileged belligerent" if captured by the enemy when IHL is not applicable (i.e. if there is no conflict)? What are the rules applicable if the detaining power wants to prosecute this detainee for the crimes he committed?

5. Which of the offenses mentioned in Section 6 (B) (2), (3) and (5) may be charged against a prisoner of war? Against a protected civilian? May such persons be brought before a military commission for such charges? (*Cf.* Arts. 84, 99 and 102 of Convention III; Arts. 64, 66 and 67 of Convention IV; Art. 43 (2) of Protocol I.)

Case No. 218, US, Rasul v. Bush

THE CASE

[**Source:** Shafiq Rasul, *et al.*, Petitioners 03-334 v. George W. Bush, President of the United States, *et al.* Appeal, Columbia Circuit, June 28, 2004, available on http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-334.pdf]

[N.B.: To facilitate understanding the order of paragraphs has been modified.]

SUPREME COURT OF THE UNITED STATES

Nos. 03-334 and 03-343
SHAFIQ RASUL, ET AL., PETITIONERS 03-334
v. GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS 03-343
v. UNITED STATES ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
[June 28, 2004]

JUSTICE STEVENS delivered the opinion of the Court

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. [...]

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U. S. military has held them - along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad - at the Naval Base at Guantanamo Bay. [...]

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U. S. District Court for the District of Columbia challenging the legality of their detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none has been charged with any wrong-doing, permitted to consult with counsel, or provided access to the courts or any other tribunal. [...]

Petitioners in these cases differ from the Eisentrager detainees [*See* **Case No. 84**, US, Johnson v. Eisentrager, p. 1056.] in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. [...]

Syllabus [...]

Held: United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. [...] (a) The District Court has jurisdiction to hear petitioners' habeas challenges under 28 U. S. C. para. 2241, which authorizes district courts, "within their respective jurisdictions," to entertain habeas applications by persons claiming to be held "in custody in violation of the . . . laws . . . of the United States," paras. 2241(a), (c)(3). Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." [...]

(2) Also rejected is respondents' contention that para. 2241 is limited by the principle that legislation is presumed not to have extraterritorial application unless Congress clearly manifests such an intent, *EEOC v. Arabian American Oil Co.*, [...]. That presumption has no application to the operation of the habeas statute with respect to persons detained within "the [United States'] territorial jurisdiction." *Foley Bros., Inc. v. Filardo*, [...]. By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses. Respondents concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that para. 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the statute's geographical coverage to vary depending on the detainee's citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts' para. 2241 authority. [...].

(b) The District Court also has jurisdiction to hear the *Al Odah* petitioners' complaint invoking 28 U. S. C. para. 1331, the federal question statute, and para.1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed these claims for want of jurisdiction because the petitioners lacked the privilege of litigation in U. S. courts. [...]

DISCUSSION

1. May a prisoner of war introduce a *habeas corpus* petition before the courts of the detaining power? May an enemy civilian alien introduce a *habeas corpus* petition before the courts of the detaining power? Is every enemy national either prisoner of war or protected civilian? (*Cf.* Arts. 4, 5 and 14 (3) of Convention III, Arts. 4 and 38 of Convention IV; Art. 23 (h) of the Hague Regulations.)

2. How and why does this case and the court's ruling differ from the Eisentrager case? (*See* **Case No. 84**, US, Johnson v. Eisentrager. p. 1056.)

Case No. 219, US, Trial of John Phillip Walker Lindh

THE CASE

A. American Taliban Flies Back, but not to the Cages of Guantanamo Bay

[**Source:** HUGGLER Justin, "American Taliban flies back, but not to the cages of Guantanamo Bay", in *The Independent*, London, 23 January 2002.]

American Taliban flies back,
but not to the cages of Guantanamo Bay

by Justin Huggler
23 January 2002

The American John Walker Lindh, who joined the Taliban, met Osama bin Laden and fought with al-Qa'ida troops as bombs fell on Afghanistan, began his journey home from the war yesterday, to face trial.

He was being flown from the navy assault ship USS Bataan in the Arabian Sea, where he has been held, to a prison in Alexandria, Virginia.

Mr Walker is an al-Qa'ida volunteer. But, unlike the other suspects, he will not be held in the cages of Guantanamo Bay, Cuba. And his fate will not be decided by a military commission. Mr Walker will face justice before a US civilian court, because he is an American citizen.

He was probably the only American who knew in advance of 11 September that something terrible was going to happen. In June, he was training at an al-Qa'ida camp in Afghanistan, where he was told by an instructor that Mr bin Laden had sent operatives to make an attack on America.

Mr Walker stunned America when he emerged, barely able to walk, from a flooded basement, out of one of the darkest episodes of the war - in which more than 150 Taliban prisoners of war were killed by US bombs after they staged a prison revolt in Mazar-i-Sharif.

As he crawled into the light, Americans could barely believe one of their citizens was fighting for the Taliban. Yet there was Mr Walker's face, heavily bearded and wild-eyed with fear, staring at them out of their television screens.

His face keeps coming back to haunt America. Mr Walker appears in the extraordinary video footage of CIA agents interrogating the foreign Taliban volunteers who surrendered at the Qalai Jangi fortress in Mazar. Johnny "Mike" Spann, a CIA agent who was killed hours later, crouches before Mr Walker and snaps his fingers in front of his face. Off camera, "Dave", another CIA man, says: "He needs to decide if he wants to live or die. If he wants to die, he's just going to die here - he can f****** die here." Shortly afterwards, the revolt began.

The charge sheet against Mr Walker contains startling revelations. Not only did he fight alongside the Taliban, he was a member of an al-Qa'ida brigade run by

Mr bin Laden, the charges say. The young American allegedly met Mr bin Laden at least once, and spoke with him in a small group.

Many Americans are baying for revenge. The authorities say there isn't enough evidence for a treason charge, which could carry the death penalty. But Mr Walker could face life in prison under charges including conspiring to kill Americans and aiding a terrorist group.

Conditions at the Virginia jail will be very different from those of his affluent upbringing. Mr Walker's former friends say he was a typical American child. He played American football and basketball. His father was an attorney, his mother a housewife. He was named after John Lennon. When he was 10, the family moved from Maryland to California.

And when he was 16, he converted to Islam, reportedly after reading the autobiography of Malcolm X. He went to Friday prayers at an Islamic centre. He changed his name to Suleyman al-Faris.

In 1998, he left to study Arabic and Islam in Yemen. Mr Walker's father, Frank Lindh, says he was not concerned at the time. In October 2000, he moved to a religious school in Pakistan's North West Frontier Province, a recruiting ground for the Taliban. His family lost touch with him.

In May last year, the American charge sheet says, Mr Walker joined a training camp for Harakat ul-Mujahedin, an Islamic group active in Kashmir, identified by the US as a "terrorist organisation". He quickly left the camp and travelled to Afghanistan to join the Taliban. There, the FBI says, he was told he would have to join a brigade of Arabs, because he did not speak an Afghan language, but did speak Arabic.

He was sent to an al-Qa'ida training centre at al-Farooq, where recruits were addressed by Mr bin Laden on several occasions. According to the charges, Mr Walker learnt at the camp that Mr bin Laden was planning suicide attacks. He was asked if he wanted to launch attacks on American

interests but chose instead to stay on Afghanistan's front line.

When the American bombing began, he was sent to the front line near Taloqan. When the Taliban started to collapse, he and the other foreign fighters fell back on Kunduz. Eventually, Afghan Taliban leaders negotiated the surrender of Kunduz. Mr Walker was one of about 400 foreign fighters who agreed to surrender to General Rashid Dostum. Which is how Mr Walker found himself on his knees in Qalai Jangi fortress, face to face with the CIA's Johnny Spann.

B. Lindh agrees to serve 20 years

[**Source:** BRAVIN Jess, "Lindh agrees to serve 20 years", in *The Wall Street Journal*, New-York, 16 July 2002.]

Lindh agrees to serve 20 years

In Plea Deal Approved by Bush

By Jess Bravin
Staff Reporter of The Wall Street Journal

ALEXANDRIA, Va. - John Walker Lindh agreed to serve 20 years in prison for spending five months as a Taliban soldier, in a plea bargain reached with approval from President Bush.

The surprise deal, announced to a packed courtroom Monday, spares the 21-year-old defendant a possible life sentence, had he been convicted of charges that included conspiring with al Qaeda and the Taliban to kill Americans.

It also relieves the government of a complicated criminal prosecution involving evidence from the battlefields of Afghanistan, testimony from intelligence officers and possibly even the appearance of Taliban and al Qaeda fighters brought from their prison at the U.S. Guantanamo Bay Naval Base in Cuba.

A hint of the deal came right before Monday's scheduled hearing on which of Mr. Lindh's statements could be used against him. Frank Lindh, the defendant's father, made the puzzling gesture of greeting U.S. Attorney Paul McNulty, warmly shaking the hand of the man heading his son's prosecution.

U.S. District Judge T.S. Ellis III, who lawyers said learned of the deal a half-hour before the hearing, went through a colloquy with the defendant to establish that he understood the consequences of his plea. There is no parole from federal prison.

"Do you feel all right today?" Judge Ellis asked. "Do you feel like you can make decisions about your future?"

"Yes, sir," Mr. Lindh replied.

Born in Washington, D.C., Mr. Lindh was 10-years old when his family moved to Marin County, Calif. He converted to Islam and in 1998 went to Yemen to study Arabic. He later traveled to Afghanistan, and last June volunteered for a Taliban unit that surrendered to the Northern Alliance opposition army in November. He was captured following a bloody prison riot near Mazar-e-Sharif.

Mr. Lindh pleaded guilty to two charges, each carrying a 10-year sentence and a maximum fine of $250,000. One count, from the original indictment, is supplying services to the Taliban regime, which has been illegal under an order issued by President Clinton in 1999.

In a new charge filed Monday, Mr. Lindh pleaded guilty to carrying an explosive while committing the first offense. He also agreed to cooperate with authorities, including possibly testifying against others before military tribunals. He promised to give the government any money he might earn from selling his story.

Prosecutors agreed to dismiss the indictment's remaining nine counts, dropping accusations that Mr. Lindh supported the al Qaeda terrorist network or conspired to kill Americans.

Lawyers in the case said informal talks about a plea bargain began six weeks ago, and that the defense initially proposed a 10-year sentence. President Bush approved a 20-year term Thursday. The two sides spent the weekend hammering out the particulars, and signed off on the terms around 1 a.m. Monday.

Mr. McNulty called the deal "an important victory for the American people," adding that it proved "the criminal justice system can be an effective tool in combating terrorism."

In recent months, the Bush administration hasn't been so sure. After coming up against such varying hurdles as Mr. Lindh's crackerjack defense team and the erratic courtroom behavior of Zacarias Moussaoui, who is representing himself at trial on charges of conspiring in the Sept. 11 hijackings, officials increasingly are seeking to bypass the justice system altogether.

Instead, officials have designated two U.S.-born men taken in antiterrorism operations as "enemy combatants," holding them in military jails without charge or access to lawyers.

And according to chief defense lawyer James Brosnahan, prosecutors suggested Mr. Lindh might face the same fate should he be acquitted of criminal charges, adding to the pressure for a plea deal.

Defense lawyer Tony West said his client hoped to pursue a Ph.D. in prison, perhaps in Islamic literature. Prosecutors agreed to recommend Mr.Lindh be sent to prison near his parents' home, but the Justice Department will have the final word. Mr. Lindh faces formal sentencing Oct. 4. Judge Ellis can reduce the punishment to less than 20 years, but said he is unlikely to do so.

[N.B.: John Walker Lindh was sentenced to 20 years in prison on 4 October 2002 by the Eastern District Court of Virginia.]

DISCUSSION

1. What is Mr. Lindh's status under International Humanitarian Law (IHL)? Is he a prisoner of war? A civilian? Is the fact that he is a US citizen a relevant factor in determining his status? Under Convention III? Under Convention IV? (*Cf.* Art. 4 of Convention III; Art. 4 of Convention IV; Art. 44 of Protocol I.)

2. If Mr. Lindh were a member of the Afghan armed forces, when captured by the US, would he lose his status of prisoner of war because of his citizenship? Could Convention III prevent the United States from punishing a US prisoner of war for treason? (*Cf.* Arts. 4 and 85 of Convention III.)

3. Why is Mr Lindh not eligible for trial by a military commission, set up by the President's Military Order of 13 November 2001? (*See* **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf.* F. United States of America, President's Military Order.] p. 2309.)

Case No. 220, US, Hamdan v. Rumsfeld

THE CASE

[**Source:** United States District Court for the District of Columbia. Civil Action No. 04-1519 (JR) footnotes partially omitted; available on http://www.dcd.uscourts.gov/04-1519.pdf]

[Note: When this book was already with the printer and substantive changes were no longer possible, this decision was overturned on appeal [*Cf.* Hamdan v. Rumsfeld, United States Court of Appeals for the District of Columbia Circuit, No. 04-5393, 15 July 2005 (re-issued 18 July 2005), available on http://pacer.cadc.uscourts.gov/docs/common/opinions/200507/04-5393a.pdf]. A petition to the Supreme Court against the Appeals Court decision is pending.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 04-1519(3R)
SALIM AHMED HAMDAN,
Plaintiff,
V.
DONALD H. RUMSFELD,
Defendant

MEMORANDUM OPINION

Salim Ahmed Hamdan petitions for a writ of habeas corpus, challenging the lawfulness of the Secretary of Defence' s plan to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moves to dismiss. [...]

Background

Hamdan was captured in Afghanistan in late 2001, during a time of hostilities in that country that followed the terrorist attacks in the United States on September 11, 2001 mounted by al Qaeda, a terrorist group harboured in Afghanistan. He was detained by American military forces and transferred sometime in 2002 to the detention facility set up by the Defence Department at Guantanamo Bay Naval Base, Cuba. On July 3, 2003, acting pursuant to the Military Order he had issued on November 13, 2001, and finding "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States," the President designated Hamdan for trial by military commission. Press Release, Dep't of Defence, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), http://www.defenselink.mil/releases/2003/nr20030703-0173.html. In December 2003, Hamdan was placed in a part of the Guantanamo Bay facility known as Camp Echo, where he was held in isolation. On December 18, 2003, military counsel was appointed for him. On February 12, 2004, Hamdan's counsel filed a demand for charges and speedy trial under Article 10 of the Uniform Code of Military Justice. On February 23, 2004, the legal advisor to the Appointing Authority ruled that the UCMJ did not apply to Hamdan's detention. On April 6, 2004, in the United States District Court for the Western District of Washington, Hamdan's

counsel filed the petition for *mandamus* or *habeas corpus* that is now before this court. On July 9, 2004, Hamdan was formally charged with conspiracy to commit the following offences: "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." [...]

2. No proper determination has been made that Hamdan is an offender triable by military tribunal under the law of war. [...]

   b. The law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt.

   "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."

   This language is from *Quirin* 317 U.S. at 27-28. [*See* **Case No. 83**, p. 1053.]. The United States has ratified the Geneva Convention Relative to the Treatment of Prisoners of War [...] Afghanistan is a party to the Geneva Convention. The Third Geneva Convention is acknowledged to be part of the law of war, [...]. It is applicable by its terms in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Third Geneva Convention, art. 2. That language covers the hostilities in Afghanistan that were ongoing in late 2001, when Hamdan was captured there. If Hamdan is entitled to the protections accorded prisoners of war under the Third Geneva Convention, one need look no farther than Article 102 for the rule that requires his habeas petition to be granted:

   A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed. [footnote 7: *See* Brief Amici Curiae of Sixteen Law Professors at 28-30]

   The Military Commission is not such a court .Its procedures are not such procedures.

   The government does not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position is that Hamdan is not entitled to the protections of the Third Geneva Convention at all, and certainly not the prisoner-of war status, and that in any event the protections of the Third Geneva Convention are not enforceable by way of habeas corpus.

(1) The government's first argument that the Third Geneva Convention does not protect Hamdan asserts that Hamdan was captured, not in the course of a conflict between the United States and Afghanistan, but in the course of a "separate" conflict with al Qaeda. That argument is rejected. The government apparently bases the argument on a Presidential "finding" that it claims is "not reviewable." *See* Motion to Dismiss at 33, *Hicks v. Bush* (D.D.C. No. 02-00299) (October 14, 2004). The finding is set forth in Memorandum

from the President, to the Vice President *et al.*, Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), [*See* **Case No. 157**, US, The Schlesinger Report. p. 1623 [*Cf.* Appendix C.].] http://www.library. law.pace.edu/research/020207_bushmemo.pdf, stating that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees captured in Afghanistan, because al Qaeda is not a state party to the Geneva Conventions. Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary, see Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, 96 Am. J. Int'l. L. 345, 349 (2002) (conflict in Afghanistan was international armed conflict in which Taliban and al Qaeda joined forces against U.S. and its Afghan allies)), the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with. See Amicus Brief of General David M. Brahms (ret.), [...] at 17 (citing Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President 91 3 (Feb. 2, 2002), http://www.fas.org/sgp/othergov/taft.pdf). Thus at some level - whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3, [...] - the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.

(2) The government next argues that, even if the Third Geneva Convention might theoretically apply to anyone captured in the Afghanistan theatre, members of al Qaeda such as Hamdan are not entitled to POW status because they do not satisfy the test established by Article 4(2) of the Third Geneva Convention - they do not carry arms openly and operate under the laws and customs of war. Gov't Resp. at 35. *See also* The White House, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html. We know this, the government argues, because the President himself has determined that Hamdan was a member of al Qaeda or otherwise involved in terrorism against the United States. Id. Presidential determinations in this area, the government argues, are due "extraordinary deference." 10/25/04 Tr. at 38. Moreover (as the court was advised for the first time at oral argument on October 25, 2004) a Combatant Status Review Tribunal (CSRT) found, after a hearing on October 3, 2004, that Hamdan has the status of an enemy combatant "as either a member of or affiliated with Al Qaeda." [...]

Article 5 of the Third Geneva Convention provides:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in 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 provision has been implemented and confirmed by Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, http://www.army.mil/usapa/epubs/pdf/r190_8.pdf., Hamdan has asserted his entitlement to POW status, and the Army's regulations provide that whenever a detainee makes such a claim his status is "in doubt." [...] The Army's regulation is in keeping with general international understandings of the meaning of Article 5 [...].

Thus the government's position that no doubt has arisen as to Hamdan's status does not withstand scrutiny, and neither does the government's position that, if a hearing is required by Army regulations, "it was provided," [...] There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under Geneva Conventions. Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions. It was established to comply with the Supreme Court's mandate in *Hamdi*, *supra* to decide "whether the detainee is properly detained as an enemy combatant" for purposes of continued detention. Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 3 (July 7, 2003), : http //www.defenselink.mil/news/Jul2004/d20040707review.pdf; see also Memorandum From Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), http //www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

The government's legal position is that the CSRT determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan's prisoner-of-war status since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions, [...] The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to Hamdan's status under the Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.

(3) The government's next argument, that Common Article 3 does not apply because it was meant to cover local and not international conflicts, is also rejected. It is universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law off nations, that Common Article 3 embodies "international human norms," *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002), and that it sets forth the "most fundamental requirements of the law of war" *Kadic v. Karadzic* [*see* **Case No. 189**. p. 2055.]. [...]. The International Court of Justice has stated it plainly: "There is no doubt that, in the event off international armed conflicts . . . [the rules articulated in Common Article 3] . . . constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elementary considerations of humanity'." *Nicaragua v. United States*, [*see* **Case No. 130**. [*Cf.* para. 218.] p. 1365.]. [...]. The court went on to say that, "[b]ecause the minimum rules to international and non-international conflicts are identical, there is no

need to address the question whether . . . [actions alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or the other category of conflict." Id.

The government has asserted a position starkly different from the positions and behaviour of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. *Amici* remind us of the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to a Somali warlord. The United States demanded assurances that Durant would be treated consistently with protections afforded by the Convention, even though, if the Convention were applied as narrowly as the government now seeks to apply it to Hamdan, "Durant's captors would not be bound to follow the convention because they were not a 'state'". Neil McDonald & Scott Sullivan, Rational Interpretation in Irrational Times: The Third Geneva Convention and "War On Terror", 44 Harv. Int'l. L.J. 301, 310 (2003). Examples of the way other governments have already begun to cite the United States' Guantanamo policy to justify their own repressive policies are set forth in Lawyers Committee for Human Rights, Assessing the New Normal: Liberty and Security for the Post-September 11 United States, at 77-80 (2003).

(4) The government's putative trump card is that Hamdan's rights under the Geneva Conventions, if any, and whatever they are, are not enforceable by this Court - that, in effect, Hamdan has failed to state a claim upon which relief can be granted - because the Third Geneva Convention is not "self executing" and does not give rise to a private cause of action.

As an initial matter, it should be noted Hamdan has not asserted a "private right of action" under the Third Geneva Convention. The Convention is implicated in this case by operation of the statute that limits trials by military tribunal to "offenders . . . triable under the law of war." 10 U.S.C.§ 821. The government's argument thus amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation.

Treaties made under the authority of the United States are the supreme law of the land. U.S. Const. art. VI, cl. 2. United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are "non-self-executing." *The Paquete Habana* 175 U.S. 677, 708 (1900); Restatement (Third) of the Foreign Relations Law of the United States para. 111. A treaty is "non-self executing" if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation; or if the Senate in consenting to the treaty requires implementing legislation; or if implementing legislation is constitutionally required. Id. at para. 111(4). The controlling law in this Circuit on the subject of whether or not treaties are self-executing is *Diggs v. Richardson* 555 F 848 (D.C. Cir. 1976), [...]. The decision in that case instructs a court interpreting a treaty to look to the intent of the signatory parties as manifested by the language of the treaty and, if the language is uncertain, then to look to the circumstances surrounding execution of the

> treaty. *Id.* at 851. *Diggs* relies on the *Head Money Cases* 112 U.S. 580 (1884), which established the proposition that a "treaty is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *Id.* at 598. [...]
>
> The Geneva Conventions, of course, are all about prescribing rules by which the rights of individuals may be determined. Moreover, as petitioner and several of the *amici* have pointed out, [...] it is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, if any, was deemed required to give effect to the provisions contained in the four conventions," S. Rep. No. 84-9, at 30 (1955), and found that only four provisions required implementing legislation. Articles 5 and 102, which are dispositive of Hamdan's case, *supra*, were not among them. What did require implementing legislation were Articles 129 and 130, providing for additional criminal penalties to be imposed upon those who engaged in 'grave" violations of the Conventions, such as torture, medical experiments, or "wilful" denial of Convention protections, none of which is involved here. Third Geneva Convention, art. 130. Judge Bork must have had those provisions in mind, together with Congress' response in enacting the War Crimes Act, 18 U.S.C. § 2441, when he found that the Third Geneva Convention was not self-executing because it required "implementing legislation." *Tel-Oren v. Libyan Arab Republic, et al.* 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring). That opinion is one of three written by a three judge panel, none of which was joined by any other member of the panel. It is not Circuit precedent and it is, I respectfully suggest, erroneous. "Some provisions of an international agreement may be self-executing and others non-self-executing." Restatement (Third) of Foreign Relations Law of the United States para. 111 cmt. h. [footnote 10: The observation in Al-Odah v. United States 321 F.3d 1134, 1147 (D.C. Cir. 2003), that the Third Geneva Convention is not self-executing merely relies on the reasons stated by Judge Bork in Tel-Oren 726 F.2d at 809. Since that observation was not essential to the outcome in Al-Odah and since in any event Al-Odah was reversed by the Supreme Court, I am not bound by it.]
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> * * *

Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty. [footnote 11: Hamdan is a citizen of Yemen. The government has refused permission for Yemeni diplomats to visit Hamdan at Guantanamo Bay. Decl. of Lieutenant Commander Charles Swift at 4 (May 3, 2004). It ill behooves the government to argue that enforcement of the Geneva Convention is only to be had through diplomatic channels.] I further conclude that it is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections of the Third Geneva Convention as a prisoner of war and that accordingly he must be given those protections unless and until the "competent tribunal" referred to in Article 5

concludes otherwise. It follows from those conclusions that Hamdan may not be tried for the war crimes he is charged with except by a court-martial duly convened under the Uniform Code of Military Justice.

c. Abstention is appropriate with respect to Hamdan's rights under Common Article 3.

There is an argument that, even if Hamdan does not have prisoner-of-war status, Common Article 3 would be violated by trying him for his alleged war crimes in this Military Commission. Abstention is appropriate, and perhaps required, on that question, because, unlike Article 102, which unmistakably mandates trial of POW's only by general court-martial and thus implicates the jurisdiction of the Military Commission, the Common Article 3 requirement of trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" has no fixed, term-of-art meaning. A substantial number of rights procedures conferred by the UCMJ are missing from the Military Commission's rules. [...] I am aware of no authority that defines the word "guarantees" in Common Article 3 to mean that all of these rights must be guaranteed in advance of trial. Only Hamdan's right to be present at every phase of his trial and to see all the evidence admitted against him is of immediate pre-trial concern. [...]

CONCLUSION

It is now clear, by virtue of the Supreme Court's decision in Hamdi that the detentions of enemy combatants at Guantanamo Bay are not unlawful per se. The granting (in part) of Hamdan's petition for habeas corpus accordingly brings only limited relief. The order that accompanies this opinion provides: (1) that, unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offences with which he is charged only by court-martial under the Uniform Code of Military Justice; [...]

James ROBERTSON

United States District Judge

November 8, 2004

[N.B.: In *Ridouane Khalid* v. *George Walker Bush et al* and *Lakhdar Boumediene et al* v. *George Walker Bush et al, Memorandum Opinion and Order*, U.S. District Court for the District of Columbia, 19 January 2005, Civil Case Nos. 1:04-1142 (RSL) and 1:04-1166(RSL) (online: http://www.dcd.uscourts.gov/04-1142.pdf) Justice Leon held that the U.S. Supreme Court in *Rasul* v. *Bush* [Case No. 218, at p. 2340] determined only that U.S. Courts have jurisdiction to hear petitions for *habeas corpus* for persons detained in Guantánamo Bay. Justice Leon refused the petitions for *habeas corpus* in this case, holding that the petitioners, all non-U.S. citizens, could not invoke U.S. Constitutional Law, international law, or any treaty law by which the lawfulness of their detention could be questioned.

In *In re Guantanamo Detainee Cases, Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law*, U.S. District Court for the District of Columbia, 31 January 2005, (online: http://www.dcd.uscourts.gov/opinions/2005/Green/2002-CV-299~8:57:59~3-2-2005-a.pdf) Justice Hens Green rejected the narrow interpretation of *Rasul* applied by Leon J. above. Rather, she held that, properly interpreted, *Rasul* means that non-citizen detainees being held in Guantánamo Bay also enjoy substantive fundamental rights under the U.S. Constitution, including the right not to be deprived of liberty without due process of law. Furthermore, Hens Green J. held that the Combatant Status Review Tribunals established to determine whether each detainee should be considered an "enemy combatant" were constitutionally deficient on the grounds that they 1) fail to provide detainees with access to material evidence; 2) fail to permit assistance of counsel when disclosure of classified information to detainees is refused; 3) in some cases, inadequately handle accusations of torture; and 4) operate on the basis of a vague or potentially overbroad definition of "enemy combatant". Justice Hens Green concurs with the opinion in *Hamdan* that there must be an individual status determination regarding whether Taliban or persons associated with the Taliban are entitled to Prisoner of War status.]

DISCUSSION

1. How would you classify the conflict during which Hamdan was captured? Is it conceivable for there to be two distinct armed conflicts in Afghanistan, one governed by the IHL of international armed conflicts and the other not? Even if the U.S. is the enemy of both Afghanistan and of the group Hamdan is fighting for?

2. a. How would you define Hamdan's status? What could make you doubt that he is a prisoner of war (POW)? What is the test established by IHL for POW status? Who determines whether someone satisfies this test?

   b. If Hamdan is a POW, may he be tried by a military commission? If he may not, must he be released? Must the *habeas corpus* petition be granted? Who should try Hamdan?

   c. If Hamdan is POW, may he be tried for attacking civilians? For attacking civilian objects? For murder? For terrorism?

   d. If there is doubt as to whether Hamdan is a POW or not, may he be tried by a military commission? How can the doubt be eliminated? Why do the findings of the Combatant Status Review Tribunal not resolve the question whether Hamdan is a POW? May only an independent and impartial tribunal rule on Hamdan's status? Only a court-martial?

3. If Hamdan was not a member of an armed force belonging in any way to Afghanistan, does this change the law applicable to the conflict? To Hamdan's status?

4. a. Is Convention III self-executing? Are the provisions of this Convention relevant for our case self-executing? Which are those provisions? Why are they self-executing?

   b. Does Hamdan invoke Convention III? Does he assert a private right of action? According to the judge? In your opinion?

5. a. How could common Article 3 protect Hamdan? Does this imply that the conflict is a non-international one? Does the judge or does the U.S. government claim that Hamdan was captured during a non-international armed conflict?

   b. If Hamdan or Warrant Officer Michael Durant are protected by common Art. 3, must they be treated like POWs?

   c. If Hamdan is protected by common Article 3, which of its rules could make you doubt whether Hamdan may be tried by a military commission? Is this rule self-executing?

Case No. 221, UN, Request for an Investigation on War Crimes

THE CASE

[**Source:** Brunnstrom, David, UN, Request for an Investigation on War Crimes; original in French, unofficial translation.]

Afghanistan/UN, Request for an Investigation on War Crimes by David Brunnstrom

Reuters, 23 October 2002

Kabul (Reuters) - A United Nations expert called Wednesday for the establishment of an independent, international commission to investigate crimes against humanity and other human rights violations committed during Afghanistan's 23 years of armed conflict.

Asma Jahangir, a lawyer from Pakistan who is currently serving as UN special rapporteur on extrajudicial, summary or arbitrary executions, said that the findings of such a commission would constitute the first step towards setting up a mechanism capable of bringing the perpetrators to trial.

Jahangir told a press conference at the end of her 10-day trip to Afghanistan that the number of people executed in 23 years of war was "staggering" and recommended that the death penalty be suspended until international standards for imposing capital punishment could be met.

At the same time, she said that the cycle of violence could not be halted until an end was put to impunity and that the perpetrators of crimes against humanity must be brought to trial. [...]

When asked whether she was referring to a tribunal inside or outside Afghanistan, Jahangir replied that it was too early to say which type of mechanism would be most appropriate. [...]

Justice must be done

While in Afghanistan, Jahangir visited the towns of Herat, Kandahar, Mazar-i-Sharif and Paghman, where the number of extrajudicial and summary killings seemed to have decreased.

However, she said that a climate of fear prevailed, especially outside of Kabul, and that various recent reports of extrajudicial killings were probably only the "tip of the iceberg."

These included the case of a man who had been killed after firing on a US marine in Kandahar and whose body had been strung up with a note of warning, and those of several women who had been killed by their families in the name of morality.

The UN expert said that she was "disturbed" by the alleged execution of prisoners after the fall of the Taliban and "deeply concerned" about reports of excessive use of force by the US-led coalition in Uruzgan province in July.

She also mentioned the discovery in northern Afghanistan of mass graves containing the remains of about 1,000 Taliban prisoners who had been handed over to coalition-backed warlords and the deaths of some 40 Afghans in Uruzgan villages after a mistaken attacked by U.S. aircraft.

According to information gathered by Jahangir, perpetrators of war crimes still hold key positions in Kabul and elsewhere in the country.

"Our job is to ensure that justice is done. No one, whatever their rank or position, should be considered above the law."

DISCUSSION

1. How would you qualify the conflict between the Northern Alliance and the Taliban armed forces? Between the latter and the United States?
2. If it is confirmed that there have been extrajudicial and summary executions of Taliban prisoners in the context of this armed conflict, do these constitute war crimes? Crimes against humanity? (*Cf.* Art. 3 common to the Conventions; Arts. 13, 14 and 130 of Convention III; Arts. 27, 32 and 147 of Convention IV; Arts. 75 (2) and 85 (2) of Protocol I; Art. 4 of Protocol II.)
3. Was the bombing of villages in Uruzgan, which killed 40 Afghans, a war crime? Even if it was a mistake? (*Cf.* Arts. 48, 51, 52, 57 and 85 (3) of Protocol I.)
4. What kind of commission could be considered in order to implement Ms Jahangir's idea to create an international commission? (*Cf.* Arts. 52/53/132/149 respectively of the four Conventions; Art. 90 of Protocol I.)
5. What would be the role of an international fact finding commission in Afghanistan? Under what conditions would it be able to intervene?
6. Cold the investigation work be given to a non-governmental organisation such as Human Rights Watch or Amnesty International? Could it be given to the ICRC, or would this compromise its activities which are based on neutrality and impartiality and its work methods based on dialogue and therefore on the confidentiality of the information it may obtain? (*See* **Case No. 183**. p. 1900 and **Case No. 215**. p. 2308.)
7. Is Afghanistan obliged to prosecute perpetrators of war crimes? Would the creation of a Commission allow Afghanistan to fulfill this obligation? And setting up a "truth and reconciliation" type commission? (*Cf.* Arts. 49/50/129/146, respectively of the four Conventions; Art. 85 of Protocol I.)

XXXIV. INDIA

(*See also,* Chapter VI. Goa. p. 1097.)

Case No. 222, India, Press Release, Violence in Kashmir

THE CASE

[**Source:** *Physicians for Human Rights and Human Rights Watch/Asia,* Press Release, India, May 9, 1993.]

Rape in Kashmir: A Crime of War

[...]

Indian security forces involved in counter-insurgency operations in Kashmir have committed rape with impunity, according to a report released today by two human rights organizations: Asia Watch, a division of the New York-based Human Rights Watch, and the Boston-based Physicians for Human Rights (PHR). The 18-page report, *Rape in Kashmir: A Crime of War*, is the result of a fact-finding mission in October 1992 to Kashmir by Asia Watch and PHR. It focuses on rape as a tactic of war in Kashmir, and argues that in conflict as well as non-conflict situations, the central element of rape is power. Indian security forces and militant forces in Kashmir use rape as a weapon: to punish, intimidate, coerce, humiliate and degrade their female victims. Asia Watch and PHR call for international condemnation of this crime as a violation of international human rights and humanitarian law.

Since the government crackdown against militants in Kashmir began in earnest in January 1990, reports of rape by security personnel have become more frequent. Rape most often occurs during search operations, during which the security forces frequently engage in collective punishment against the civilian population, most frequently by beating or otherwise assaulting residents, and burning their homes. Rape has also occurred frequently during reprisal attacks on civilians following militant ambushes. In some cases, the victims have been accused of providing food or shelter to militants or have been ordered to identify their male relatives as militants. In other cases, the motivation for the abuse is not explicit. In many attacks, the selection of victims is seemingly arbitrary and the women, like other civilians assaulted or killed, are targeted simply because they happen to be in the wrong place at the wrong time. The report documents fifteen cases of rape by Indian security forces. The investigators interviewed the victims, a gynecologist who examined nine of the women, and obtained medical evidence in the cases documented in the report.

Indian government authorities have rarely investigated charges of rape by security forces in Kashmir. Although there is no evidence that this form of torture is sanctioned as a matter of government policy in Kashmir, by failing to prosecute and punish those responsible, the Indian authorities have signalled that the

practice of rape is tolerated, if not condoned. Indeed, in responding to reports by the press and human rights groups about incidents of rape, government officials unfailingly attempt to dismiss the testimony of the women by accusing them of being militant sympathizers. In one case described in the report, a physician who assisted rape victims and arranged for them to be examined was detained and tortured by the security forces.

Reports of rape by militant groups in Kashmir have increased in since [sic] 1991, and the report includes information about these abuses. In some cases, women have been raped and then killed after being abducted by rival militant groups and held as hostages for their male relatives. In other cases the victims or their families are accused of being informers or of being opposed to the militants or supporters of rival militant groups. Asia Watch and PHR are also unaware of any efforts by the militant groups to prevent their forces from committing rape. In fact, some groups have continued to encourage violent attacks on women who do not conform to prescribed social behavior. In doing so, these groups help to create a climate of fear for women.

The report included recommendations to the government of India, including prosecutions of security forces responsible for rape, training on adequate evidence gathering for rape prosecutions, and protections for medical workers involved in examining and treating rape victims. The report also calls on the international community to condemn rape as a crime of war and bring pressure on all parties, including militant groups, to end this abuse. [...]

DISCUSSION

1. Under which conditions could the situation in Kashmir be qualified as an international armed conflict between India and Pakistan? Would the described rapes then violate IHL? Would they be grave breaches of IHL? (*Cf.* Art. 2 common to the Conventions, Arts. 50/51/130/147 respectively of the four Conventions, Art. 27 (2) of Convention IV, and Arts. 1 (4), 11, 76 (1) and 85 of Protocol I.)

2. If the situation in Kashmir is qualified as non-international armed conflict do the described rapes then violate IHL? Do they constitute grave breaches of IHL? Must they be punished? (*Cf.* Arts. 2 and 3 common to the Conventions, Arts. 50/51/130/147 respectively of the four Conventions, Art. 4 of Convention IV, and Art. 4 (2) (e) of Protocol II.)

3. Is rape already condemned by the international community as "a crime of war"? What additional measures could be useful in ending such practices? Would an additional international instrument be useful? What provisions should it contain? (*See* **Case No. 15**, The International Criminal Court. [*Cf.* A., The Statute, Art. 8 (b) (xxii) and (e) (vi).] p. 608.)

4. Does it matter under IHL whether the rape victim is a civilian, a combatant, a fighter, a militant sympathizer, or a terrorist?

5. Is there any situation conceivable in which a rape committed in an armed conflict does not violate IHL?

6. Does a State violate IHL if rapes are committed by its security forces, although they are not government policy? Although that State's laws prohibit them? (*Cf.* Art. 3 of Hague Convention IV and Arts. 86 and 91 of Protocol I.)

Case No. 223, India, People's Union for Civil Liberties v. Union of India

THE CASE

[**Source:** The Report of the JAG seminar, People's Union for Civil Liberties, Petitioner v. Union of India, S.C. 1203-1208, 1997.]

AIR 1997 SUPREME COURT 1203
B.P. JEEVAN REDDY AND
SUHAS C. SEN.JJ.

Writ. Petn. (Cri) No. 612 of 1992. D/- 5-2-1997.

People's Union for Civil Liberties,
Petitioner v. Union of India and another, Respondents. [...]

B.P. JEEVAN REDDY, J.: - People's Union for Civil Liberties has filed this writ petition under Article 32 of the Constitution of India for [...] appropriate order or direction (1) to institute a judicial inquiry into the fake encounter by Imphal Police on April 3, 1991 in which two persons of Lunthilian village were killed, (2) to direct appropriate action to be taken against the erring police officials and (3) to award compensation to the members of the families of the deceased. According to the petitioner, there was in truth no encounter but it was a case where certain villagers were caught by the police during the night of April 3, 1991, taken in a truck to a distant place and two of them killed there. It is alleged that three other persons who were also caught and taken away along with two deceased persons were kept in police custody for a number of days and taken to Mizoram. They were released on bail only on July 22, 1991. It is further submitted that Hamar peoples' Convention is a political party active in Mizoram. It is not an unlawful organisation. Even according to the news released by the said organisation, it was a case of deliberate killing. Though representations were made to the Chief Minister of Manipur and other officials, no action was taken. [...] Affidavits of the wives of the deceased were [...] filed setting out the miserable condition of their families after the death of their respective husbands.

2. On notice being given, a counter-affidavit was filed by the Joint Secretary (Home), Government of Manipur denying the allegations. The allegation of 'fake encounter' was denied. It was submitted that there was genuine cross firing between the police and the activists of Hamar Peoples' Convention during which the said two deaths took place. The report of the Superintendent of Police, Churachandpur was relied upon in support of the said averment. It was submitted that Hamar Peoples' Convention was indulging in illegal and terrorist activities and in acts disturbing the public order. [...]

3. [...] The learned District and Sessions Judge has concluded that there was no encounter in the night between 3-4-1991 and 4-4-1991 at Nungthulien village. The two deceased, [...] were shot dead by the police while in custody on 4-4-1991. The State of Manipur has filed its objections to the report [...].

   We have heard the counsel for the parties. We are not satisfied that there are any reasons for not accepting the report of the learned District and Sessions Judge which means that the said two deceased persons were taken into custody on the night of April 3, 1991, taken in a truck to a long distance away and shot there. The question is what are the reliefs that should be granted in this writ petition?

4. It is submitted by Ms. S. Janani, learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hamar Peoples' Convention is one of such terrorist organisations, that they have been indulging in a number of crimes affecting the public order - indeed, affecting the security of the State. It is submitted that there have been regular encounters and exchange of fire between police and terrorists on number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists.

5. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms. Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. [...] It is not for the Court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be death [sic] with by force is a matter of policy for the government to determine. The Courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the Courts even in the case of disturbed areas. [...] [T]he proper course for them

was to deal with them according to law. "Administrative liquidation" was certainly not a course open to them. [...]

7. [...] "The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty [...] and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State? ... Can the fundamental right to life guaranteed by Art. 21 [of the Constitution] be defeated by pleading the archaic defence of sovereign functions? [...] We think not. Article 21 does not recognize any exception, [...]."

[...]

9. [...] [T]his Court [...] held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defence of sovereign immunity does not apply in such a case even though it may be available as a defence in private law in an action based on tort. [...] It is one mode of enforcing the fundamental rights by this Court or High Court. Reliance is placed upon Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which says, "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". [...]

"[...] In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. [...]"

[...]

14. Now coming to the facts of the case, we are of the opinion that award of compensation of Rs. 100,000/- [Rupees one lakh only] to the families of each of the deceased would be appropriate and just. [...]

Order accordingly.

DISCUSSION

1. a. Do the police actions in this case violate IHL? Is IHL even applicable here?

   b. Do the circumstances here constitute those necessary for the application of Art. 3 common to the Conventions? What are the necessary criteria? Are acts disturbing the public order or threatening the security of the State sufficient to invoke Art. 3 common to the Conventions? Is it sufficient if the encounters with organized opposition groups (*e.g.,* Hamar Peoples' Convention) occur regularly?

   c. Is the level of a conflict's intensity for application of Protocol II higher or lower than the threshold necessary for application of Art. 3 common to the Conventions? Is Protocol II applicable here? (*Cf.* Art. 1 of Protocol II.)

2. a. Could the situation in this case be described as an internal tension or disturbance? Cannot violations similar to those in conflicts covered by Art. 3 common to the Conventions occur during internal disturbances? If Art. 3 common to the Conventions is inapplicable in such circumstances, should the threshold necessary for its application be lowered?

   b. What law applies protecting individuals caught up in such situations? Is International Human Rights Law always adequate? Does it not provide rights from which States may not derogate? Is this alone sufficient?

   c. Would adoption by States Parties of an instrument such as the Turku Declaration (*See* **Document No. 40**, Minimum Humanitarian Standards. p. 823.) fill this gap in protection? If it was a valid instrument binding on India, would it change the legal situation in the present case?

3. a. Does IHL, like Indian law and Art. 9 (5) of the International Covenant on Civil and Political Rights, provide for compensation to victims of IHL violations? Under what circumstances? By whom? *(Cf., e.g.,* Art. 3 of the Hague Regulations, Arts. 51/52/131/148 respectively of the four Conventions, and Art. 91 of Protocol I.)

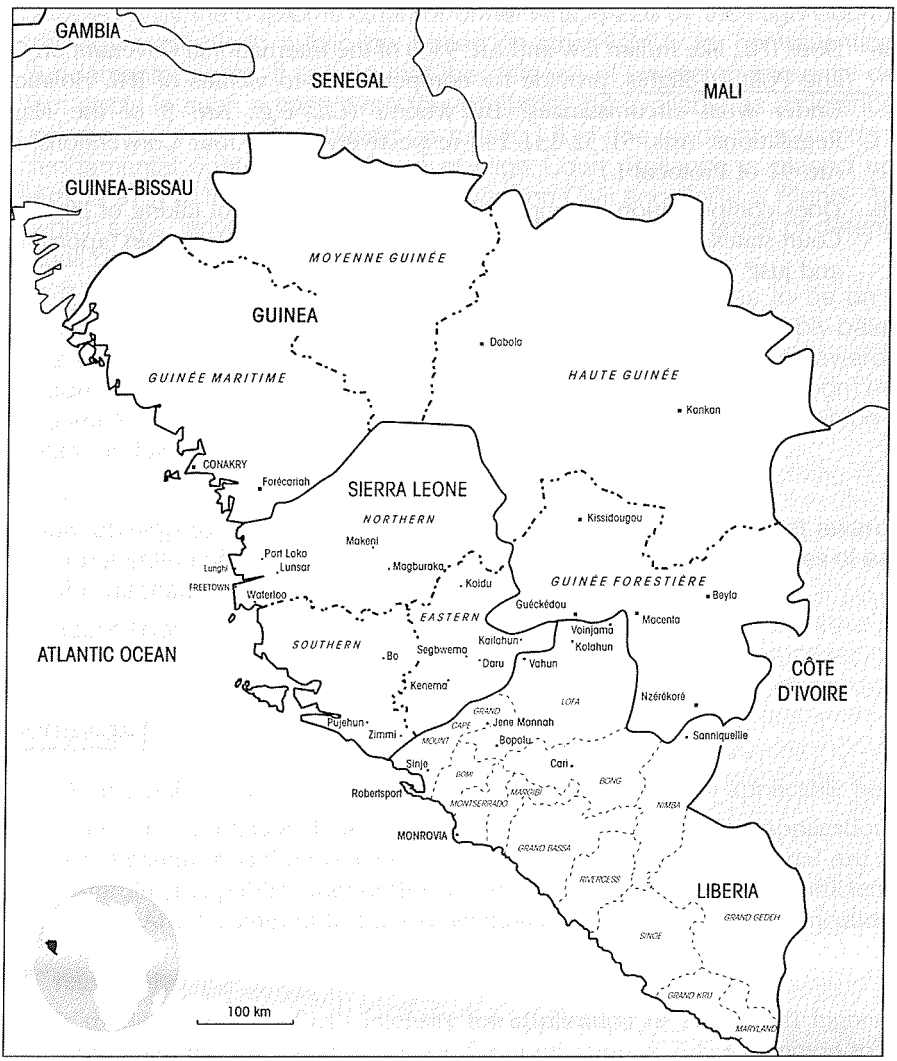
   b. Does compensation appropriately redress the wrongful taking of life as the Court states: "an infringement of a fundamental right?" How is an "appropriate and just" amount assessed?

XXXV. SIERRA LEONE, LIBERIA AND GUINEA

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea

THE CASE

[N.B.: This case study was written by Thomas de Saint Maurice in view of its publication in the 2001 French edition of this book. It is based exclusively on documents available to the public, such as press releases, reports by agencies or United Nations documents.]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

OUTLINE OF THE CASE STUDY

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2. The situation in Liberia
3. The situation in Guinea

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Abbreviations:

ECOWAS: Economic Community of West African States

ECOMOG: Economic Community of West African States (ECOWAS) Monitoring Group

Sierra Leone:

CDF: Civil Defence Forces (Kamajors)

NPCR: National Provisional Ruling Council

RUF: Revolutionary United Front

SLA: Sierra Leone Army

UNAMSIL: UN Observer Mission in Sierra Leone

Liberia:

AFL: Armed Forces of Liberia

LPC: Liberia Peace Council

NPFL: National Patriotic Front of Liberation

ULIMO: United Liberation Movement of Liberia (later called LURD: Liberians United or Reconciliation and Democracy)

Guinea:

RFDG: Rally of the Democratic Forces of Guinea

1. Multiple actors

A. Internal actors

1) The situation in Sierra Leone

[**Source:** PEREZ Andres, "UN peacekeeps for rival gangsters. Sierra Leone's diamond wars", in *Le Monde diplomatique*, June 2000, footnotes are not reproduced; available on http://www.monde-diplomatique.fr]

UN PEACEKEEPS FOR RIVAL GANGSTERS

Sierra Leone's diamond wars

It was a short-lived peace: signed last July between the Freetown government and the RUF, it broke down in early May when 300 blue berets were taken captive by the rebels. The arrest of the RUF's leader Foday Sankoh by British troops on 10 May did not bring a halt to the fighting. The background to the civil war is a no-holds-barred fight between the international mining companies for control of Sierra Leone's diamonds.

That a criminal economy can eat away at the heart of states and whole nations is nothing new. But recent events in Sierra Leone have shown that it can also divert to its own advantage an entire peace-keeping operation run by the United Nations and supported by the main foreign powers. The UN Observer Mission in Sierra Leone (Unamsil) - the largest UN peace-keeping mission in the world with its 9,000 men - was supposed to bring an end to a ghastly, 10-year-long civil war [...]. [In November 2001, it was composed of 16 600 men.]

We must be clear about who is involved. Barbaric, drug-crazed and dragooned by the warlords as they may be, armed and desperate young men could not have brought UNAMSIL to its knees all on their own. The UN has been ensnared by something different, something newer and more insidious: by a struggle between two rival groups supported by businessmen intent on gaining control of mineral wealth. By refusing to declare an embargo on diamonds from Sierra Leone, or indeed the economic exclusion zone that many experts have been calling for, the Security Council and UN Secretary General have left the field wide open for a mafia-like conflict in which their soldiers have become pawns in the game.

On one side, the rebel Revolutionary United Front (RUF), the true masters of the territory, controls one half of the country and, over the other half, spreads an insecurity that renders impossible any heavy mining activity of the kind the small, "junior" companies would like to start up. Its base lies in the zone of military and commercial influence wielded by Charles Taylor, today the president of Liberia (dubbed Taylorland). Monrovia, his base, is where a large proportion of the smuggled Sierra Leone diamonds are traded, channelling some $200m a year "linked with the markets in arms, drugs and money-laundering in Africa" and elsewhere. [...]

Facing the RUF are the "legitimist" forces around the president, Ahmed Tejan Kabbah. His government includes the powerful deputy minister for defence and

head of the Kamajor militia, Samuel Hinga Norman, and Johnny Paul Koroma, an earlier coup leader and torturer, with his militia.[...]

It has been the brutal clash between these two alliances that scuppered any hope of peace and changed the nature of a UN mission, after fanning for 10 long years the flames of a war whose only victims have been civilians, and especially children. And it is because what is at stake is real and sizeable - over a billion dollars'-worth of stones sold in the jewellers' shops each year, the world's second biggest field of rutile, and bauxite deposits that could have an effect on world prices - that Britain, the old colonial power, is coming forward and deploying its military strength to back up the government of Sierra Leone without having to hide behind the smoke-screen of the Sandline International mercenaries as it did before. [...]

"The Kalashnikov lifestyle helps our business", sing the child-soldiers of the RUF. [...]

As these children saw it, the blue berets with their UN badges were no different from the mercenary Gurkha Security Guards hired by private companies in 1994, or the men of Executive Outcomes (1996), or of Sandline International (1997), or the Lifeguards they had been holding at bay since 1998. And besides, BBC radio had told them last December that the Indian battalions of the blue berets included Gurkhas who were to operate in the diamond-mining areas. It is even known that last March UN high-ups met the leaders of a number of private armies (including Executive Outcomes, Sandline International and Israel's Levdan), to look at ways of working together. [...]

2) The situation in Liberia

[**Source:** STEAD David, "Troubled past of Africa's first republic", *BBC News Online*, August 12, 1999, available on http://news.bbc.co.uk]

Troubled past of Africa's first republic

For much of the last 20 years Liberia has been one of the most unstable countries in Africa.

Plagued since the early 1980s by coup attempts and later by civil conflict its economic assets were squandered and rival ethnic fighters outdid each other in brutal savagery. [...]

At the root of Liberia's political problems have been the conflicts between the descendents of American freed slaves settled during the 19th Century and the indigenous ethnic groups. [...]

The wide disparity between the wealthy coastal elites and the rest of the population created civil disunity sparking a military coup led by a member of the Krahn ethnic group, Master Sergeant Samuel Doe in 1980. [...]

On Christmas Eve, 1989, Charles Taylor and his National Patriotic Front of Liberia (NPFL) began a rebel assault from the north-eastern province of Nimba - reaching Monrovia by September 1990. [...]

Three armed groups competed for Monrovia - the NPFL, a breakaway group led by Prince Yormie Johnson and the Armed Forces of Liberia - AFL - remnants of Doe's army.

It was Prince Johnson's forces which captured Doe, and savagely hacked him to death.

From 1990 onwards there was an escalation of war in Liberia, with new rebel groups establishing powerbases throughout the country.

An African peace-keeping force - ECOMOG - of mainly Nigerian soldiers secured Monrovia [...] but rebel groups continued to control wide swathes of land outside the capital. [...]

Continued efforts at establishing peace and re-uniting the country failed and a new rebel movement, the United Liberation Movement of Liberia - ULIMO emerged to challenge the NPFL.

ULIMO, which invaded from Sierra Leone, succeeded in wresting large areas of Lofa and Cape Mount counties in western Liberia from Taylor's forces.

The movement later split into two - ULIMO J - led by Roosevelt Johnson, which was mainly Krahn and ULIMO K, led by Alhaji Kromah, which was principally Mandingo.

By 1993 another armed faction had emerged - the Liberia Peace Council (LPC) which battled the NPFL in south-eastern Liberia. [...]

The breakthrough came with a peace agreement signed at Abuja in Nigeria in August 1995 and the subsequent deployment of ECOMOG troops throughout Liberia. [...]

After many last minute hitches on 19 July 1997 Liberia finally went to the polls - with Charles Taylor securing an outright victory.

Shortly after his inaugeration, President Taylor accused ULIMO-K of re-assembling in Sierra Leone with the aim of destabilising his government. [...]

3) The situation in Guinea

[**Source:** *The Forces involved in the fighting in Guinea*, Agence France Presse, Febuary 14, 2001.]

The Forces involved in the fighting in Guinea

CONAKRY, Feb 14 (AFP) - Southern Guinea has been rocked since September by fierce fighting between government troops and rebel groups operating out of neighbouring Sierra Leone and Liberia. More than 1,000 people have been killed and hundreds of thousands of refugees put to flight.

The United Nations has warned that it currently faces its worst humanitarian crisis in the troubled region. Also implicated in the fighting are Guinean dissidents, ().

Following is a list of groups, movements and factions regarded as "enemies" of Guinea and branded by Conakry as being part of a "rebel coalition":

- The revolutionary United Front (RUF), [...] based in the north and east of Sierra Leone. [...]

- ULIMO, the Liberian United Liberation Movement for Democracy. Founded at the beginning of 1991, the group was one of the principle rivals of Charles Taylor's National Patriotic Front of Liberia (NPFL), which started the Liberian civil war in December 1989. In 1994, one of ULIMO's leaders, Roosevelt Johnson, broke away and founded ULIMO-J, comprising members of the Krahn ethnic group. [...]
  Since coming to power, Taylor has regularly accused ULIMO faction ULIMO-K of having bases in southern Guinea and, with the support of Conakry, of launching raids into northern Liberia.
- ULIMO-K, [...]. Mercenaries [of the mandingue ethnic group] trained by warlord Alaji Kromah [...].
- RFDG, the ally of Democratic forces of Guinea, an external movement opposed to the Guinean government. [...]

In its fight against these groups, the Guinean army is supported by:

- The "Volunteers", Guinean civilians who have been recruited en masse by the authorities to "repulse the invaders", and who are organised as self-defence militia equipped with shotguns, spears, bows and arrows and other traditional weapons of war.
- Kamajors, Sierra Leone's militant traditional hunters [...] one of the most faithful supporters of the [...] Sierra Leone President Ahmad Tejan Kabbah and among the most dreaded enemies of the RUF. [...] According to sources in Conakry, there are currently about one thousand Kamajor fighters in Guinea.

B. External actors

1) Intervention by external armed forces: the example of Executive Outcomes mercenaries

[**Source:** United Nations, E/CN.4/1996/27, 17 January 1996; available on http://www.unhchr.ch]

COMMISSION ON HUMAN RIGHTS
THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN DOMINATION OR FOREIGN OCCUPATION

Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, pursuant to Commission resolution 1995/5 and Economic and Council resolution 1995/254 [...]

C. Sierra Leone

62. Sierra Leone is in the grip of an internal armed conflict which broke out in March 1991 when an opposition group known as the Revolutionary United Front (RUF) was formed as an armed resistance movement and launched an invasion from neighbouring Liberia with a view to occupying part of the southern and eastern regions of the country. The conflict did not come to an

end when, in 1992, a military-nationalist movement calling itself the National Provisional Ruling Council (NPRC), headed by Captain Valentine Strasser, seized power in a coup, suspended the 1991 Constitution and declared a state of emergency. [...]

63. In the course of the internal armed conflict, both the NPRC and the RUF rebel forces, led by Foday Sankoh, have committed serious violations of and disregarded, basic provisions of international humanitarian law. [...] The civilian victims of this conflict are estimated to number in the thousands.

64. There is clear evidence of mercenary involvement in this internal armed conflict. [...] [T]he NPRC has strengthened its military capability by hiring mercenaries supplied by Executive Outcomes, a private company officially registered in Pretoria as a security company, but in this case said to have been paid in cash and, in particular, in the form of mining concessions, for supplying specially trained mercenaries and weapons. According to information made available to the Special Rapporteur, Executive Outcomes is involved in the recruitment, contracting and training of the mercenaries and the planning of their operations. It uses them in a variety of situations where, in return for payment, it has carried out all kinds of illegal acts. Executive Outcomes is reported to have provided Sierra Leone with about 500 mercenaries from various countries, usually paying them between US$ 15,000 and US$ 18,000 per month, depending on their qualifications and experience, in addition to providing them with generous life-insurance cover and weapons.

65. [...] According to the sources consulted, Executive Outcomes is receiving about US$ 30 million and mining [...]. In recruiting mercenaries, Executive Outcomes is said to work through a network of security companies operating in various countries, soldiers of fortune and intelligence circles. Its work in Sierra Leone is said to involve the following activities: training of officers and other ranks; reconnaissance and aerial photography; strategic planning; training in the use of new military equipment; advising on arms purchases; devising psychological campaigns aimed at creating panic among the civilian population and discrediting the leaders of the RUF, etc. According to the source consulted, all these activities are supervised by executives of the company. [...]

66. [...] In any event, this would appear to be yet another instance of an internal armed conflict in which the involvement of mercenaries prolongs and adds to the cruelty of that conflict, while at the same time undermining the exercise of the right to self-determination of the people of the country involved.

2) Intervention by a regional force: ECOMOG

[**Source:** PEYRO LLOPIS Ana, "La Sierra Leone ou le renouveau des opération de paix", in *Actualité et Droit international*, Paris, February 2001, footnotes are not reproduced. Original in French, unofficial translation.]

SIERRA LEONE OR RENEWED PEACE OPERATIONS

[...] The conflict in Sierra Leone dates back to March 1991 when the RUF launched an offensive against the government headed by Joseph Momoh. That

government was toppled in April 1992 - not by the RUF, but by its own officials led by Valentine Strasser. He proclaimed himself head of the new government, which was, in turn, overthrown in January 1996 by one of its members, Brigadier Julius Maada Bio. He organized elections which were won in March 1996 by Ahmad Tejan Kabbah. He, too, was removed from power on 25 May 1997 by a coalition comprising a sector of the Sierra Leone army and the RUF and led by Major Johnny Paul Koroma. Mr Kabbah was again the "effective" head of the Sierra Leone government from March 1998, following intervention by the Economic Community of West African States (ECOWAS) and ECOMOG (ECOWAS Monitoring Group or ECOWAS Military Observer Group). [...]

I. A regional peace operation with variable geometry [...]

A. ECOMOG's implementation of the United Nations embargo

Initially, pursuant to Chapter VIII of the Charter of the United Nations, the Security Council authorized ECOWAS to ensure the implementation of the embargo on the supply of arms and petroleum products stipulated in Resolution 1132 of 8 October 1997. Even if the Council did not quote it explicitly, this was, more precisely, a matter of implementing Article 53 of the Charter, which requires enforcement action taken under regional arrangements or by regional agencies to be authorized by the Security Council. The Charter thus subjects regional agencies to the authority of the Security Council. In order to implement the embargo stipulated by the Security Council, ECOWAS sent the first ECOMOG contingents to Sierra Leone. [...]

B. ECOMOG: a regional peace force

[...] From its initial role as the body responsible for monitoring compliance with the embargo, ECOMOG became a regional peacekeeping force whose activities came within the scope of the peaceful settlement of disputes pursuant to Chapter VI and Article 52 of the Charter. However, it soon resorted to using force - without Security Council authorization. Was that [...] a breach of international law?

Following the breakdown of the peace agreement signed in Conakry on 23 October 1997 between Major Koroma, who was then in power, and ECOWAS, the latter decided to strengthen ECOMOG with new contingents, which entered Sierra Leone territory in February 1998. The peace agreement had provided for ECOMOG to be present in the country to supervise compliance with the ceasefire, to deal with the disarmament, demobilization and reintegration of combatants, and to monitor humanitarian assistance. That step was taken without any Security Council authorization whatsoever. [...]

In accordance with a bilateral defence agreement signed with President Kabbah, troops from Nigeria had already been in Sierra Leone before that date and had tried to topple the new Koroma government the day after the *coup d'État* in May 1997. The Nigerian troops soon began to act in the name of ECOMOG. Although it is accurate to say that, as from February 1998, a regional peacekeeping operation was deployed in Sierra Leone, during the period extending from the *coup d'État* of May 1997 to February 1998, the status of the

ECOMOG and Nigerian forces in Sierra Leone was very controversial. President Kabbah said that he had asked Nigeria to intervene by virtue of the bilateral defence agreement with that country whereas Nigeria maintained that "it had launched its offensive under the ECOMOG banner". However, ECOMOG, which the Security Council had authorized solely to monitor the embargo, had never been given such a mandate. In fact, ECOMOG, which was set up in 1991 to intervene in Liberia, had always been an instrument of Nigerian foreign policy. [...]

In its Resolution 1162 of 17 April 1998, the Security Council commended "ECOWAS and ECOMOG on the important role they [were] playing in Sierra Leone in support of ... the restoration of peace and security". In similar terms, it commended ECOMOG on 20 August 1999 for the "outstanding contribution that it [had] made to the restoration of security and stability in Sierra Leone, the protection of civilians and the promotion of a peaceful settlement of the conflict". The Security Council thus avoided confronting the issue of ECOMOG's true nature: it was easier to consider it a classic force concerned with the peaceful settlement of disputes, where the basic principle governing relations between the universal organisation and the regional organisations is coordination (Article 52 of the Charter), than to make it subordinate to the Security Council (Article 53 of the Charter).

Once President Kabbah's government had been reinstated as a result of ECOMOG's operations, the Security Council decided to deploy "a United Nations military liaison group and security advisers " which was to be coordinated with the Sierra Leone government and ECOMOG. The United Nations thus acknowledged the essential role of ECOWAS and ECOMOG. However, in July 1998 the Security Council decided to set up its own peacekeeping operation.

3) UN intervention: UNAMSIL

a) The mandate

[**Source:** UNAMSIL mandate, United Nations, available on http://www.un.org]

According to Security Council resolution 1270 (1999) of 22 October 1999, UNAMSIL has the following mandate:

- To cooperate with the Government of Sierra Leone and the other parties to the Peace Agreement in the implementation of the Agreement
- To assist the Government of Sierra Leone in the implementation of the disarmament, demobilization and reintegration plan

  To that end, to establish a presence at key locations throughout the territory of Sierra Leone, including at disarmament/reception centres and demobilization centres
- To ensure the security and freedom of movement of United Nations personnel

- To monitor adherence to the ceasefire in accordance with the ceasefire agreement of 18 May 1999 [...] through the structures provided for therein
- To encourage the parties to create confidence-building mechanisms and support their functioning
- To facilitate the delivery of humanitarian assistance [...]

According to Security Council resolution 1289 (2000) of 7 February 2000 (under Chapter VII of the Charter of the United Nations), the mandate has been revised to include the following tasks:

- To provide security at key locations and Government buildings, in particular in Freetown, important intersections and major airports, including Lungi airport
- To facilitate the free flow of people, goods and humanitarian assistance along specified thoroughfares
- To provide security in and at all sites of the disarmament, demobilization and reintegration programme
- To coordinate with and assist, the Sierra Leone law enforcement authorities in the discharge of their responsibilities
- To guard weapons, ammunition and other military equipment collected from ex-combatants and to assists in their subsequent disposal or destruction

The Council authorized UNAMSIL to take the necessary action to fulfil those additional tasks, and affirmed that, in the discharge of its mandate, UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone.

b) The concept of operations

[**Source:** United Nations, S/2001/228, *Ninth report of the Secretary-General on the United Nations Mission in Sierra Leone*, 14 March 2001; available on http://www.un.org]

[...]

VI. Concept of Operations

57. UNAMSIL has revised its concept of operations, [...] to take into account the ABUJA Ceasefire Agreement, [10 November 2000] the changes in the Mission's military structure and the circumstances on the ground. [...]

58. The main objectives of UNAMSIL in Sierra Leone remain to assist the efforts of the Government of Sierra Leone to extend its authority, restore law and order and stabilize the situation progressively throughout the entire country, and to assist in the promotion of a political process which should lead to a renewed disarmament, demobilization and reintegration programme and the holding, in due course, of free and fair elections.

59. The Mission's updated concept of operations integrates military and civilian aspects and envisages the deployment, in successive phases, into RUF-

controlled areas of UNAMSIL troops, United Nations civil affairs, civilian police and human rights personnel, representatives of humanitarian agencies, and governmental personnel and assets to establish and consolidate State authority and basic services in these areas. [...]

60. In its movement and deployment forward, UNAMSIL will continue to project the necessary military strength and determination to deter any attempt to use force against United Nations and its mandate in Sierra Leone. The mission's rules of engagement allow it to respond robustly to any attack or threat of attack, including, if necessary, in a pre-emptive manner. [...]

4) Intervention by foreign forces: the United Kingdom

[**Source:** Rémy Ourdan, "La Grande-Bretagne mène en Sierra Leone sa plus vaste opération militaire depuis les Malouines", in *Le Monde*, 25 May 2000. Original in French, unofficial translation.]

The United Kingdom in Sierra Leone - its largest military operation since the Falklands

[...] The British military operation in Sierra Leone has now taken Her Majesty's soldiers beyond the scope of their official mission, which was to evacuate European Union and Commonwealth citizens. [...] The fact that a sense of security has been restored in the capital of Sierra Leone is clearly due to "Operation Palliser" having been more than an airlift to Dakar. The operation has now become the hub of an outright political and military counter-attack against the Revolutionary United Front (RUF) rebels.

The 800 British soldiers first secured Lungi airport and the Aberdeen peninsula, the location of the Mammy Yoko heliport and United Nations headquarters, but from the moment they arrived, the impression they conveyed was that of being set to defend Freetown against rebel offensives. Patrols were extended to every part of the capital and military "advisers" seconded to the Sierra Leone army (SLA) ensured that pro-government forces were deployed in such a way as to best defend the city.

Contracted "advisers"

An attack by some 40 rebels 15 kilometres outside of Lungi then thrust the paratroopers into a new phase of their military operation. They retaliated in an act of self-defence but, according to a military source, they also pursued their attackers. Helicopters flew over and lit up the retreating RUF combatants, allowing them to be picked out easily by the paratroopers as they made their way along the road. British soldiers allegedly killed about 15 rebels that night.

Another aspect of British intervention is the assistance rendered, on the one hand, by army instructors to the Sierra Leone forces and, on the other, by the paratrooper battalion to the United Nations forces. [...] The pro-government coalition, made up of soldiers loyal to President Ahmad Tejan Kabbah, traditional Kamajor hunters led by Sam Hinga Norman and former rebels headed by Johnny Paul Koroma, is at the forefront of the battle. The fighters have obviously been supplied with automatic

rifles, mortars and munitions by the United Kingdom. Within the SLA hierarchy, British officers are quietly seconding their Sierra Leone colleagues. [...]

Once the battle is over, the United Nations forces go back to the positions that they abandoned after Blue Helmets were taken captive and the RUF rebels advanced. Once again British officers ensure that the men are deployed smoothly, give advice on how to set up more effective observation posts and supply communication equipment.

The naturally secret operations of the SAS (Special Air Service) commandos should not be overlooked. There are said to be 120 of these elite British army combatants deployed beyond the front lines in Sierra Leone, deep in the heavily forested and diamond-producing regions under RUF control. [...]

DISCUSSION

1. How would you qualify the fighting in Sierra Leone between:
   - The Sierra-Leonean government's army and the RUF rebels?
   - The Kamajors and the RUF?
   - The UNAMSIL soldiers and the RUF?
   - The mercenaries and the RUF?
   - ECOMOG soldiers and the RUF?
   - The British army and the RUF?

2. Must we divide the different elements of the conflict according to the nature of the armed groups? Even if this creates a risk of having different qualifications depending on the actors? What would be the consequences, under IHL, of qualifying the same conflict as international in some respects and non-international in other respects? Is it possible (and desirable) that one person can benefit from a specific status if he or she is in the hands of one party to the conflict but not if he or she is in the hands of a different party?

3. In each of the situations enumerated in question 1, what would be the status of possible detainees? What about UNAMSIL members in the hands of the RUF? Is hostage taking a violation of IHL? Is this valid for combatants taken as "hostages"? If two members of different groups are held (for example) by the RUF, may they have different statuses? (*Cf.* Art. 3 common to the Conventions; Art. 4 of Convention III and Art. 8 of the Statute of the ICC, *see* **Case No. 15**, p. 608.)

4. How would you qualify the conflict in Liberia between:
   - The governmental forces (of Samuel Doe) and the NPFL?
   - The governmental forces and those of Prince Johnson?
   - The NPFL as the new government and the other armed groups (ULIMO, LPC.)?
   - Liberian rebel groups or factions among themselves?

5. What if the fighting takes place in part or in whole outside of Liberian territory (in Guinea for example)?

6. May the ULIMO be held responsible for acts committed by Doe's governmental army, as it was created by former members of the army loyal to Doe? May Charles Taylor's government be held responsible for acts committed by the NPFL as a rebel group? (*See* **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf.* A., Art. 10 (1).] p. 805.).

7. How would you qualify the fighting in Guinea between:
   - The governmental forces and mutineers?
   - The governmental forces and Guinean rebels of the RFDG?
   - The governmental forces and foreign rebels (RUF, ULIMO)?
   - The Sierra-Leonean Kamajors and the mutineers or members of the RFDG?
   - The Guinean "volunteers" and the mutineers, the RFDG or foreign rebels?

8. How would you qualify fighting involving the governmental forces of Liberia, Sierra Leone or Guinea, outside of their territory:
   - If these attacks are aimed at rebel forces of the country were the fighting takes place, for example between the Guinean government and the RUF on the territory of Sierra Leone?
   - If these attacks are aimed at rebel forces of the attacking forces country, but are based on foreign territory, for example attacks by the Liberian government on ULIMO in Guinea?

9. What is the position of mercenaries in IHL? In the IHL of non-international armed conflicts? Is the use of mercenaries authorised or not under international law (for a State, the UN, rebel forces)? What would be their status in case of capture? Are they bound by the rules of IHL? Are private security agencies staff who for example protect mine exploitations, mercenaries? If they make use of armed force to fulfil their mission? In terms of criminal and international responsibility, who can be held responsible for acts committed by mercenaries: the State and members of the government that used mercenaries such as Sierra-Leone and the United Kingdom, the leaders of the companies of mercenaries, the mining companies who used them? (*Cf.* OAU Convention of 1977, United Nations Convention of 1989, available on http://www.icrc.org/ihl and **Case No. 12**, The Issue of Mercenaries. p. 575 Art. 47 of Protocol I.)

10. The head of the Kamajor militia, Samuel Hinga Norman is vice-minister of defence in Sierra Leone. How could this affect IHL (qualification of the conflict, applicable law, State responsibility, etc.)?

11. Are ECOMOG forces bound by IHL? As Nigerian soldiers are the main element of this force, can it be assimilated to the Nigerian army? What would be the consequences of this? If the Security Council authorised armed intervention by ECOMOG, what would be the consequences in terms of the application of IHL and responsibility?

12. Are United Nations forces, and in this case UNAMSIL bound by IHL? Discuss the provisions of IHL that are specific to United Nations forces. (*Cf.* **Case No. 14**, Convention on the Safety of UN Personnel. p. 602; Art. 8 of the Statute of the ICC, *see* **Case No. 15**. p. 608, and **Document No. 42**, UN, Guidelines for UN Forces. p. 861.)

13. What would be the status of members of the British Special Air Service (SAS) under IHL? What would be the legal consequences of fighting between the SAS and the RUF? In case of capture? Could the SAS members be qualified as spies? What rules of IHL are applicable to spies? Are they applicable if the conflict is qualified as non-international? (*Cf.* Art. 5 of Convention IV; Art. 46 of Protocol I.)

2. Violations of International Humanitarian Law

A. The violations of International Humanitarian Law by the parties to the conflict in Sierra Leone

[**Source:** Sierra Leone, Annual Report 2001, Amnesty International; available on http://www.amnesty.org]

[...]

Abuses by rebel forces

In early 2000 human rights abuses against civilians - abduction, rape, looting and destruction of villages - by rebel forces occurred almost daily in Northern Province, [...]. From May deliberate and arbitrary killings, mutilation, rape, abduction and forced labour and recruitment increased. Aid workers were attacked and forced to withdraw from rebel-held areas.

[...] [R]efugees forced to return from Guinea were attacked and pressured to join RUF forces in Kambia District.

A group of renegade soldiers known as the West Side Boys terrorized civilians through killings, rape, torture, abduction and ambushes along major roads in the Occra Hills area east of Freetown until September, when their leader was captured and many surrendered or were arrested.

Deliberate and arbitrary killings

Large numbers of civilians were killed by rebel forces from May, particularly in areas around Port Loko, Lunsar, Makeni and Magburaka.

On 8 May RUF members killed about 20 people and injured dozens of others when they fired on some 30,000 people protesting outside Foday Sankoh's residence in Freetown against RUF attacks on UNAMSIL. [...]

In early September rebel forces attacked Guinean villages close to the Sierra Leone border, killing Sierra Leonean refugees.

Torture, including mutilations and rape

Many civilians had limbs deliberately amputated; others had the letters RUF carved into their flesh. Abduction of girls and women, rape and sexual slavery were systematic and widespread. Most victims had contracted sexually transmitted diseases and many became pregnant. [...]

Civilians near Mongeri who escaped from six months' captivity in October had been used as forced labour and repeatedly beaten and threatened with death; women had been repeatedly raped. [...]

Human rights violations by government forces

Members of the CDF and the Sierra Leone Army were responsible for summary executions, arbitrary detention and torture of captured or suspected rebels and recruitment and use of child combatants. The CDF, operating in Eastern and Southern Provinces, became increasingly undisciplined and usurped police authority. Civilians were also arbitrarily detained at CDF headquarters, including in Bo, Koribundu and Kenema. Ill-treatment and extortion of money and property at checkpoints were common and several incidents of rape, previously rare, were reported. [...]

A detainee captured by the CDF in May and held in Bo lost an ear and suffered cuts to his back after being beaten with a bayonet; others reported being stripped and beaten with sticks until they bled.

In September, two men were killed and a third injured when they resisted recruitment by the CDF. [...]

Civilian casualties from aerial attacks

In May and June, attacks by government forces from a helicopter gunship on suspected rebel positions in Northern Province resulted in up to 30 civilian deaths and many other casualties. Attacks often appeared to be indiscriminate and undertaken without adequate measures to safeguard civilians. Although warning leaflets were dropped in Makeni and Magburaka, attacks followed shortly afterwards. Civilians fleeing Makeni, however, said that they were forced out of their homes by rebel forces as the gunship flew overhead. At least 14 civilians were killed in Makeni and at least six were killed in an early afternoon attack on the market in Magburaka.

Child combatants

The resumption of hostilities in May halted demobilization of child combatants, leaving several thousand still to be released by rebel forces, and resulted in further recruitment.

RUF forces continued to abduct and forcibly recruit children in Northern Province. Recruitment of children by the CDF also continued in Southern Province, [...] . In May about 25 per cent of combatants fighting with government forces near Masiaka were observed to be under 18, some as young as seven. The government reiterated that 18 was the minimum age for recruitment and instructed the acting Chief of Defence Staff to ensure demobilization of all those under the age of 18. [...]

B. The violations of International Humanitarian Law by ECOMOG

[**Source:** Francis Kpatinde, "Les 'casques blancs' aussi ...", in *Jeune Afrique*, 26 February 1999. Original in French, unofficial translation.]

"White Helmets" too

Civilians are treated little better by ECOMOG soldiers than by Revolutionary United Front (RUF) rebels. [...] Since the beginning of the year, ECOMOG

members have repeatedly attacked, raped, beaten and summarily executed civilians alleged to be rebels or rebel sympathizers. This was disclosed in an unpublished United Nations report presented by the Secretary-General, Kofi Annan, to a closed meeting of the Security Council on 11 February. Although human rights violations by ECOMOG and the civil defence forces [...] have not matched the scale of the RUF's campaign of terror, they are nonetheless, as the text underlines, "totally unacceptable." The report came from the United Nations Observer Mission in Sierra Leone [UNOMSIL, which was succeeded by UNAMSIL in October 1999], which was sent by the Security Council to Sierra Leone in June 1998 [...]. The United Nations observers, who collected eyewitness accounts from around 100 people in Freetown, also report ECOMOG's mishandling of civilians at checkpoints. People suspected of rebel allegiance - including women and children - are stripped naked in public and sometimes whipped. Several witnesses said that they saw Nigerian soldiers execute three people after cursory questioning. Similarly, an eight-year-old boy spotted holding a gun that he had picked up off the ground was shot down on the spot. Witnesses also claimed that ECOMOG had shot women and children without any kind of trial and, on 12 January, killed around 20 patients at Connaught Hospital in Freetown. The same report claims that [...] Nigerian soldiers indiscriminately shelled working-class districts, deliberately opened fire on civilians being used by the rebels as human shields and mistreated humanitarian staff - notably from the Red Cross - who were trying to assist people. The Nigerian General Timothy Shelpidi, who is in charge of the West African contingent of 15,000 men, most of whom are Nigerians, initially denied the facts before admitting, on 17 February, that around 100 of his men had been placed in custody pending questioning in connection with atrocities committed against the civilian population. [...] Since RUF combatants infiltrated Freetown in January, humanitarian organizations have reported witnessing several cases of what were clearly "punitive raids" organized by ECOMOG soldiers and carried out under the indifferent gaze or even with the approval of their superior officers. [...] When things are relatively calm, the soldiers of the West African force - comprising contingents from Nigeria, Ghana and Guinea - hold the civilian population to ransom. When hostilities begin, they behave like a gang of ruffians.

C. Analysis of the humanitarian situation in Sierra Leone

[**Source:** PRATT David, *Sierra Leone: Danger and Opportunity in a Regional Conflict. Report to Canada's Minister of Foreign Affairs*, July 27, 2001.]

[...]

The Humanitarian Situation

The general humanitarian situation in Sierra Leone is serious and likely to get worse before it gets better. Officially, the humanitarian community is dealing with a caseload of over 4000,000 IDPs, but this represents only a small proportion of the total. Estimates of IDPs living on their own or with host families run as high as two million, almost half the population. [...] The caseload for humanitarian

agencies has risen since the fighting in Guinea. As of September 2000, an estimated 57,000 Sierra Leonean refugees have returned to the country, although not to their areas of origin. The actual numbers may be much higher.

The organized camps and host communities in which IDPs live are crowded and unsanitary. Morbidity and mortality rates are high, shelter and all forms of infrastructure are abysmal, food rations are inadequate and many people are now in their tenth year of exile from their homes. [...] UN agencies and NGOs work with the most rudimentary budgets to provide food, shelter, emergency health services, child protection, tracing assistance and other services.

People desperately want to go home, and as new areas are declared "safe", this will begin to present new problems. Once an area is declared safe, it is intended that IDPs will be resettled and their food allowance will stop. [...]

In the immediate future, therefore, the demand for food assistance will remain high regardless of weather people return home or not. If they do, shelter will be one of the most serious problems with an estimated 80 per cent of housing damaged or destroyed in rebel-controlled areas. The Office for the Coordination of Humanitarian Affaires (OCHA) estimates that out of 439,000 farming households nationwide, 331,200 are vulnerable and require emergency agricultural assistance.

One of the biggest short-term requirements will be assistance for the building or rebuilding of heath infrastructure. Health services are poor or non-existent in large parts of the country and even hospitals in major towns outside rebel-held areas are seriously under-equipped. [...]

Progress in the peace process may give the impression that the humanitarian situation is easing. With the onset of the rainy season and the possible return of more than 100,000 refugees from Guinea, however, the situation is likely to become much worse through 2001. In fact the refugee situation in Guinea remains precarious. Cote d'Ivoire has also been affected. In mid-June 2001, some 2,000 new Liberian refugees arrived at Danane near the Liberian border. [...]

D. Violations of International Humanitarian Law in Liberia

[**Source:** *Liberia: Killings torture and rape continue in Lofa County*, Amnesty International, London, 1 August 2001; AI Index: AFR 34/008/2001; available on http://www.amnesty.org]

Liberia: Killings, torture and rape continue in Lofa County

Introduction

Widespread and gross abuses against unarmed civilians, including women and children, continue unabated in Lofa County, the northern region of Liberia bordering Guinea and Sierra Leone. There has been armed conflict in the area since renewed incursions by armed opposition groups into Lofa County from Guinea in July 2000. Hundreds of civilians have been victims of killings, arbitrary detention, torture and rape and the number of civilians fleeing fighting - estimated to be tens of thousands - has now reached an unprecedented level.

Testimonies and reports gathered by Amnesty International suggest that since late April 2001, government security forces, especially the Anti-Terrorist Unit (ATU), a special military unit [...], have extrajudicially executed, arbitrarily detained or tortured - including by the rape of women and girls - more than 200 civilians suspected of supporting armed opposition groups. Civilians fleeing Lofa County have often been prevented from moving to safer areas by the security forces, on suspicion that dissidents were among them.

Armed opposition combatants, reportedly based in Guinea and belonging to the Liberians United for Reconciliation and Democracy (LURD), have also been responsible for abuses in recent months. They have reportedly carried out summary executions, torture and rape of civilians suspected of collaborating with the Liberian security forces. [...]

E. Violations of International Humanitarian Law in Guinea

[**Source:** in *Fraternité Matin*, Abidjan, 2 October 2000. Original in French, unofficial translation.]

Guinea: 70 die in series of armed attacks on Liberian and Sierra Leonean borders

A police source in Conakry has reported that almost 70 people were killed in two "rebel" attacks carried out on Friday and Saturday in south-west and south-east Guinea. According to the police, some 60 people were killed in one "rebel" attack in N'delenou, a village near Macenta (south-east Guinea) near the Liberian border, in the night from Friday to Saturday. And according to information from a spokesman for the President of the Republic of Guinea, about 10 people were killed in an attack on Farmoreya [...] (in south-west Guinea) close to the Sierra Leone border on Saturday. The fighting in Farmoreya was "particularly vicious", the spokesman said, adding that the Guinean army was immediately dispatched to the area and succeeded in "restoring order" in the course of the afternoon. "Calm now reigns", he said. "But the attackers, who came from Sierra Leone, devastated the sub-prefecture, lighting many fires." [...] Most of the victims were civilians, the spokesman said, but at least three members of the Guinean armed forces were also reported to have been killed and several others wounded. [...]

DISCUSSION

1. Are the abuses listed in these documents banned by International Humanitarian Law (IHL)? Are they also criminalised? Can we talk about crimes against humanity? About genocide? Are the facts described criminalised in the same way in the law of international armed conflicts and that of non-international armed conflicts? Is this distinction of importance for the qualification of crimes against humanity and genocide?

2. Are these bans and/or this criminal liability part of customary law or conventional law?

3. In this instance, do the aerial attacks by the government violate IHL? What measures should be taken before launching an attack? Is dropping pamphlets sufficient? Can the rebels be held (partially) accountable? What does IHL say about "human shields"? (*Cf.* Art. 28 of Convention IV; Arts. 51, 57 and 58 of Protocol I and Art. 8 of the Statute of the ICC, *See* **Case No. 15**. p. 608.)

4. What does IHL say about "child soldiers"? What is the age limit for recruitment into the armed forces? Are there any specific provisions in IHL that protect all children? Is there a ban on killing a child even if it is carrying weapons? And if the child is part of an armed group and openly carrying weapons? (*Cf.* Art. 77 of Protocol I; Art. 4 of Protocol II; the 1989 Convention on the Rights of the Child and **Document No. 16**, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000. p. 636 and the ILO Convention No. 182, available on http://www.ilo.org; Art. 8 of the Statute of the ICC.)

5. Are the abuses inflicted on the Red Cross humanitarian personnel banned/ criminalized? Does the Red Cross personnel benefit from additional protection in comparison to the other humanitarian workers? (*Cf.* Arts. 9/9/9/10 respectively of the four Conventions; Art. 122 of Convention III; Art. 142 of Convention IV; Arts. 8, 17, 18, 38, 71 and 81 of Protocol I and Arts. 9, 12 and 18 of Protocol II.)

6. What is the difference between the "internally displaced" and refugees? Are they protected by IHL? Are the camps of internally displaced persons and refugees specifically protected? What if they shelter members of armed groups? Do the internally displaced and refugees have a specific right to humanitarian aid? What obligations do the parties to the conflict have in regards to them? May civilians be prevented from fleeing the conflict? May they be forced to do so? (*Cf.* Arts. 44 and 48 of Convention IV; Arts. 58 and 73 of Protocol I and Art. 17 of Protocol II.)

7. Is the destruction of a sub-prefecture by Sierra Leonean rebels banned/ criminalised by IHL? Is it a military objective? What are the criteria of the definition of military objective? Is it applicable in cases of non-international armed conflicts? Is this latter qualification possible although borders were crossed in this case? (*Cf.* Art. 52 of Protocol I.)

3. Towards repression and reconciliation

A. Statute of the Special Court for Sierra Leone

[**Source:** United Nations, S/2000/915, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000; available on http://www.un.org]

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2: Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3: Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4: Other serious violations of international humanitarian law

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

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

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5: Crimes under Sierra Leonean law [...]

Article 6: Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires. [...]

Article 7: Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.
2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.
3. In a trial of a juvenile offender, the Special Court shall:
   (a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;
   (b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8: Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.
2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9: *Non bis in idem*

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.
2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:
   (a) The act for which he or she was tried was characterized as an ordinary crime; or
   (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution. [...]

B. Eleventh Report of the Secretary General on the United Nations Mission in Sierra Leone

[**Source:** United Nations, S/2001/857, *Eleventh report of the Secretary-General on the United Nations Mission in Sierra Leone*, 7 September 2001; available on http://www.un.org]

[...]

Truth and Reconciliation Commission

44. UNAMSIL continued to engage the RUF leadership on the issue of the Truth and Reconciliation Commission. A sensitization campaign in the Northern Province was launched at Makeni on 2 August 2001. In general, RUF appears receptive to the Truth and Reconciliation Commission. Nevertheless, they express concern over the independence of the Commission and the relationship between it and the Special Court.

45. On 1 August 2001, the United Nations High Commissioner for Human Rights addressed a letter to potential donors with a preliminary budget and information on the Truth and Reconciliation Commission. According to the initial estimates, the first year of operation of the Commission would cost approximately $10 million. Currently, the Office of the High Commissioner is working with UNAMSIL to revise the preliminary budget prior to the formal launching of a special appeal by the High Commissioner. The High Commissioner is also considering the establishment of an interim secretariat for the Truth and Reconciliation Commission, which will initially function under the auspices of UNAMSIL. In the meantime, the selection process of international commissioners has made progress. The High Commissioner will soon forward her recommendations to the selection panel. Regarding the national commissioners, the Advisory Committee to the Special Representative of the Secretary-General met recently and submitted a shortlist of nominees for his consideration.

Special Court

46. Following the exchange of communications between the Secretary-General and the Security Council (S/2001/693 and S/2001/722), in which the Council concurred with the recommendation to commence the operation of the Special Court, the Secretariat, on 23 July 2001, sent a letter to the countries that had made pledges for the first year of operation of the Special Court, and requested that they deposit their contributions with the United Nations within 30 days. Of a total amount pledged of $15,492,500, only a third had been received by the end of the 30-day period.

47. When sufficient contributions have been received to permit the operation of the Trust Fund, the Secretariat will dispatch a planning mission to Sierra Leone to discuss with the Government the practical arrangements for the establishment of the Special Court. [...]

48. The Revolutionary United Front has indicated that, while it will not stand in the way of the Court's establishment, it expects that the Court will be impartial and that it will try all those who have been accused of atrocities

during the period in question, not only members of RUF. The Government, for its part, has continued to express its full support for the Court. However, on 20 August the Government sent a letter to the Legal Counsel of the United Nations in which it requested that the temporal jurisdiction of the Court be extended to cover the period since March 1991, when the conflict started. The draft statute and the draft agreement had provided that the temporal jurisdiction would begin on 30 November 1996.

C. Balancing peace and justice in Sierra Leone

[**Source:** PARLEVLIET Michelle, "Truth Commissions in Africa: the Non-case of Namibia and the Emerging Case of Sierra Leone", in *International Law Forum*, vol. 2, No. 2, 2000; footnotes omitted.]

Balancing peace and justice in Sierra Leone

[...] [T]he Lomé Peace Agreement in July 1999 [...] granted free and absolute pardon and reprieve from prosecution to the leader of the RUF, Foday Sankoh. [...] It also provided for the establishment of a truth and Reconciliation Commission to address impunity, break the cycle of violence, establish what happened and provide a forum for those affected and involved to tell their stories. [...] [T]he amnesty provision has been widely criticised. Even the UN seemed [...] embarrassed about it: when signing the Agreement, Francis Okelo, the Secretary-General's Special Representative for Sierra Leone, added a disclaimer that the UN did not consider the amnesty to be applicable to genocide, crimes against humanity, war rimes and other serious violations of international humanitarian law. [...]

The Office of the United Nations High Commissioner for Human Rights (UNOHCHR) has played a pivotal role [...]. It is the first time that the UNHCHR has been so closely involved in setting up a truth commission. [...] The office [of the High Commissioner Mary Robinson] assisted in preparing the legislation for the Commission. [...]

In February [2000], the Parliament of Sierra Leone adopted the *Truth and Reconciliation Commission Act*. [...] The objectives of the Commission [are]: "to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict; to address impunity; to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered" The period under investigation is from the beginning of the war in March 1991 to the signing of the Lomé Agreement. [...]

It is the first time that a truth commission mandate explicitly refers to "violations of international humanitarian law". This was probably done to ensure that acts by state actors as well as non-state actors fall within the mandate of the Commission. [...]

It [...] remains to be seen whether the TRC will be able to draw in perpetrators to any large extent. No immediate incentive exists for them to participate in the process given the blanket amnesty already granted. [...]

D. The Amnesty Clause in the Lomé Peace Agreement

[**Source:** United Nations, S/2000/915, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000; available on http://www.un.org]

[...]

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution." [...]

DISCUSSION

1. What are the differences between the Special Court for Sierra Leone, the *ad-hoc* international criminal tribunals for the former Yugoslavia and Rwanda and the International Criminal Court?

2. Is the tribunal's lack of jurisdiction over crimes committed before the 30 September 1996 acceptable? Does Article 1 of the Statute of the Tribunal put an end to all possibility of prosecution of serious violations committed before this date? Will the International Criminal Court be able to judge the suspected authors of these crimes? Is there a statute of limitation for breaches of IHL? (*Cf.* United Nations 1968 Convention available on http://www.icrc.org/ihl and Arts. 11 and 29 of the ICC Statute, *see* **Case No. 15**. p. 608.)

3. Article 2 on crimes against humanity uses the term "widespread or systematic attack", when the French version uses the term "attaque généralisée et systématique". Article 7 of the Statute of the International Criminal Court adopted the term "widespread or systematic attack". Does this difference change the reach of this provision? Is one version preferable to the other?

4. Is Article 4 (c) of the Statute designed for children who willingly took up weapons? Is the voluntary enrolment of children under the age of 15 legal? What does Article 3 of the 25 Mai 2000 Optional Protocol to the Convention on the Rights of the Child concerning involvement of Children in armed Conflicts say about this (See **Document No. 16**, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000. p. 636.)?
5. Is the tribunal competent to judge foreign forces (Liberian, Nigerian or others) who committed violations on the territory of Sierra Leone? Does it have jurisdiction to prosecute crimes committed for example by the RUF in Guinea?
6. If Foday Sankoh (deceased in July 2003) had to appear before the court, would he have been able to invoke the amnesty afforded to him in the 1999 Lomé Agreement? Is an amnesty acceptable in IHL? (*Cf.* Art. 6 of Protocol II.)
7. Is it not contradictory to have at the same time a Truth and Reconciliation Commission and a Special Court? How could the two interact? How do you decide who should go before the tribunal and who be heard by the Commission?
8. What differences are there between the "violations of IHL" mentioned by the Truth and Reconciliation Commission Act and the "war crimes" or the "grave braches of IHL" which are excluded from the amnesty?

Case No. 225, Sierra Leone, Special Court Ruling on Immunity for Taylor

THE CASE

[**Source:** Special Court for Sierra Leone, *Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction*, 31 May 2004, available on Decision http://www.sc-sl.org]

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice George Gelaga King
Justice Renate Winter

Registrar: Robin Vincent
Date: 31 May 2004

PROSECUTOR Against CHARLES GHANKAY TAYLOR

Case Number SCSL-2003-01-I

DECISION ON IMMUNITY FROM JURISDICTION [...]

I. INTRODUCTION: PROCEDURAL AND FACTUAL HISTORY

1. This is an application by Mr. Charles Taylor, the former President of the Republic of Liberia, to quash his Indictment and to set aside the warrant for his arrest on the grounds that he is immune from any exercise of the

jurisdiction of this court. The Indictment and arrest warrant were approved by Judge Bankole Tompson on 7 March 2003, when Mr. Taylor was Head of State of Liberia. At the request of the Prosecutor on 4 June 2003, they were transmitted to the appropriate authorities in Ghana, where Mr Taylor was visiting, but proved ineffective to secure his apprehension. [...]

3. Mr. Taylor was elected President of the state of Liberia in 1997. [...]

4. Mr Taylor remained Head of State until August 2003, his tenure of office covering most of the period over which the Special Court has temporal jurisdiction, pursuant to its mandate to try those primarily responsible for the war crimes and crimes against humanity that were committed in Sierra Leone since 30 November 1996.

5. The Indictment against Mr. Taylor contains seventeen counts. It accuses him of the commission of crimes against humanity and grave breaches of the Geneva Conventions, with intent "to obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the state". It is alleged that he "provided financial support, military training, personnel, arms, ammunition and other support and encouragement" to rebel factions throughout the armed conflict in Sierra Leone. The counts variously accuse him of responsibility for "terrorizing the civilian population and ordering collective punishment", sexual and physical violence against civilians, use of child soldiers, abductions and force labour, widespread looting and burning of civilian property, and attacks on and abductions of UNAMSIL peacekeepers and humanitarian assistance workers. In short, the prosecution maintains that from an early stage and acting in a private rather than an official capacity he resourced and directed rebel forces, encouraging them in campaigns of terror, torture and mass murder, in order to enrich himself from a share in the diamond mines that were captured by the rebel forces.

II. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

6. The Applicant argues first that:

   a) Citing the judgment of the International Court of Justice ("ICJ") in the case between the *Democratic Republic of Congo v Belgium* ("*Yerodia case*", [See **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium. p. 2257.]) incumbent Head of State at the time of his indictment, Charles Taylor enjoyed immunity from criminal prosecution;

   b) Exceptions from diplomatic immunities can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter ("UN Charter");

   c) The Special Court does not have Chapter VII powers, therefore judicial orders from the Special Court have the quality of judicial orders from a national court;

   d) The indictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution. [...]

7. The Applicant also puts forward a second argument that:
   a) Citing the *Lotus* case [Available on http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_10/30_Lotus_Arret.pdf] the principle of sovereign equality prohibits one state from exercising its authority on the territory of another.
   b) Exceptionally, a state may prosecute acts committed on the territory of another state by a foreigner but only where the perpetrator is present on the territory of the prosecuting state.
   c) The Special Court's attempt to serve the Indictment and arrest warrant on Charles Taylor in Ghana was a violation of the principle of sovereign equality.
8. The Applicant seeks :
   a) Orders quashing the Indictment, arrest warrant and all consequential orders.
   b) Interim relief restraining the service of the Indictment and arrest warrant on Charles Taylor.

B. Prosecution Response

9. The Prosecution submits in relation to the first argument of the Defence that: [...]
   d) The *Yerodia* case concerns the immunities of an incumbent Head of State from the jurisdiction of the courts of another state.
   e) Customary international law permits international criminal tribunals to indict acting Heads of State and the Special Court is an international court established under international law.
   f) The lack of Chapter VII powers does not affect the Special Court's jurisdiction over Heads of State. The International Criminal Court ("ICC"), which does not have Chapter VII powers, explicitly denies immunity to Heads of State for international crimes.
10. In response to the Applicant's second argument, the Prosecution asserts that:
   a) Charles Taylor has been indicted in accordance with Article 1 (1) of the Special Court Statute, for crimes committed in the territory of Sierra Leone and not the territory of another state.
   b) The transmission of documents to Ghanaian authorities could not violate the sovereignty of Ghana. [...]

I. Submissions of the *Amici Curiae*

(i) Professor Philippe Sands

17. [...] He concludes as follows:
   a) In respect of international courts, international practice and academic commentary supports the view that jurisdiction may be exercised over a serving Head of State in respect of international crimes. Particular reference may be had to the

Pinochet cases [See House of Lords.... available on http://www.publication.parliament.uk] and the *Yerodia* case.

b) In respect of national courts a serving Head of State is entitled to immunity even in respect of international crimes

c) The lawfulness of issuing an arrest warrant depends on the Court's powers and attributes and the legal basis upon which it was established. The Special Court is not part of the judiciary of Sierra Leone and is not a national court. Rather, it is an international court established by treaty with a competence and jurisdiction that is similar to the ICTY, ICTR and ICC, and it has the characteristics associated with classical international organisations.

d) There is nothing in the Special Court Agreement or Statute to prevent the Court from seeking to exercise jurisdiction over offences committed on the territory of Sierra Leone by the Head of State of Liberia.

e) The Special Court did not violate the sovereignty of Ghana by transmitting the arrest warrant for Taylor but Ghana was not obliged to give effect to such a warrant.

f) A former Head of State is not entitled to claim immunity ratione materiae before an international criminal court in respect of international crimes.

(ii) Professor Diane Orentlicher

18. [...]

a) In the *Yerodia* case, the ICJ distinguished the law applicable in the case of an attempt by a national court to prosecute the foreign minister of another state, from the rule embodied in the statutes of international criminal tribunals. For the purposes of the distinction between prosecutions before national and international criminal courts recognised by the ICJ and other authorities, the Special Court is an international court and may exercise jurisdiction over incumbent and former heads of state in accordance with its statute.

b) A distinction must be drawn between immunity *ratione personae* (procedural immunity) which attached to the status of certain incumbent officials and operates as a procedural bar to the exercise of jurisdiction over them by the courts of another state, and immunity *ratione materiae* (substantive immunity) which operates to shield from the scrutiny of domestic courts the official conduct of foreign state officials. Although substantive immunities shield the official conduct of heads of state after such persons cease to hold office, this type of immunity is not available in respect of the crimes for which Taylor has been indicted.

(iii) African Bar Association

19. The amicus brief of the African Bar Association raises a number of issues, the third of which, dealing with the question of the validity of the Indictment against Taylor, is relevant to this Preliminary Motion. Making reference to the case of United States of America v. Noriega [*See* **Case**

No. 134, US, US v. Noriega. p. 1399.], the *Pinochet* case, the *Milosevic* case [See http://www.un.org/icty], the 1993 World Conference of Human Rights and the Rome Statute of the ICC [*See* **Case No. 15**, The International Criminal Court. p. 608.]. The African Bar Association submits that Taylor enjoys no immunity for international crimes alleged to have been committed by him in Sierra Leone.

HEREBY DECIDES AS FOLLOWS:

III. CONSIDERATION OF THE MOTION

20. At the time of his indictment (7 March 2003) and of its communication to the authorities in Ghana (4 June 2003) and of this application to annul it (23 July 2003), Mr Taylor was an incumbent Head of State. As such, he claims entitlement to the benefit of any immunity asserted by that state against exercise of the jurisdiction of this Court. These bare facts raise the issue of law that we are called upon to decide, namely whether it was lawful for the Special Court to issue an indictment and to circulate an arrest warrant in respect of a serving Head of State. [...]

V. THE LEGAL BASIS OF THE SPECIAL COURT FOR SIERRA LEONE

35. The Special Court is established by the Agreement between the United Nations and Sierre Leone which was entered into pursuant to Resolution 1315 (2000) [See http://www.un.org] of the Security Council for the sole purpose of prosecuting persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone. [...]

VI. IS THE SPECIAL COURT AN INTERNATIONAL CRIMINAL TRIBUNAL?

37. Although the Special Court was established by treaty, unlike the ICTY and the ICTR which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone. Article 39 empowers the Security Council to determine the existence of any threat to the peace. In Resolution 1315, the Security Council reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.

38. Much issue had been made of the absence of Chapter VII powers in the Special Court. A proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court. It is manifest from the first sentence of Article 41, read disjunctively, that (i) The Security Council is empowered to "decide what measures not involving the use of armed force are to be employed to give effect

to its decision;" an (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures. The decisions referred to are decisions pursuant to Article 39. Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation. Its decision to do so in furtherance of Article 41, or Article 48, should subsequent events make that course prudent may be made subsequently to establishment of the court. It is to be observed that in carrying out its duties [...] under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.

39. By reaffirming in the preamble to Resolution 1315 "that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations that the *international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law*", it has been made clear that the Special Court was established to fulfil an international mandate and is part of the machinery of international justice.

40. We reaffirm, as we decided in the Constitutionality Decision that the Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone. This conclusion disposes of the basis of the submissions of counsel for the Applicant on the nature of the Special Court.

41. For the reasons that have been given, it is not difficult to accept and gratefully adopt the conclusions reached by Professor Sands who assited the court as *amicus curiae* as follows:

    a) The Special Court is not part of the judiciary of Sierra Leone and is not a national court.

    b) The Special Court is established by treaty and has the characteristics associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).

    c) The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of ICTY and the ICTR and the ICC, including in relation to the provisions confirming the absence of entitlement of any person to claim of immunity.

    d) Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State.

42. We come to the conclusion that the Special Court is an international criminal court. The constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable.

VII. THE SPECIAL COURT AND JURISDICTIONAL IMMUNITY [...]

44. Article 6(2) of the Statute provides as follows:

> The official position of any accused persons, whether as Head of State or Government or as responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.

45. Article 6(2) is substantially in the same terms as Article 7(2) of the Statute of the ICTY and Article 6(2) of the Statute of the ICTR. Article 27(2) of the Statute of the International Criminal Court (ICC) [*See* **Case No. 15**, The International Criminal Court [*Cf.* A., The Statute, Art. 27.] p. 608.] which entered into force on 1 July 2002 provides that:

46. A forerunner of Article 6(2) of the Statute and of similar provisions in the Statutes of the ICTY, ICTR and ICC is Article 7 of the Charter of the International Military Tribunal ("the Nuremberg Charter") which provides that:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

47. The General Assembly by resolution 177(II) directed the International Law Commission to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal". The International Law Commission proceeded in carrying out the directive on the footing that the General Assembly had already affirmed the principles recognized in the Nuremberg Charter and in the Judgment of the Tribunal and that what it was required to do was merely to formulate them. On that basis it formulated a provision from Article 7 of the Nuremberg Charter, Principle III as follows:

> The fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under international law.

As long ago as 12 December 1950 when the General Assembly accepted this formulation of the principle of international law by the International Law Commission, that principle became firmly established. [...]

50. More recently in the Yerodia case, the International Court of Justice upheld immunities in national courts even in respect of war crimes and crimes against humanity relying on customary international law. That court, after carefully examining "state practice, including national legislation and those few decisions of national higher courts such as the House of Lords or the French Court of Cassation", stated that it "has been unable to deduce from this

practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign affairs, where they are suspected of having committed war crimes or crimes against humanity". It held:

> although various international conventions on the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.

But in regard to criminal proceedings before "certain international criminal courts", it held:

> an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts*, where they have jurisdiction. Examples include the International Criminal tribunal for the former Yugoslavia and the International Criminal tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's statute expressly provides, in Article 27, paragraph 2, that "(I) immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person."

51. A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from international community. Another reason is as put by Professor Orentlicher in her *amicus* brief that:

> states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.

52. Be that as it may, the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. We accept the view expressed by Lord Slynn of Hadley that

> "there is ... no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before international tribunals." [footnote 45: See R v. Bartle and the Commissioner of Police for the Metropolis and others, *Ex Parte* Pinochet, House of Lords, 25 November 1998 [Available on http://www.publications.parliament.uk.]

53. In this result the Appeals Chamber finds that Article 6(2) of the Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect by this court. We hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. The Applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone. [...]

57. Finally, the Applicant contended that the issue of the arrest warrant and its transmission to Ghana was an infringement of the sovereignty of Ghana. That issue should properly be raised by Ghana rather than the Applicant and the forum which Ghana has for raising the issue, if it so decides, is not the Special Court which is a court of criminal proceedings against individuals. It must be observed that a warrant of arrest transmitted by one country to another is not self-executing. It still requires the co-operation and authority of the receiving state for it to be executed. Other than a situation in which the receiving state has an obligation under Chapter VII of the United Nations Charter or a treaty obligation to execute the warrant, the receiving authority has no obligation to do so. That state asserts its sovereignty by refusing to execute it. [...]

VII. DISPOSITION

60. For the reasons we have given this Motion must be dismissed.

Done at Freetown this thirty-first day of May 2004

Justice Ayoola
Justice King
Justice Winger

Presiding

DISCUSSION

1. What are the differences between the Special Court for Sierra Leone, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court? Do you consider that the Special Court for Sierra Leone is an international court?

2. a. If the Special Court for Sierra Leone were considered as a national court, would it be impossible for it to prosecute an incumbent head of state? Why? What about a former head of state? And if this head of state were found on the territory of Sierra Leone?

   b. Do you believe that it is sufficient to only allow international courts, lawfully established by the international community, to prosecute persons who have a personal immunity for war crimes and crimes against humanity? Or do you think that national courts should also have the right to exercise their universal jurisdiction, even against a head of state? What would be the inconveniences of such a right?

3. a. Does the obligation to prosecute the grave breaches of International Humanitarian Law exist also for persons who have a personal immunity, such as a head of state? Does this obligation concern only international tribunals? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions.)

   b. Is there a contradiction between the obligation to prosecute and the personal immunities provided by international law? If there is a contradiction between two rules, which one prevails? The rule which belongs to *ius cogens*? If any, which of the two above mentioned rules belongs to *ius cogens*? (*Cf.* Art. 1 common to the Conventions; Arts. 49/50/129/146 and 51/52/131/148 respectively of the four Conventions.)

4. Are the Ghanaian authorities obliged to execute an arrest warrant issued by an international court such as the Special Court for Sierra Leone? If not, what could oblige Ghana to execute this arrest warrant? A Security Council Resolution? What if an arrest warrant is issued by the International Criminal Court? An *ad-hoc* tribunal such as the International Criminal Tribunal for Rwanda? A national court? Does International Humanitarian Law imply an obligation to execute an arrest warrant against a person prosecuted for war crimes? To extradite such person? (*Cf.* Arts. 49/50/129/146 respectively of the four Conventions and Art. 88 of Protocol I.)

Case No. 226, Sierra Leone, Special Court Ruling on the Recruitment of Children

THE CASE

[**Source:** Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction*, 31 May 2004, available on http://www.sc-sl.org]

SPECIAL COURT FOR SIERRA LEONE

PROSECUTOR Against SAM HINGA NORMAN

DECISION ON PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (CHILD RECRUITMENT)

[...]

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("the Special Court");

SEIZED of the Defence Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, filed on 26 June 2003 ("Preliminary Motion") on behalf of Sam Hinga Norman ("Accused"); [...]

1. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

1. The Defence raises the following points in its submissions:

   a) The Special Court has no jurisdiction to try the Accused for crimes under Article 4(c) of the Statute (as charged in Count 8 of the

Indictment) prohibiting the recruitment of children under 15 "into armed forces or groups or using them to participate actively in hostilities" since the crime of child recruitment was not part of customary international law at the times relevant to the Indictment.

b) Consequently, Article 4(c) of the Special Court Statute violates the principle of *nullum crimen sine lege*.

c) While Protocol II Additional to the Geneva Conventions of 1977 and the Convention of the Rights of the Child of 1990 may have created an obligation on the part of States to refrain from recruiting child soldiers, these instruments did not criminalise such activity.

d) The 1998 Rome Statute of the International Criminal Court criminalises child recruitment but it does not codify customary international law.

The Defence applies for a declaration that the Court lacks jurisdiction to try the Accused on Count 8 of the Indictment against him.

B. Prosecution Response

2. The Prosecution submits as follows:

a) The crime of child recruitment was part of customary international law at the relevant time. The Geneva Conventions established the protection of children under 15 as an undisputed norm of international humanitarian law. The number of states that made the practice of child recruitment illegal under their domestic law and the subsequent international conventions addressing child recruitment demonstrate the existence of this customary international norm.

b) The ICC Statute codified existing customary international law.

c) In any case, individual criminal responsibility can exist notwithstanding lack of treaty provisions specifically referring to criminal liability in accordance with the Tadic case [See **Case No. 180**, ICTY, The Prosecutor v. Tadic. p. 1804.]

d) The principle of *nullum crimen sine lege* should not be rigidly applied to an act universally regarded as abhorrent. The question is whether it was foreseeable and accessible to a possible perpetrator that the conduct was punishable.

C. Defence Reply

3. The Defence submits in its Reply that if the Special Court accepts the Prosecution proposition that the prohibition on the recruitment of child soldiers has acquired the status of a crime under international law, the Court must pinpoint the moment at which this recruitment became a crime in order to determine over which acts the Court has jurisdiction. Furthermore, the Defence argues, a prohibition under international law does not necessarily entail criminal responsibility.

D. Prosecution Additional Submissions

4. The Prosecution argues further that:

a) In international law, unlike in a national legal system, there is no Parliament with legislative power with respect to the world as a whole.

Thus, there will never be a statute declaring conduct to be criminal under customary law as from a specified date. Criminal liability for child recruitment is a culmination of numerous factors which must all be considered together.

b) As regards the principle of *nullum crimen sine lege*, the fact that an Accused could not foresee the creation of an international criminal tribunal is of no consequence, as long as it was foreseeable to them that the underlying acts were punishable. The possible perpetrator did not need to know the specific description of the offence. The dictates of the public conscience are important in determining what constitutes a criminal act, and this will evolve over time.

c) Alternatively, individual criminal responsibility for child recruitment had become established by 30 April 1997, the date on which the "Capetown Principles" were adopted by the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, which provides that "those responsible for illegally recruiting children should be brought to justice".

d) Alternatively, individual criminal responsibility for child recruitment had become established by 29 June 1998, the date on which the President of the Security Council condemned the use of child soldiers and called on parties to comply with their obligations under international law and prosecute those responsible for grave breaches of international humanitarian law.

e) Alternatively, individual criminal responsibility for child recruitment had become established by 17 July 1998 when the ICC Statute was adopted. [...]

F. Submissions of the *Amici Curiae*

University of Toronto International Human Rights Clinic and interested Human Rights Organisations

6. The University of Toronto International Human Rights Law Clinic sets out its arguments as follows:

a) In invoking the principle *nullum crimen sine lege*, the Defence assumes a clear distinction between war crimes and violations of international humanitarian law, and that only the former may be prosecuted without violating this principle. This premise is false and the jurisprudence supports the ability to prosecute serious violations of international humanitarian law. [...]

c) Since child recruitment can attract prosecution by violating laws against, for example, kidnapping, it is overly formalistic to characterise regulation of military recruitment as merely restricting recruitment rather than prohibiting or criminalising it.

d) International resolutions and instruments expressing outrage at the practice of child recruitment since 1996 demonstrate acceptance of the prohibition as binding.

e) International humanitarian law permits the prosecution of indivicuals for the commission of serious violations of the laws of war, irrespective of whether or not they are expressly criminalised, and this is confirmed in international jurisprudence, state practice, and academic opinion.

f) The prohibition on recruitment of children is contained in the "Fundamental Guarantees" of Additional Protocol II and the judgments of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") provide compelling evidence that the violation was a pre-existing crime under customary international law.

g) The principle of *nullum crimen sine lege* is meant to protect the innocent who in good faith believed their acts were lawful. The Accused could not reasonably have believed that his acts were lawful at the time they were committed and so cannot rely on *nullum crimen sine lege* in his defence.

UNICEF

7. UNICEF presents its submissions along the following lines:

a) By 30 November 1996, customary international law had established the recruitment or use in hostilities of children under 15 as a criminal offence and this was the view of the Security Council when the language of Article 4(c) of the Statute was proposed. While the first draft of the Special Court Statute referred to "abduction and forced recruitment of children under the age of fifteen", the language in the final version was found by the members of the Security Council to conform to the statement of the law existing in 1996 as currently accepted by the international community. [...]

h) The prohibition of child recruitment which was included in the two Additional Protocols and the CRC has developed into a criminal offence. The ICTY Statute provides, and its jurisprudence confirms, that breaches of Additional Protocol, I [Sic] lead to criminal sanctions and the ICTR status recognised that criminal liability attaches to serious violations of Additional Protocol II. The Trial Chamber in the ICTR case of Akayesu [See **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A.] p. 2171.] confirmed the view that in 1994 "serious violations" of the fundamental guarantees contained within Additional Protocol II to the Geneva Conventions were subject to criminal liability and child recruitment shares the same character as the violations listed therein. [...]

HEREBY DECICES:

II. DISCUSSION

Under Article 4 of its Statute, the Special Court has the power to prosecute persons who committed serious violations of international humanitarian law including:

c. Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ("child recruitment").

The original proposal put forward in the Secretary-General's Report on the establishment of the Special Court referred to the crime of "abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities", reflecting some uncertainty as to the customary international law nature of the crime of conscripting or enlisting children as defined in the Rome Statute of the International Criminal Court and mirrored in the Special Court Statute. The wording was modified following a proposal by the President of the Security Council to ensure that Article 4(c) conformed "to the statement of the law existing in 1996 and as currently accepted by the international community". The question raised by the Preliminary Motion is whether the crime as defined in Article 4(c) of the Statute was recognised as a crime entailing individual criminal responsibility under customary international law at the time of the acts alleged in the indictments against the accused.

9. To answer the question before this Court, the first two sources of international law under Article 38(1) of the Statute of the International Court of Justice ("ICJ") have to be scrutinized:

   1) international conventions, whether general or particular, establishing rules especially recognized by the contesting states
   2) international custom, as evidence of a general practice accepted as law [...]

A. International Conventions

10. Given that the Defence does not dispute the fact that international humanitarian law is violated by the recruitment of children, it is not necessary to elaborate on this point in great detail. Nevertheless, the key words of the relevant international documents will be highlighted in order to set the stage for the analysis required by the issues raised in the Preliminary Motion. It should, in particular, be noted that Sierra Leone was already a State Party to the 1949 Geneva Conventions and the two Additional Protocols of 1977 prior to 1996.

1) Fourth Geneva Convention of 1949

11. This Convention was ratified by Sierra Leone in 1965. As of 30 November 1996, 187 States were parties to the Geneva Conventions. The pertinent provisions of the Conventions are as follows: [*See* Arts. 14, 24 and 51, available on http://www.icrc.org/ihl] [...]

2) Additional Protocols I and II of 1977

12. Both Additional Protocols were ratified by Sierra Leone in 1986. Attention should be drawn to the following provisions of Additional Protocol I: [*See* Arts. 77(2), (3) and (4) available on http://www.icrc.org/ihl]

13. 137 States were parties to Additional Protocol II as of 30 November 1996. Sierra Leone ratified Additional Protocol II on 21 October 1986. The key

provision is Article 4 entitled "fundamental guarantees" which provide in relevant part: [See Arts. 4 (3) (c) available on http://www.icrc.org/ihl] [...]

3) Convention on the Rights of the Child of 1989

14. The Convention entered into force on 2 September 1990 and was on the same day ratified by the Government of Sierra Leone. In 1996, all but six states existing at the time had ratified the Convention. The CRC recognizes the protection of children in international humanitarian law and also requires States Parties to ensure respect for these rules by taking appropriate and feasible measures.

15. On feasible measures:

Article 38

[See **Quotation**, *supra* p. 177].

16. On general obligations of States

Article 4

States Parties shall undertake **all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention**. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

B. Customary International Law

17. Prior to November 1996, the prohibition on child recruitment had also crystallised as customary international aw. The formation of custom requires both state practice and a sense of pre-existing obligation *(opinio iuris)*. "An articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without opinion iuris, is just habit."

18. As regards state practice, the list of states having legislation concerning recruitment or voluntary enlistment clearly shows that almost all states prohibit (and have done so for a long time) the recruitment of children under the age of 15. Since 185 states, including Sierra Leone, were parties to the Geneva Conventions prior to 1996, it follows that the provisions of those conventions were widely recognised as customary international law. Similarly, 133 states, including Sierra Leone, ratified Additional Protocol II before 1995. Due to the high number of States Parties one can conclude that many of the provisions of Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996. Even though Additional Protocol II addresses internal conflicts, the ICTY Appeals Chamber held in Prosecutor v Tadic that "it does not matter whether the 'serious violations' has occurred within the context of an international or an internal armed conflict". This means that children are protected by the

fundamental guarantees, regardless of whether there is an international or internal conflict taking place.

19. Furthermore, as already mentioned, all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance, the highest acceptance of all international conventions, clearly shows that the provisions of the CRC became international customary law almost at the time of the entry into force of the Convention.

20. The widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the CRC underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance.

21. **The African Charter on the Rights and Welfare of the Child**, adopted the same year as the CRC came into force, reiterates with almost the same wording the prohibition of child recruitment:

Article 22(2): Armed Conflicts

2. States Parties to the present Charter shall take necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.

22. As stated in the Toronto Amicus Brief, and indicated in the 1996 Machel Report, it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws. It has also been pointed out that non-state entities are bound by necessity by the rules embodied in international humanitarian law instruments, that they are "responsible for the conduct of their members" and may be "held so responsible by opposing parties or by the outside world". Therefore all parties to the conflict in Sierra Leone were bound by the prohibition of child recruitment that exists in international humanitarian law.

23. Furthermore, it should be mentioned that since the mid-1980s, states as well as non-state identities started to commit themselves to preventing the use of child soldiers and to ending the use of already recruited soldiers.

24. The central question which must now be considered is whether the prohibition on child recruitment also entailed individual criminal responsibility at the time of the crimes alleged in the indictments.

C. *Nullum Crimen Sine Lege, Nullum Crimen Sine Poena*

25. it is the duty of this Chamber to ensure that the principle of non-retroactivity is not breached. As essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered. In the ICTY case of *Prosecutor v Hadzihasanovic*, it was observed that "In interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The Emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance." In other words it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable". As has been shown in the previous sections, child recruitment was a violation of conventional and customary international humanitarian law by 1996. But can it also be stated that the prohibited act was criminalised and punishable under international or national law to an extent which would show customary practice?

26. In the ICTY case of *Prosecutor v. Tadic*, the test for determining whether a violation of humanitarian law is subject to prosecution and punishment is set out thus:

    The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3 [of the ICTY Statute];

    (i) the violation must constitute an infringement of a rule of international humanitarian law;
    (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
    (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];
    (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

1. International Humanitarian Law

27. With respect to points i) and ii), it follows from the discussion above, where the requirements have been addressed exhaustively, that in this regard the test is satisfied.

2. Rule Protecting Important Values

28. Regarding point iii), all the conventions listed above deal with the protection of children and it has been shown that this is one of the fundamental guarantees articulated in Additional Protocol II. The Special Court Statute, just like the ICTR Statute before it, draws on Part II of Additional Protocol II entitled "Humane Treatment" and its fundamental guarantees, as well as Common Article 3 to the Geneva Conventions in specifying the crimes falling within its jurisdiction. "All the fundamental guarantees share a similar character. In recogninsing them as fundamental, the international community set a benchmark for the minimum

standards for the conduct of armed conflict." Common Article 3 requires humane treatment and specifically addresses humiliating and degrading treatment. This includes the treatment of child soldiers in the course of their recruitment. Article 3(2) specifies further that the parties "should further endeavour to bring into force [...] all or part of the other provisions of the present convention", thus including the specific protection for children under the Geneva Conventions as stated above. [...]

3. Individual Criminal Responsibility

30. Regarding point iv), the Defence refers to the Secretary-General's statement that "while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognised as a war crime entailing the individual criminal responsibility of the accused." The ICTY Appeals Chamber upheld the legality of prosecuting violations of the laws and customs of war, including violations of Common Article 3 and the Additional Protocols in the *Tadic* case in 1995. [...]

32. In 1998 the Rome Statute for the International Criminal Court was adopted. It entered into force on 1 July 2002. Article 8 includes the crime of child recruitment in international armed conflict [footnote 50: Article 8(2)(b)(xxvi) [*See* **Case No. 15**, The International Criminal Court. p. 608.]] and internal armed conflict [...] [footnote 51: Article 8(2)(e)(vii).]

34. Building on the principles set out in the earlier Conventions, the 1999 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, provided:

Article 1

Each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term "child" shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, **including forced or compulsory recruitment of children for use in armed conflict.**

It is clear that by the time Article 2 of this Convention was formulated, the debate had moved on from the question whether the recruitment of children under the age of 15 was prohibited or indeed criminalized, and the focus had shifted to the net step in the development of international law, namely the raising of the standard to include all children under the age of 18. This

led finally to the wording of Article 4 of the Optional Protocol II to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

35. The CRC Optional Protocol II was signed on 25 May 2000 and came into force on 12 February 2002. It has 115 signatories and has been ratified by 70 states. The relevant Article for our purposes is Article 4 which states:

    1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons **under the age of 18 years.**

    2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary **to prohibit and criminalize such practices.** [...]

38. A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty? Furthermore, it is not necessary for the *individual criminal responsibility* of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsibility under customary international law. As Judge Meron in his capacity as professor has pointed out, "it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offences, even when there is not accompanying provision for the establishment of the jurisdiction of particular courts or scale of penalties".

39. The prohibition of child recruitment constitutes a fundamental guarantee and although it is not enumerated in the ICTR and ICTY Statutes, it shares the same character and is of the same gravity as the violations that are explicitly listed in those Statutes. The fact that the ICTY and ICTR have prosecuted violations of Additional Protocol II provides further evidence of the criminality of child recruitment before 1996. [...]

44. By 2001, and in most cases prior to the Rome Statute, 108 states explicitly prohibited child recruitment, one example dating back to 1902, and a further 15 states that do not have specific legislation did not show any indication of using child soldiers. The list of states in the 2001 Child Soldiers Global Report clearly shows that states with quite different legal systems - civil law, common law, Islamic law - share the same view on the topic.

45. It is sufficient to mention a few examples of national legislation criminalizing child recruitment prior to 1996 in order to further demonstrate that the nullum crimen principle is upheld. [...]

46. More specifically in relation to the principle nullum crimen sine poena, before 1996 three different approaches by states to the issue of punishment of child recruitment under national law can be distinguished.

47. First, as already described, certain states from a various legal systems have criminalized the recruitment of children under 15 in their national legislation.

Second, the vast majority of states lay down the prohibition of child recruitment in military law. [...]

49. When considering the formation of customary international law, "the number of states taking part in a practice is a more important criterion [...] than the duration of the practise." It should further be noted that "the number of states needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and that [even] a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule.

50. Customary law, as its name indicates, derives from custom. Custom takes time to develop. It is thus impossible and even contrary to the concept of customary law to determine a given event, day or date upon which it can be stated with certainty that a norm has crystallised. One can nevertheless say that during a certain period the conscience of leaders and populations started to note a given problem. In the case of recruiting child soldiers this happened during the mid-1980s. One can further determine a period where customary law begins to develop, which in the current case began with the acceptance of key international instruments between 1990 and 1994. Finally, one can determine the period during which the majority of states criminalized the prohibited behaviour, which in this case, as demonstrated, was the period between 1994 and 1996. It took a further six years for the recruitment of children between the age of 15 and 18 to be included in treaty law as individually punishable behaviour. The development process concerning the recruitment of child soldiers, taking into account the definition of children as persons under the age of 18, culminated in the codification of the matter in the CRC Optional Protocol II.

51. The overwhelming majority of states, as shown above, did not practise recruitment of children under 15 according to their national laws and many had, whether through criminal or administrative law, criminalized such behaviour prior to 1996. The fact that child recruitment still occurs and is thus illegally practised does not detract from the validity of the customary norm. It cannot be said that there is a contrary practice with a corresponding opinion iuris as states consider themselves to be under a legal obligation not to practise child recruitment.

4. Good Faith

52. The rejection of the use of child soldiers by the international community was widespread by 1994. In addition, by the time of the 1996 Graça Machel Report, it was no longer possible to claim to be acting in good faith while recruiting child soldiers 8contrary to the suggestion of the Defence during the oral Hearing). Specifically **concerning Sierra Leone, the Government acknowledged in its 1996 Report to the Committee of the Rights of the Child** that there was no minimum age for conscripting into armed forces "except the provision in the Geneva Convention that children below the age of 15 years should not be conscripted into the army." This shows that the

Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law.

53. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld.

III. DISPOSITION

54. For all the above-mentioned reasons the Preliminary Motion is dismissed. [...]

DISSENTING OPINION OF JUSTICE ROBERTSON [...]

Discussion

33. So what had emerged, in customary international law, by the end of 1996 was an humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under fifteens or involving them in hostilities, whether arising from international or internal conflict. What had not, however, evolved was an offence cognizable by international criminal law which permitted the trial and punishment of individuals accused of enlisting (i.e. accepting for military service) volunteers under the age of fifteen. It may be that in some states this would have constituted an offence against national law, but this fact cannot be determinative of the existence of an international law crime: theft, for example, is unlawful in every state of the world, but does not for that reason exist as a crime in international law. It is worth emphasizing that we are here concerned with a jurisdiction which is very special, by virtue of its power to override the sovereign rights of states to decide whether to prosecute their own nationals. Elevation of an offence to the category of an international crime means that individuals credibly accused of that crime will lose the protections as international law would normally afford, such as diplomatic or head of state immunity. For that reason, international criminal law is reserved for the very worst abuses of power - for crimes which are "against humanity" because the very fact that fellow human beings conceive and commit them diminishes all members of the human race and not merely the nationals of the state where they are directed or permitted. That is why not all, or even most, breaches of international humanitarian law, i.e. offences committed in the course of armed conflict, are offences at international criminal law. Such crimes are limited to the breaches of the Geneva Convention which violate Common Article 3, and to other specified conduct which has been comprehensively and clearly identified as an international law crime: treaties or State practice or other methods of demonstrating the consensus of the international community that they are so destructive of the dignity of humankind that

individuals accused of committing them must be put on trial, if necessary in international courts.

34. For a specific offence - here, the non-forcible enlistment for military service of under fifteen volunteers - to be exhibited in the chamber of horrors that displays international law crimes, there must, as I have argued above, be proof of general agreement among states to impose individual responsibility, at least for those bearing the greatest responsibility for such recruitment. There must be general agreement to a formulation of the offence which satisfies the basic standards for any serious crime, namely a clear statement of the conduct which is prohibited and a satisfactory requirement for the proof of mens rea - i.e. a guilty intent to commit the crime. The existence of the crime must be a fact that is reasonably accessible. I do not find these conditions satisfied, as at November 1996, in the source material provided by the Prosecutor or the amici. Geneva Convention IV, the 1977 Protocols, the Convention on the Rights of the Child and the African Charter are, even when taken together, insufficient. What they demonstrate is a growing predisposition in the international community to support a new offence of non-forcible recruitment of children, at least for front-line fighting. What they do not prove is that there was a universal or at least general consensus that individual responsibility had already been imposed in international law. [...]

35. Indeed, it was from about this time that the work of Graça Machel (who first reported on this subject to the United Nations in 1996) and the notable campaigning by NGOs led by UNICEF, Amnesty International, Human Rights Watch and No Peace Without Justice, took wing. What they were campaigning for, of course, was the introduction into international criminal law of a crime of child enlistment - and their campaign would not have been necessary in the years that followed 1996 if that crime had already crystallized in the arsenal of international criminal law.

36. The first point at which that can be said to have happened was 17th July 1998, the conclusion of the five week diplomatic conference in Rome which established the Statute of the International Criminal Court. [...]

38. The Rome Statute was a landmark in international criminal law - so far as children are concerned, participation in hostilities was for the first time spelled out as an international crime in every kind of serious armed conflict. The Statute as a whole was approved by 122 states. True, 27 states abstained and 7 voted against it, but the conference records do not reveal that any abstention or opposition was based on or even referred to this particular provision relating to child recruitment. In the course of discussions, a few states - the US in particular - took the position that "it did not reflect customary international law and was more a human rights provision than a criminal provision." That, in my view, was correct - until the Rome Treaty itself, the rule against child recruitment was a human rights principle and an obligation upon states, but did not entail individual criminal liability in international law. It did so for the first time when the Treaty was concluded and approved on 17 July 1998. [...]

40. I do not think, for all the above reasons, that it is possible to fix the crystallization point of the crime of child enlistment at any earlier stage, although I do recognise the force of the argument that July 1998 was the beginning and not the end of this process, which concluded four years later when sufficient ratifications (that of sixty states) were received to bring the Rome Treaty into force. Nonetheless, state practice immediately after July 1998 demonstrates that the Rome treaty was accepted by states as a turning point in the criminalisation of child recruitment. [...]

41. In other words, there was no common state practice of explicitly criminalizing child recruitment prior to the Rome Treaty, and it was in the process of ratification of that Treaty that many states introduced municipal laws to reflect it. [...]

Conclusion

45. The above analysis convinces me that it would breach the *nullen crimen* rule to impute the necessary intention to create an international law crime of child enlistment to states until 122 of them signed the Rome Treaty. From that point, it seems to me it was tolerably clear to any competent lawyer that a prosecution would be "on the cards" for anyone who enlisted children to fight for one party or another in an ongoing conflict, whether internal or international. It is not of course *necessary* that a norm should be embodied in a Treaty before it becomes a rule of international law, but in the case of child enlistment the Rome Treaty provides a *sufficient* mandate - certainly no previous development will suffice. [...]

46. There are many countries today where young adolescents are trained with live ammunition to defend the nation or the nation's leader. What the international crime most seriously targets is the use of children to "actively participate" in hostilities - putting at risk the lives of those who have scarcely begun to lead them. "Conscription" connotes the use of some compulsion, and although "enlistment" may not need the press gang or the hype of the recruiting officer, it must nevertheless involve knowledge that those enlisted are in fact under fifteen and that they may be trained for or thrown into front-line combat rather than used for service tasks away from the combat zones. There may be a defence of necessity, which could justify desperate measures when a family or community is under murderous and unlawful attack, but the scope of any such defence must be left to the Trial Chamber to determine, if so requested.

47. I differ with diffidence from my colleagues, but I have no doubt that the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998. That it exists for all present and future conflicts is declared for the first time by the judgments in this Court today. The modern campaign against child soldiers is often attributed to the behaviour of Holden Roberto in Angola, who recognised how much it demoralizes an enemy village to have its chief headman executed by a child. More recently, we have had allegations about children being indoctrinated to become suicide bombers - surely the worst example of

child soldier initiation. By the judgments today, we declare that international criminal law can deal with these abhorrent actions. But so far as this applicant is concerned, I would grant a declaration to the effect that he must not be prosecuted for an offence of enlistment, under Article 4(c) of the Statute, that is alleged to have been committed before the end of July 1998.

Done at Freetown this thirty-first day of May 2004.

Justice Robertson

DISCUSSION

1. a. How are children protected by International Humanitarian Law (IHL)? (*Cf.* Arts. 14, 17, 23-24, 38, 50, 76, 82, 89, 94 and 132 of Convention IV; Arts. 70 and 77-78 of Protocol I and Art. 4 (3) of Protocol II.)

   b. What does the IHL of international and non-international armed conflicts say, specifically, about recruitment and participation to hostilities? (*Cf.* Art. 77 (2) (3) of Protocol I; Art. 4 (3) (c) (d) of Protocol II and Art. 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the ICC Statute.)

2. a. Is the prohibition to recruit children under 15 into armed forces or to use them to participate actively in hostilities, as mentioned in Art. 4 (c) of the Statute, a customary rule of international law? What does the ICRC study on customary IHL say about this rule? (*See* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rules 136 and 137.] p. 730.)

   b. What kind of practice does the Court refer to to conclude that the recruitment of children under 15 is prohibited by customary international law? Can customary IHL be derived from abstract state acts such as diplomatic statements, undertakings and declarations? By belligerents? By non-belligerents? By both? What if the actual behaviour of the belligerents is incompatible with their statements? With the statements of other States?

   c. Would it have been possible to include this crime in the Statute of the Special Court if it were not of customary character? If Sierra Leone were not bound by this rule?

   d. Do you agree with the defence when it says that the Rome Statute of the ICC does not codify customary international law? Is it important, in this specific case, taking into account that the government of Sierra Leone signed (1998) and ratified (2000) the Statute? Did this Statute codify existing customary international law or was it only the starting point of new customary rules (as stated by Justice Robertson for the very rule concerned in this case)?

3. a. What do you think about Justice Robertson's dissenting opinion which states that the criminalization of the prohibition of the recruitment and direct

participation to hostilities of children under 15 was not part of customary international law before the adoption of the Rome Statute in July 1998?

b. Does the Court consider that customary international law criminalized, at the time of the crime, the recruitment of children under 15? If yes, on what kind of practice does the Court base its conclusion?

c. Do you agree with the University of Toronto's (and with the Court's own) statement that serious violations of the laws of war do not need to be expressly criminalized in order to be prosecuted?

d. Do you think it is possible to raise the *nullum crimen sine lege* argument in the case of a person who committed an act knowing that it was a violation of IHL, but presuming it was not explicitly criminalized? What are the objective and the definition of the principle of *nullum crimen sine lege*?

XXXVI. ANGOLA

Case No. 227, Angola, Famine as a Weapon

THE CASE

[**Source:** AYAD Christophe, "L'arme de la famine en Angola", in *Libération*, Paris, 28 June 2002. Original in French, unofficial translation.]

The weapon of famine in Angola
Three million Angolans need aid and 600,000 are at risk

By the beginning of June, the mortality rate in Chiteta camp was 2.3 deaths per day for a population of 10,000. The "emergency threshold" is one death per day per 10,000. The fighting may have stopped, but the war continues. Angolans are dying by the thousand every day. It is not "merely" a famine that is decimating the Angolan population - the war continues. The World Food Programme has estimated that three million Angolans are in need of aid; and 600,000 of them are at immediate risk of falling short, according to an estimate by Médecins sans frontiers (MSF). But this is not the result of the two years of severe drought that has plagued southern Africa as a whole. The Angolan government has been using famine as its preferred weapon in its long final assault on the rebels of Jonas Savimbi's UNITA movement.

Scorched earth

Determined to cut UNITA's supply lines, the Angolan armed forces have had no compunction about razing entire villages and forcing the inhabitants to gather in closely guarded "camps". This scorched earth policy has been aimed at preventing UNITA from recruiting men and generally exploiting the population. Forced to leave their gutted homes and wrenched from their land, these peasant farmers faced autumn and then the winter with help from no one. In Bunjei, south of Huambo - Savimbi's former stronghold - up to 14,000 people have been assembled in the immediate vicinity of the military camp. The camp itself is protected by mines and supplied with food and beer. But just next door the displaced are dying like flies: 15 deaths per day, the majority due to malnutrition. A measles epidemic is decimating the weakest. The mortality and severe malnutrition rates are close to those recorded in Southern Sudan during the terrible famine in 1998, with a quarter of the children weighing less than 70% of normal. In Chipindo, 4,000 out of a total population of 18,000 have died since last September.

It was not until Savimbi was killed in combat on 22 February and the peace agreement was signed on 4 April that the army finally relaxed its stranglehold on the camp. The bravest set out on foot for the north, where they had heard that Western NGOs were distributing food. That was when Médecins sans frontières began to see "refugees from the interior" arrive on the point of collapse.

According to their accounts, the homes of over 90% of them had been burnt down. After several refusals, the French NGO was finally allowed to conduct an exploratory mission, in the course of which it "discovered" the Bunjei camp.

The weakest of the children are now being cared for in Bunjei, where the camp's population has increased to 20,000 and the mortality rate has stabilized. But there are scores of other Bunjeis along an imaginary line drawn from Lobito to Luena, running west to east following the line of the 2001-2002 government offensive. These territories are known as "grey areas". Since total war resumed in 1998, 80% of Angola's territory has been closed to any form of humanitarian aid, access being prohibited by both the government and the UNITA rebels. There doubtless remain as yet undiscovered pockets of famine, far from the main roads, which are the only negotiable routes owing to the 12 million mines planted throughout the country - one per inhabitant. [...]

DISCUSSION

1. a. Can starvation be considered a weapon? Is it "merely" an inevitable consequence of war? How can a famine resulting from climate conditions be distinguished from one intentionally induced by a party to a conflict? If such a party "organizes" the starvation of a population, does it thereby commit a war crime? A crime against humanity? What about in a non-international armed conflict? Is it conceivable that starvation used as a method of warfare could be outlawed in international armed conflict but not in internal conflict? (*Cf.* Art. 54 of Protocol I; Art. 14 of Protocol II and Art. 8 (2) (b) (xxv) of the ICC Statute; *See* **Case No. 15**. p. 608.)

   b. Even if starvation as a method of warfare cannot be made an offence, are actions taken that result in famine a violation of International Humanitarian Law (IHL)? Is it a war crime to "raze entire villages," to force people to assemble in camps, to burn down houses? Is it a crime against humanity? Under what conditions? And in the context of a non-international armed conflict? (*Cf.* Art. 52 of Protocol I and Art. 8 (2) (a) (iv), (b) (ii, xiii) and (e) (xii) of the ICC Statute.)

2. Can a party to a conflict deny humanitarian organizations access to victims of war, in particular those suffering the effects of famine, without violating IHL? If so, under what conditions? Can the party deny the ICRC access to the victims? Can it deny other humanitarian organizations access? What about in a non-international armed conflict? (*Cf.* Arts. 23, 55 and 59-63 of Convention IV; Arts. 69-70 of Protocol I and Art. 18 (2) of Protocol II.)

3. Is the use of anti-personnel mines prohibited by IHL? Even in a non-international armed conflict? (*Cf.* **Document No. 8**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention). p. 547, and **Document No. 10**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. p. 560.)

XXXVII. CHECHNYA

Case No. 228, Germany, Government Reply on Chechnya

THE CASE

[**Source:** German Bundestag, Document 13/718, 13th legislative period, March 9, 1995; original in German, unofficial translation.]

REPLY
by the Federal Government to the written question submitted by the Parliamentary Social Democratic Party - Document 13/437 -
The Federal Government's position on Russian action in the Chechen conflict

[*The reply was issued on behalf of the Federal Government in a letter of the Federal Ministry of Foreign Affairs dated March 2, 1995.*

The document also sets out - in small type - the text of the questions.] [...]

In the debate on Chechnya in the German Bundestag the Federal Government left many important questions unanswered. Its position before and after that debate has given rise to doubts as to whether the Federal Government has done everything within its power, and is continuing to do everything possible, to bring about an end to the use of force and to the violations of international law and human rights in Chechnya.

Preliminary remarks

The Federal Government rejects as unfounded the claim made in the written question [...]

[...]

However, the declaration made by Federal Foreign Minister Dr Klaus Kinkel on January 19, 1995 when issuing a government policy statement on the Chechen conflict, namely that "We cannot compel the Russian government to take a specific course of action, we can only try to persuade it", remains valid. [...]

6. Is the Federal Government of the opinion that Russian action in Chechnya violates Article 48 of Protocol I additional to the Geneva Conventions of 1949?

Under the terms of Article 1, para. 3, of the Protocol additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), taken in conjunction with the provisions of Article 2 common to the Geneva Conventions, Protocol I applies only to international armed conflicts arising between the contracting parties thereto. Therefore, it cannot apply to an internal conflict within the borders of a contracting State. However, the Federal Government has repeatedly reminded Russia of the latter's duty to abide by its obligations under Protocol II additional to the 1949 Geneva

Conventions, which provides for the protection of victims of non-international armed conflicts and thus applies to the conflict in Chechnya.

DISCUSSION

1. How would you qualify the conflict in Chechnya? Under which provision of Protocol I could it be claimed to be an international armed conflict? (*Cf.* Art. 1 (4) of Protocol I.)
2. Does the law of non-international armed conflicts contain a rule similar to that of Art. 48 of Protocol I? (*Cf.* Part IV of Protocol II.)
3. Was the respect of IHL in the conflict in Chechnya an internal affair of the Russian Federation? On which basis does Germany ask the Russian Federation to respect IHL in Chechnya? Did the basis of Germany's request apply IHL to the fullest possible extent in this situation?

Case No. 229, Russian Federation, Chechnya, Operation Samashki

[**Source:** Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7-8, 1995*, Moscow, 1996; footnotes omitted.]

THE CASE

1. PREFACE

This report is devoted to the events connected with an operation by Russian Federation [RF] Ministry of Internal Affairs divisions in the village of Samashki on April 7-8. [1995] According to Anatoly Aleksandrovich Antonov, Deputy Commander of MVD [Ministry of Internal Affairs *(Ministerstvo Vnutrennykh Del)*] forces in Chechnya, it was "the first completely independent military operation by MVD troops". The operation and its consequences received wide attention in Russia and abroad.

On December 9, 1994, the President of the Russian Federation issued the Decree on Measures to Stop the Operation of Illegal Armed Formations in the Territory of the Chechen Republic and in the Ossetian-Ingush Conflict Zone. The decree instructed the RF government to "use all means available to guarantee state security, lawfulness, rights and freedoms of citizens, the guarding of public order, the fight against crime, the disarming of all illegal armed formations".

On December 11, 1994, Ministry of Defence and MVD units began to enter the territory of Chechnya. Chechen armed formations resisted federal forces, and an undeclared war was under way in the Northern Caucasus.

The authors of this report consider the wide-scale military activities that followed this decree a non-international armed conflict, whose victims must be protected

by strict observance of Article 3 common to the Geneva Conventions of August 12, 1949 and Protocol II additional to them. In accordance with these instruments, parties to the conflict are obliged to respect these and other laws and customary law on the conduct of war. [...]

OM [Observer Mission] members visited Samashki in May and August and received additional testimony necessary for the preparation of this report. [...]

2. BRIEF NOTES ON THE GEOGRAPHY AND DEMOGRAPHY OF SAMASHKI

[...]

When the Chechen-Ingush Autonomous Soviet Socialist Republic was split in 1992, the village of Sernovodsk, located 9.5 kilometers to the west of Samashki, went to Ingushetia and Samashki became a border village within the Chechen Republic. [...]

The pre-war population of Samashki counted about 14,600 people. With the commencement of military activities, Samashki began to receive displaced people from Grozny and villages that either became conflict zones or were shelled and bombed. In addition, beginning in February 1995, some refugees left Samashki. The village's elders estimated that toward the beginning of April approximately 4,500-5,000 people remained in the village; according to the village administration, this figure was between 5,000-6,000. [...]

3. THE SITUATION IN SAMASHKI FROM DECEMBER 1994 TO APRIL 1995

While Russian troops were sent to Chechnya with the proclaimed goal of "restoring constitutional order and disarming illegal formations" in the republic, Russian military planning concentrated first and foremost on controlling Grozny, the capital of Chechnya. To this end, the command tried not to divert great force on bringing "constitutional order" to other parts of the republic, and troop deployments along the borders created "neither peace nor war" zones.

For a certain period, one such zone was western Chechnya (Achkoi-Martan, the district center, and the villages of Samashki, Assinovskaya, Melkhi-Yurt, Novyi Sharoi, and Zakan-Yurt along the border with Ingushetia, where tens of thousands of refugees from Grozny had amassed. [...]

On December 12, columns of federal troops were shelled in the village of Assinovskaya, and in the village of Novyi Sharoi a crowd of residents from nearby villages blocked the road. Further troop movements would inevitably have led first, to firing on unarmed residents, which at the time soldiers and officers were not prepared to do, and second, to skirmishes with partisan fighter units, which every village had. These units were armed with automatics, machine guns and grenade launchers. Self-defense units based in the area south of the village of Bamut had armored vehicles.

Federal forces were consequently reinforced along this conditional border area near the villages of Samashki, Davydenko, Novyi Sharoi, Achkoi-Martan, and Bamut. On December 17, federal forces had Samashki semi-surrounded, but the divisions left the village soon thereafter. An MVD checkpoint (Post No. 13) was established about four to five kilometers from Samashki, on the road to Sernovodsk. [...]

[...] By maintaining a humanitarian corridor connecting and a number of villages in Chechnya with the outside world, the command of federal forces in Chechnya was, of course, complying with humanitarian law. But in numerous incidents, the MVD also detained Chechen men for one reason or another at Post No. 13, subjected them to mistreatment, beatings, and torture before sending them off to the filtration camp at Mozdok. [...]

On January 18, an astoundingly senseless incident took place. According to a report by G. Zhavoronkov, a correspondent for *Obshchaya Gazeta,* and P. Marchenko, his partner, they travelled left with a column of Ingush Republic EMERCOM [Ministry for Emergency Situations] cars transporting food to Grozny. Both sides to the conflict would allow columns of this sort, travelling under white flags, to pass through checkpoints unimpeded. About 11:30 a.m. the column went through the MVD checkpoint between Sernovodsk and Samashki.

As the column was entering Samashki, however, a Russian APC caught up with it, drove up its middle, and rode along with it to the edge of the village under EMERCOM cover. Shooting began immediately. Fortunately, no one in the EMERCOM vehicles was injured, as some of the cars in the column were able to speed away from the battle, and others took cover in ditches along the road. [...]

On January 30, a column of Russian armored vehicles and trucks attempted to drive through Samashki. Different sources described this incident in different ways. Newspapers reported:

> "The elders went out on the road and asked them not to drive the column through the village in order to avoid provoking a clash with villagers. The column nonetheless moved forward, and began to shoot villagers. Chechens returned fire, which resulted in the deaths of at least three Russian servicemen, and took several APCs and military vehicles out of action seventeen people were injured. The military then led the column away from the village".
>
> "On Monday evening *[January 30]* in the village of Samashki, located on the border with Ingushetiya, Dudayev forces attacked a column of armored vehicles carrying marines from the Pacific Fleet. At least three people were killed and nine wounded".

According to one of Samashki's village elders, on January 30 Chechen armed groups attacked military vehicles that had got lost and entered the northern end of the village. Three soldiers were killed, and the wounded were taken prisoner and then taken to a hospital. The elders reported that the wounded were drunk. According to much testimony, during the clash fighters seized a vehicle that had satellite equipment. [...]

On February 2, a mine exploded [...] during a funeral, killing Samashki residents. [...] *Moskovsky Komsomolets* reporter A. Kolpakov was a witness to this incident. The reporter described the consequences of the shelling.

> "There was an unexpected, silent strike one hundred meters from us and a minute later a human cry cut through the air. We ran toward the cry. A square yard. On the ground - three people killed, smeared in blood; a wounded man sits near the wall, his head thrown back; on his forehead, swollen beyond belief, blood. Nearby there were women and children, crying, wiping their tears across their faces. It seemed as though the mine

fell directly on the funeral: that morning the same kind of mine killed a woman and a fourteen-year-old girl. Our side clearly has one target ..." [...]

From the end of February to the beginning of March, when Dudayev forces were driven from Grozny, Russian forces in the western part of Chechnya began more actively to disarm villages, driving out rebels. Checkpoints were set up along roads between villages, and villages were shelled, involving, for the most part, MVD forces. At the same time, negotiations were held with the elders on the withdrawal of rebel fighter units from the villages [...]

On February 24, a group of Samashki residents and the head of the village administration went to the checkpoint, where they drafted an agreement with Russian Col. Nikolai Nikolaevich, which was given to villagers for discussion. Women and young people wavered. [...]

Meanwhile, the NTV news program Segodnya ("Today") reported on March 11 that fighters had not left the village and that "up to 400 Dudayev fighters remained in Samashki. They are threatening the leaders of the local government with physical revenge for having favored a peaceful resolution of the conflict". The next day the same television program reported, citing the Russian military, that there were 200 armed Dudayev supporters in the village. [...]

Samashki residents were in a difficult position. On the one hand, the Russian military, as a consequence of negotiations held on March 23-25, got the military train through Samashki. Had that not occurred, another Russian general participating in negotiations threatened to use force and bloodshed. On the other hand, Dudayev fighters who turned up through the forest demanded villagers not to allow the train to pass through Samashki. Pro-Dudayev snipers wounded two soldiers, and previously, in mid-March, two railroad bridges were blown up on the railway lines between Sernovodsk and Samashki. [...]

Participants in the "March for Peace" who passed through Samashki on March 26 saw helicopters shooting from rocket launchers in the area [...] above the village. When the marchers reached the entry to the village, local residents asked them whether there were any surgeons among them, as two hours earlier the village had undergone an air strike, seriously injuring four people and damaging four homes. Several marchers examined the houses that had been damaged in the air attack. Many armed people were indeed in the village (armed with automatics, and sniper rifles), some dressed in civilian clothes, others in camouflage. In a conversation with D.A. Salokhina, one of the marchers, the people said they were local residents.

According to L. Abdulkhajiev, head of the village administration, the colonel who commanded the Russian checkpoint near the village of Samashki demanded village representative to turn in their firearms. Notably, the agreement reached earlier did not require residents to turn in firearms. [...]

4. THE ULTIMATUM OF APRIL 6 - NEGOTIATIONS - MVD DIVISIONS OPERATIONS UP TO THE ARRIVAL ENTRY OF TROOPS

[...]

In a telephone conversation with OM monitors, Ingush Vice-President Boris Nikolaevich Agapov said that according to reports he had received, MVD

command intended to detain the male population of Samashki for "filtration". Agapov promised to maintain contact with the command in Mozdok in order to facilitate the departure of women, children and the elderly from Samashki. [...]

According to village leaders, the final deadline for the ultimatum - 4:00 p.m., left them too little time to notify the entire village population or to allow them to gather their things and leave the village. Until that time, many people did not believe threats that troops would in fact enter the village and hence did not want to leave their homes. [...]

Mine shelling of the village began about fifteen to twenty-five minutes before the end of the ultimatum deadline, resulting in casualties among residents leaving the village. (*See* below, "The Death of Samashki Residents").

When the shelling began, a bus filled with residents from nearby homes on Ulitsa Sharipova did not have enough time to leave the loading point.

5. SHOOTING AT VILLAGE ELDERS AND ALLEGED FIRING BY DUDAYEV FIGHTERS ON SAMASHKI'S CIVILIANS

On the evening of April 7, both Channel One news and Segodnya, the NTV news program, reported, citing Interfax, that Dudayev fighters in Samashki shot the village elders, who had called on the rebels to leave the village and who wanted to allow Russian troops to pass through. Interfax in turn cited "well-informed sources in the Russian military in Mozdok". NTV also reported that "according to Interfax sources, surviving elders requested the federal forces leadership to help them evacuate civilians from the Samashki area". [...]

Interviews with a number of refugees from Samashki, including members of the village elders, led OM monitors to conclude that reports about the shooting of the village elders were false. Indeed, according to reports by village elders and the Samashki village mullah, on April 7, when a group of elders, together with the mullah (eight people in all), returned to the village after negotiations with the Russian command, the two cars they were riding in were shot at by small arms fire. While there were bullet holes in the cars, fortunately no one was injured, with the exception of elder Ajalil Salikhov, whose finger was slightly wounded. The shots were fired from Russian troop positions.

According to L. Abdulkhajiev, head of the village administration, and his deputy, M. Borshigov, both had seen firing from Russian positions located in the Sunzha hills on the cars transporting the elders to Samashki from the checkpoint.

When M. Borshigov returned to the checkpoint the next day he asked the general who was there (who did not give his name), "What did you shoot at the elders for? The answer he received was, "what do you expect? There's a war going on!"

On April 11, Samashki village leaders signed a statement in Sernovodsk denying the false reports about having been shot by rebel fighters. The elders' side of the story and their statement were presented at a Memorial Human Rights Center press conference on April 13 on the events in Samashki. After this, there were no further statements or comments by leaders of Russian forces concerning the alleged shooting of village elders.

During the parliamentary commission hearings on May 29, it was acknowledge that such reports were untrue. However the commission did not find it necessary to investigate how these reports began and were circulated, despite a request by Sergei Kovalev to this effect. Hence, the command of federal troops in Chechnya quite clearly and intentionally lied. Why was this done?

The authors of this report lack the information necessary to judge whether the shooting at the vehicle transporting the village elders was an accident or an intentional provocation. However, there can be no doubt that disinformation about how Dudayev fighters shot the elders was spread intentionally in order to justify to the public those actions taken by MVD divisions at that time in the village. [...]

8. THE "MOP-UP" OPERATION

The "mop-up" operation in Samashki was part of a pattern federal forces used more widely in Chechnya. It was during the mop-up operation that the majority of villagers were killed and homes destroyed. [...]

In the remaining parts of the village, soldiers also went into homes again in the evening and late at night on April 7 and checked for rebel fighters. According to witnesses, however, the main part of the "mop-up" in Samashki began between 8:00 and 10:00 a.m. on April 8. [...]

For the most part, soldiers ran house-to-house checks at night. Once they were assured that there were no fighters in a given home, soldiers did not harm civilians. However by that time some people had already been detained and some civilians had been murdered. [...]

Abdurakhman Chindigaev, forty-three years of age (a resident of 46 Ulitsa Sharipova) and Salavdi Umanov, an elderly man (a resident of 41 Ulitsa Sharipova), both reported that they spent the evening of April 7 at 45 Ulitsa Sharipova. Also with them were seventy-one-year-old Musaid Isaev, and forty-seven-year-old Nasruddin Bazuev. They chose to stay there because the house had strong concrete walls and a drop-ceiling, and was thus capable of withstanding artillery fire. As federal troops approached their area, all four men hid in the pantry on the first floor of the house. When soldiers entered the courtyard, they threw a grenade into a space that adjoined the pantry. Mr. Umakhanov described the events that followed.

> "A minute later, maybe even earlier they open the door. "Anyone here alive?" There are, we go out [*into the courtyard*]. There were four of them. "Lie down, you bastards! Lie down, you bastards!" We lie down. They rifle through our cloths [sic]. Then one of them starts screaming from behind, and someone says to me, "Anyone left here?" I say, "No". The guy screaming from behind shouts, "Take hostages". Then they take me back there. There's no one there. We go outside. "In the ditch, bastards! In the ditch bastards! They chase us down there [*to the ditch in the garage for auto repair*]. The car is there, like it always was. Nasruddin crawled in first. Right there he was standing, face to the wall. Yeah, yeah, the far wall. The both of us are standing here. I say "They're going to make them kill us here". So I started to pray. Those soldiers were standing around. Musa

says, "Guys, don't shoot. Someone has to feed the cows... Don't shoot". Isaev went down the third step. Two soldiers had their automatics to his back and pushed him. He didn't even get to the bottom of the steps. In a flash they fired a round at him. We just got to the bottom, and just bent down, and then another round".

Afterwards the soldiers left the yard, leaving Isaev dead and Bazuev and Umakhanov wounded (Bazuev died the following day). Red Cross doctors treated Umakhanov's wounds in Samashki. [...]

It is not entirely clear who carried out the "mop-up" operation on April 8. The majority of villagers claimed that for the most part they were not the conscripts (men of about eighteen to twenty) who had entered the village first, but rather soldiers who were from about twenty- five to thirty-five years old, and who appeared to be "kontraktniki", or soldiers hired on contract. Some victims, however, testified that their homes were burned on the morning of April 8 by the same men who had entered the village on April 7. For example, Magomed Labazanov, an elderly man who lived at 117 Ulitsa Kooperativnaya, told Memorial that on the night of April 7, Russian troops entered the basement of his house, where he had been hiding along with other elderly people and women and children. They threw a preemptory grenade into the courtyard, but when they heard people screaming, they did not throw grenades into the basement. The commander of the group, a captain, allowed them to stay in the basement, and the soldiers spent the night in the yard. In the morning the same soldiers - who were conscripts, judging by their age - started to set the house on fire. The house where Mr. Labazanov's son, Aslambek, lived - 111 Kooperativnaya - was also burned. But when a soldier approached Mr. Labazanov's house (where Mr Labazanov himself was hiding in the cellar), holding a gasoline can, another soldier would not let him proceed, saying, "There are old people and women in the cellar there. Get back".

The hearings held on May 29 by the Parliamentary Commission on Investigating the Causes and Circumstances of the Emergence of the Crisis in the Chechen Republic became an important source of information for this report. It was only at the hearings that the report's authors were able to hear the accounts of those who had directly participated in the operation in Samashki, since hostility toward the OM on the part of the command of federal troops made it impossible to meet with them.

Soldiers and OMON [Special Task Militia Units (*Otryad Militsii Osobogo Naznacheniya*)] troops described their actions on April 8 as simply leaving a village that was almost entirely intact. They claimed that no homes were burned and no civilians killed. Moreover, they claimed that they had seen practically no civilians and had nothing to do with them. [...]

If the Samashki events were to be recreated according only to these testimonies (and indeed the Parliamentary Commission accepted such a version), then the military operations there were extraordinarily bizarre. After fighting to capture the village, in the morning the troops inexplicably left the village under fire. The majority of destruction done to the village somehow occurred later.

One Internal Troops soldier claimed that they did not enter homes, but this contradicts an answer to a question provided by a Moscow region OMON:

> Question to Moscow region OMON : "You searched houses in order to guarantee a safe retreat ? Did you enter any houses?"
>
> Answer: "Yes"
>
> Question: "And who went into the homes? Did OMON take care of security or did conscripts?"
>
> Answer: We did it together. By morning everyone understood that we were leaving, it seemed pretty quiet, calm, but that sleepless night and all the tension took its toll on us".

No one from the Parliamentary Commission bothered to ask how the troops managed to run a check on houses without having anything to do with civilians, an obvious question.

It should not be ruled out that the majority of those soldiers who had been involved in the operation in Samashki and who spoke at the Commission hearings did not actually carry out the "mop-up" operation, and simply did not know all the facts concerning what happened in the village. [...]

S. Yusupov also told of how he saw the bodies of six people who had been killed, the corpses lying on the street, including two elderly men and one woman. (*See* below, "The Death of Samashki Villagers" and Appendix 3). When OM representatives visited Mr. Yusupov's home, they saw a house that had been destroyed by fire; only the brick walls remained intact. No marks from fighting could be found on the walls and fences of this house or on houses nearby. There were traces of a grenade ("limonchik") explosion in the cellar.

Interviews with Samashki residents suggest that soldiers threw grenades into residential areas during the "mop-up" operation without a second thought. Keypa Mamaeva, who lives at 52 Ulitsa Zavodskaya (near the intersection with Ulitsa Kooperativnaya) reported that at 7:30 a.m. on April 8, she and her relatives (husband, son and father-in-law) looked out the window and saw servicemen looting the house next door, taking away cows, a television, and other items. They loaded the stolen property onto a KAMAZ truck and an APC. One of the soldiers apparently saw Mrs. Mamaeva's face in the window, and then ran towards the window and threw a grenade at it. Mrs. Mamaeva and her relatives managed immediately to get out of the room and no one was hurt. The authors of this report examined the area where these events took place, and thus believe Mrs Mamedova's story to be reliable.

Many villagers believe that soldiers who committed a number of crimes were under the influence of narcotics. To prove this, they showed journalists, Duma deputies, and OM members who were visiting Samashki disposable needles that were lying around in large numbers on the village streets after federal forces left. [...]

In attempting to judge whether soldiers were abusing promedol, it is worth noting first, the extremely low level of discipline among many federal force units in Chechnya, and second, widespread drunkenness among solders. In April, OM members, A. Blinushov and A. Guryanov, personally overheard MVD staff at

Post No. 13 talking about how after their shift they would "shoot up some promedol". [...]

9. THE DEATH OF SAMASHKI'S VILLAGERS

9.2 An analysis of Information Gathered on the Deaths of Villagers

9.2.1. Statistical Data

The list of names of people who were killed as a result of the MVD operation in Samashki on April 7-8 includes 13 women and 90 men.

The deceased break down by age as follows:

Eighteen years and younger - six boys and one girl;

Nineteen to forty-five years - forty-five men and six women;

Forty-six to sixty years - nineteen men and four women;

Sixty-one years and older - twenty men and two women.

[...]

9.2.2. Circumstances Surrounding the Death of Samashki Villagers

[...]

What is clear is that all individuals on the list either were killed during the course of the April 7-8 events, or died later from the wounds they received those two days.

The overwhelming majority of witnesses emphasized that their loved ones, relatives or fellow villagers who died were neither rebel fighters nor self-defense fighters, nor did they offer resistance to Russian troops. In addition, we learned that four villagers died in battle, which may also explain the deaths of ten other people.

Deaths resulting from artillery and mine shelling

Those who died first were victims of mine-launcher and artillery shelling on April 7, which began at 3:40 or 3:45 p.m., about fifteen to twenty minutes before the end of the cease-fire that the military had declared in order to allow civilians to leave the village. [...]

[...] And Taus Ibishev (No. 40) died several days later in the Sleptsovsk hospital, and was again wounded on April 10 during evacuation, when a tractor transporting wounded people out of the village was hit from Russian military had finally granted permission to take out the wounded, who had spent three days in Samashki without necessary medical care.

Deaths from strafing of streets from APCs

APCs and tanks that drove through Samashki and sprayed machine-gun and automatic rifle fire caused yet more deaths. [...]

Firearms shot from tanks and APCs were thus responsible for the deaths of five Samashki residents.

Sniper-related deaths

Witnesses reported seven sniper-related deaths among Samashki residents; six were killed or fatally wounded on the second day of the operation (April 8) while in their yards or on the streets near their homes. [...]

Execution-style shootings in homes and yards

The most common cause of death among men was execution-style shooting when they were taken into custody, as a rule immediately after troops would enter a house or yard, but also after they were first beaten. In all, thirty men were killed in this manner. [...]

Deaths caused by grenades that were exploded in cellars, yards, and other inhabited areas

According to reports of many witnesses, Russian troops intentionally threw grenades into cellars and courtyards, knowing or at least supposing that people were inside. In the majority of such cases, people reportedly were wounded. [...]

Additional casualties that occurred on the eve of the operation

Our list includes three such cases. Earlier we described the death of Nasruddin Bazuev, which occurred in his niece's home. The evening before, on April 7, troops forced him along with three other men (two of whom were elderly) to leave the house where they were hiding from the shooting (45 Ulitsa Sharipova), forced them to crawl into a space in the garage for automobile repair, and opened fire on them. Bazuev received a few bullet wounds during the incident. After troops left the house, his wife, daughter and niece took the wounded man first to his home, and then to his niece's home. The next day troops came to the house, ignored the daughters plea to spare the wounded man, and killed them both. [...]

The burning of corpses

We received many reports from witnesses that Russian troops intentionally burned the bodies of the deceased, either by throwing the bodies into burning houses or by pouring gasoline on them and setting them on fire. In one instance, flame launchers were reportedly used to burn corpses. [...]

The following individuals were unable to escape from a burning house, and apparently were burned alive: Yuki Gaitukaeva (No. 30), Madu Rasuev and Kesirt Rasueva; Doga Tsatishaev's body was burned in a house as well. In this case, troops had poured gasoline around the house and set it on fire. When Abi Akhmetov (No. 16) and Vladimir Belov (No. 23) came out of a house - with their hands up - troops shot them immediately. [...]

9.3 The Official Version of Villagers' Deaths

By April 8, ITAR-TASS had already reported that "during the battle" *[in Samashki]* more than 130 pro-Dudayev fighters were killed. The mass media repeated this information the next day, citing Russian command. On April 11, an MVD representative who had been on the government's commission on Chechnya, told NTV reporters that according to official information, 120 pro-Dudayev

fighters were killed in the village, and that civilians had left the village before the storming began. The next day, the MVD public relations department reported that 130 pro-Dudayev fighters were killed in Samashki.

The MVD top brass thus recognized that more than one hundred Chechens were killed, but wrote them all off as fighters.

Moreover, according to information privy to the Parliamentary Commission, an entry in the log of military activities kept by combined MVD units reports that losses among pro-Dudayev fighters totalled about sixty.

In contrast to what we outlined above, on May 12, Gen. Kulikov, in response to a question by T. V. Slotnikova (a Duma Deputy) reported that "no one made a list of dead fighters in illegal armed formations" in Samashki.

MVD Internal Troops and OMON who participated in the operation and spoke at the parliamentary commission hearings stated with certainty that no one serving in their divisions killed any civilians. Moreover, they all, with the exception of one conscript [...], claimed that they saw no civilians at all, and denied that there had been any "mop-up" operation in the village.

At the end of July 1995, a part of the members of the Parliamentary Commission prepared their conclusions on the part of the entire Commission, which included a small section on Samashki. The report considered the estimate of ninety-six deaths among villagers doubtful and unjustifiably high (This was the number on Memorial's preliminary list at the time); no serious arguments were made to support this conclusion. For their part, the Commission members did not conduct any evaluation of the number of civilians killed in Samashki. Moreover, the Conclusion's authors wrote "Moreover, one must exclude all men from the list. People holding automatics or grenade launchers cannot be considered civilians". The same deputies intentionally wrote off the entire male population of Samashki as combatants. [...]

ICRC representatives evaluated the general number of deaths in the village and the large proportion of civilians among them. The ICRC gave a series of interviews on the topic in which they protested violations of common laws of warfare by MVD soldiers, *i.e.* "indiscriminate attacks" during military operations. [...]

10. THE ICRC, OTHER HUMANITARIAN ORGANIZATIONS, AND DOCTORS DENIED ACCESS TO SAMASHKI

Over the course of several days the ICRC (which was based in Nazran) attempted to drive to the village, but Russian troops did not allow them to pass. The military required written permission to visit the village, signed by Gen. Kulikov. Yet the ICRC has the right freely to chose any location it wishes to visit, and the Russian military's refusal, which referred to the unsafe conditions for the ICRC's visit, is unfounded. On April 10, after a series of appeals to Russian authorities, the ICRC mission in Ingusehtia informed the public that their representatives were not allowed to visit Samashki.

The same day ITAR-TASS reported that an EMERCOM convoy from Ingushetia with volunteer doctors was stopped at the checkpoint near Samashki and not allowed to pass through to the village.

Médecins Sans Frontières representatives were also not allowed through during that time. [...]

On April 10, at 1:00 p.m., ICRC representatives brought a letter of permission from Gen. Kulikov, but the military still denied them entry to Samashki, claiming they had different orders from Mozdok.

ICRC cars were allowed to enter Samashki only after 4:00 p.m. that day, but the military continued to impede doctors and ICRC representatives from visiting the village. [...]

11. INJURIES AMONG VILLAGERS

Samashki villagers were wounded as a result of the April 7-8 operation. However, since the village was blockaded, they were unable to receive timely, qualified medical treatment. There were no surgeons in the village, and one female therapist tried to help as many wounded as possible.

[...]

13. LOOTING OF SAMASHKI VILLAGERS

Among the 221 appeals sent to Commission Chairman S. Govoruhkin, sixty contain reports that soldiers looted homes and frequently set the remaining property on fire. At the open hearings on May 29, every soldier and OMON who testified vigorously denied that such incidents could possibly have taken place. [...]

14. THE DETENTION AND "FILTERING" OF SAMASHKI RESIDENTS

[...]

According to the testimony of those who were brought to Mozdok, men from Samashki were forced to run a gauntlet in which they were hit with night sticks and rifle butts. Cells were overcrowded. There was inadequate food and water. The men were given water only one to one and a half days after their arrival at the filtration camp. They were beaten during interrogations, and were demanded either to confess to being fighters or name those who were. They were asked, "Who started shooting first?

From April 11-13, ICRC representatives visited the filtration camp. Military personnel threatened the men before the visit, warning them not to complain: "They'll leave, but you'll be staying here". [...]

Some of those detained in Samashki were taken from the "camp" to a temporary detention point near Assinovskaya.

It was here that, according to victims testimony, beatings and torture were widely practiced (including electric shock). [...]

The majority of Samashki villagers who were taken to the filtration point in Assinovsky were not sent to further filtration points, but were driven to the Sunzha

hills, where they were released. When these people were released they were given nothing to certify that they were detained. Hence all detentions that took place in "filtration" were not counted in official statistics on detentions. [...]

15. INVESTIGATION OF THE SAMASHKI EVENTS BY RUSSIAN GOVERNMENT AGENCIES

A number of members of the Temporary Observer Commission for Citizens' Constitutional Rights and Freedoms, under the chairmanship of Minister of Justice Valentin Kovalyev, were in Samashki throughout April. A Commission session held on April 27 examined the material they gathered. The results of the session were reported to the press and public: "People who took part in the hearings came to the conclusion that reports concerning the use of air strikes and heavy artillery during the operation to take the village were inaccurate. In addition, the Commission is in possession of a large number of written statements, testimony, and complaints about arson, pillage and deaths. These acts were carried out by people in black masks or with black bands tied around the head, and were dressed in non-standard uniforms. Materials on these incidents have been sent to the office of the General Procurator in order to open a criminal investigation". [...]

DISCUSSION

1. a. Should the conflict, as it is in the Russian Federation, be qualified as a non-international armed conflict? Which criteria need to be fulfilled in order to qualify the conflict as non-international? Does simply Art. 3 common to the Conventions apply? Has the threshold of applicability of Protocol II been reached in the Republic of Chechnya?

   b. Presuming Protocol II applies, which obligations must both parties fulfil in such a situation regarding the conduct of hostilities? (*Cf.* Preamble of Protocol II.) And the civilian population? (*Cf.* Part IV of Protocol II.)

2. If IHL of international armed conflicts applies, do the rebel forces in Chechnya fall within the definition of Art. 44 of Protocol I (thus receiving combatant status)?

3. a. Upon which provisions of IHL did the Federal troops rely, when they maintained "a humanitarian corridor connecting a number of villages"? (*See* Section 3.)

   b. Were there any violations of IHL during the "senseless incident of January 18"? (*See* Section 3.) During the event of January 30? Of February 2? Of March 26?

   c. Concerning the "filtration operation of April 6": If one applies IHL of international armed conflicts, may a belligerent in a village where civilians and combatants are intermingled separate out all the men and ask all other civilians to leave? May the village be attacked after the deadline for civilians to leave has expired?

4. The Russian Federation troops carried out, according to the reports, *"Mop up"* operations during which civilians were systematically ill-treated or killed. Do they contravene the IHL provisions regarding humane treatment and the protection of the civilian population? (*Cf.* Arts. 4, 5, 7, 8, 13 and 17 of Protocol II.)

5. a. Could the Federal troops justify such an operation on the basis that some rebel fighters were among the civilian population? Which of the categories of death listed under Section 9.2.2. were clearly results of violations of IHL? Which ones were not? For which categories would you need additional information to answer this question?

   b. Furthermore, the Report states that villagers were detained in a *"filtration camp"* and subjected to physical beating and torture. If true, does this behaviour of the Federal troops violate IHL and, more specifically, Protocol II? (*Cf.* Art. 5 of Protocol II.)

6. In light of the events in the village of Samashki, the ICRC took the initiative to visit the village. Does the ICRC have the right to take such an initiative? Does the ICRC have the right to enter the village? Were the ICRC's public statements about the fact that it was denied access to enter Samashki, compatible with its policy of confidentiality? (*Cf.* Art. 3 common to the Conventions.)

7. What do you think were the main reasons for violations of IHL in Operation Samashki? What could the belligerents have done to avoid those violations?

Case No. 230, Russia, Constitutionality of Decrees on Chechnya

THE CASE

[**Source:** *Human Rights Journal*, vol. 17 (3-6), 1996, pp. 133-138; the authentic text is published in *Rossijskaia Gazeta* of August 11, 1995, p. 3 (judgement), pp. 4-7 (separate opinions).]

CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION, MOSCOW

Presidential Decrees and Federal Government's Resolution on the Situation in Chechnya

JUDGEMENT OF JULY 31, 1995

"In the name of the Russian Federation regarding the examination of the constitutionality of the Decree of the President of the Russian Federation of November 30, 1994, No. 2137 on Measures to Restore Constitutional Legality and Law and Order on the Territory of the Chechen Republic; the Decree of the President of the Russian Federation of December 9, 1994, No. 2166 on Measures to Stop the Activities of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict; the Resolution of the Government of the Russian Federation of December 9, 1994, No. 1360 on Ensuring State Security and Territorial Integrity of the Russian Federation, Rule of

Law, the Rights an Freedoms of Citizens and Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and Adjacent Areas of the Northern Caucasus; Decree of the President of the Russian Federation of November 2, 1993, No. 1833 on the Main Provisions of the Military Doctrine of the Russian Federation.

The Constitutional Court of the Russian Federation [...] has considered in open session the case on examining the Constitutionality of the Decrees. [...]

The grounds for considering the case, under part 1 of Article 36 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation were an interpellation of a group of deputies of the State Duma of the Federal Assembly of the Russian Federation to check the constitutionality of the Decree [...] on the Main Provisions of the Military Doctrine of the Russian Federation in the part concerning the use of the armed forces of the Russian Federation in resolving internal conflicts [...], the interpellation of the Federation Council of the Federal Assembly of the Russian Federation to check the constitutionality of the Decrees [...] No. 2137 and [...] No. 2166, as well as the Resolution of the Government of the Russian Federation [...] No 1360, as well as the interpellation of a group of deputies of the Federation Council of the Federal Assembly of the Russian Federation of the same content.

[...] These interpellations, [...] were merged into a single proceeding. [...]

[T]he Constitutional Court of the Russian Federation found:

1. The Federation Council of the Federal Assembly of the Russian Federation [...] insists that the challenged decrees [...] and the resolution of the Government [...] formed a single system of normative legal acts and resulted in an unlawful use of the Armed Forces of the Russian Federation since their use on the territory of the Russian Federation as well as the other measures and actions stipulated [...] are legally possible only within the framework of the regime of a state of emergency or a state of martial law. It is stressed in the interpellation that these measures resulted in unlawful restrictions and mass-scale violations of the constitutional rights and freedoms of Russian citizens. [...]

2. In 1991-1994 an extraordinary situation arose on the territory of the Chechen Republic which is a subject of the Russian Federation. The validity of the Constitution of the Russian Federation and federal laws was denied, the system of legitimate bodies of power had been destroyed, regular unlawful armed formations were created, armed with the latest weaponry, and widespread violations of the rights and freedoms of citizens took place. [...]

   This extraordinary situation is historically stemming from the fact that in the period of Stalin's repressions the Chechen people had been deported and the consequences of that deportation had not been properly rectified. The State power first in the USSR and then in Russia has been unable to correctly assess the legitimate bitter feelings among the Chechens, the developments in the Republic and their motive forces. The federal bodies of power of the Russian Federation relaxed their law enforcement activities in the Chechen Republic, failed to ensure the protection of the State ammunition dumps on its territory and for several years exhibited passivity

in addressing the problems with that Republic as a subject of the Russian Federation. [...]

The constitutional goal of preserving the integrity of the Russian State accords with the universally recognised international legal principles concerning the right of nations to self-determination. It follows the Declaration of the principles of international law pertaining to friendly relations and co-operation between States in accordance with the Charter of the United Nations, adopted on October 24, 1970, that the exercise of the right to self-determination "should not be construed as sanctioning or encouraging any acts leading to the dismemberment or complete disruption of territorial integrity or political unity of sovereign independent States acting pursuant to the principle of equality and self-determination of nation".

Mindful of this, the federal authorities, the President, the Government and the Federal Assembly made repeated attempts to overcome the crisis in the Chechen Republic. However, they did not lead to a peaceful political solution.

The Decrees [...] prescribed the use of measures of State coercion to ensure the State security and territorial integrity of the Russian Federation, disarmament of illegal armed formations on the territory of the Chechen Republic.

Under part 2 of Article 3 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation does not consider the political opportuneness of the decisions made or the appropriateness of the actions earned out on their basis. [...]

5. In accordance with the principle of a law governed State, fixed in the Constitution of the Russian Federation, the bodies of power in their activities are bound both by internal and international law. The universally recognised principles and norms of international law and international treaties are, under Article 15, part 4 of the Constitution of the Russian Federation a component part of the legal system and must be observed in good faith, including by being taken into account in internal legislation.

The Supreme Soviet of the USSR in ratifying, on 29 September 1989 [...] Protocol II [...] directed the Council of Ministers of the USSR to prepare and submit to the Supreme Soviet proposals on making corresponding amendments in the legislation. However, that direction was not followed. Nevertheless, the provisions of this additional protocol on human treatment of all the persons who were not directly involved or have ceased to take part in hostilities, on the wounded, the sick, on the protection of civilians, of the facilities required for the survival of the civilian population, the installations and structures containing dangerous forces, on the protection of cultural values and places of worship are binding on both parties to the armed conflict.

At the same time improper consideration of these provisions in internal legislation has been one of the reasons of non-compliance with the rules of the above-mentioned additional protocol whereby the use of force must be commensurate with the goals and every effort must be made to avoid causing damage to civilians and their property. [...]

6. [...] International treaties in which the Russian Federation participates also proceed from the possibility of using armed forces to defend the national unity and territorial integrity of the State. According to Article 15 part IV of the Russian Constitution they are a constituent part of its legal system. Taking into account the possibility of such situations, the international community formulates in [...] Protocol II [...] rules on the protection of victims of non-international armed conflicts. [...]

7. [...] The main provisions of the Russian Federation's military doctrine contain no normative precepts. For this reason, the Presidential Decree [...] whereby they were adopted, also lacks normative content. Therefore, these documents do not fall within the category of legal acts that can be verified by the Constitutional Court of the Russian Federation [...]

8. [...] On the other hand, the stipulations of part V paragraph 1, point 3 of the resolution "On the expulsion out of the Chechen Republic of persons who pose a threat to public security and to the personal security of citizens, who do not live on the territory of the said Republic", cannot be regarded as being tantamount to what has been established by point 22, Article 11 of the Law of the Russian Federation on the Militia as the right of the militia to keep citizens away from certain localities, facilities, to oblige them to stay there or to leave these localities and facilities with the aim of protecting the health, lives and property of citizens, conducting search and investigation measures. [...]

   On the basis of the outlined and proceeding from part I of Article 71, Articles 72 and 87 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation, the Constitutional Court of the Russian Federation: [...]

   (3) It shall be recognised that the provisions on evicting persons posing threats to public safety and to the personal safety of citizens out of the territory of the Chechen Republic, contained in Resolution No. 1360 of the Government of the Russian Federation of December 9, 1994, "On Ensuring State Security and Territorial Integrity of the Russian Federation, Rule of Law, the Rights and Freedoms of the Citizens and Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and Adjacent of the Northern Caucasus", part V of paragraph 1, clause 3, and also on depriving journalists working in the armed conflict zone of their accreditation, paragraph 2 of clause 6, do not conform to the Constitution of the Russian Federation [...]

   (4) Under Article 68 and paragraph 1, part 1 of Article 43 of the Federal Constitutional law on the Constitutional Court of the Russian Federation, hearings on the case with regard to the examination of the constitutionality of Decree No. 1833 of the President of the Russian Federation of November 2, 1993, on the main provisions of the military doctrine of the Russian Federation, and also with regard to the examination of the constitutionality of the main provisions of the military doctrine of the Russian Federation, shall be closed.

   (5) The examination of the practical actions of the parties in the course of the armed conflict from the point of view of compliance with [...] Protocol II in accordance with Article 125 of the Constitution of the

Russian Federation, and parts I, II and III of Article 3 of the Federal Constitutional Law on the Constitutional Court, may not be a subject for consideration by the Constitutional Court of the Russian Federation and ought to be performed by other competent organs. In accordance with Articles 52 and 53 of the Constitution of the Russian Federation and the International Covenant on Civil and Political Rights, part III of Article 2, victims of any violations, crimes and abuses of power shall be granted efficient remedies in law and compensation of damages caused.

(6) The Federal Assembly of the Russian Federation shall settle the legislation on the use of the armed forces of the Russian Federation, as well as on the regulation of other conflicts and issues arising out of extraordinary situations, including those falling under [...] Protocol II. [...]

DISCUSSION

1. How does the Court qualify the conflict in Chechnya? Under which conditions could the conflict be qualified as an international one?
2. Is Protocol II applicable to the situation? Does the Court apply it? Why not? Are not international treaties directly applicable in Russia? Does the court consider that the rules of Protocol II are not self-executing and therefore need national legislation before they can be invoked before the Court? Why should a State provide for an implementing law even for self-executing norms of a directly applicable treaty?
3. Does the resolution "[o]n the expulsion out of the Chechen Republic of persons who pose a threat to public security" violate Protocol II? Does Art. 11 (22) of the Law of the Russian Federation on the militia violate it? (*Cf.* Art. 17 of Protocol II.)

Case No. 231, ECHR, Isayeva v. Russia

THE CASE

[**Source:** Case of Isayeva v. Russia, European Court of Human Rights, Application no. 57950/00, Judgement, Strasbourg, 24 February 2005; footnotes omitted; available on http://www.echr.coe.int/Eng/Judgments.htm]

CASE OF ISAYEVA v. RUSSIA
(Application no. 57950/00)

JUDGMENT

STRASBOURG
24 February 2005

In the case of Isayeva v. Russia,

The European Court of Human Rights (Former First Section), sitting as a Chamber [...]

Having deliberated in private on 14 October 2004 and 27 January 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 57950/00) against the Russian Federation lodged with the Court under [...] the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Zara Adamovna Isayeva ("the applicant"), on 27 April 2000. [...]

3. The applicant alleged that she was a victim of indiscriminate bombing by the Russian military of her native village of Katyr-Yurt on 4 February 2000. As a result of the bombing, the applicant's son and three nieces were killed. She alleged a violation of Articles 2 [right to life] and 13 [effective remedy before a national authority] of the Convention. [...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE [...]

A. The facts [...]

1. The attack on Katyr-Yurt

12. In autumn 1999 Russian federal military forces launched operations in Chechnya. In December 1999 rebel fighters ("*boyevikI*") were blocked by the advancing federal forces in Grozny, where fierce fighting took place.

13. The applicant submits that at the end of January 2000 a special operation was planned and executed by the federal military commanders in order to entice the rebel forces from Grozny. Within that plan, the fighters were led to believe that a safe exit would be possible out of Grozny towards the mountains in the south of the republic. Money was paid by the fighters to the military for information about the exit and for the safe passage. Late at night on 29 January 2000 the fighters left the besieged city and moved south. They were allowed to leave the city. However, once they had left the city they were caught in minefields and the artillery and air force bombarded them along the route. [...]

15. A significant group of Chechen fighters - ranging from several hundred to four thousand persons - entered the village of Katyr-Yurt early on the morning of 4 February 2000. According to the applicant, the arrival of the fighters in the village was totally unexpected and the villagers were not warned in advance of the ensuing fighting or about safe exit routes.

16. The applicant submitted that the population of Katyr-Yurt at the relevant time was about 25,000 persons, including local residents and internally displaced persons (IDPs) from elsewhere in Chechnya. She also submitted that their village had been declared a "safe zone", which attracted people fleeing from fighting taking place in other districts of Chechnya.

17. The applicant submitted that the bombing started suddenly in the early hours of 4 February 2000. The applicant and her family hid in the cellar of their house. When the shelling subsided at about 3 p.m. the applicant and her family went outside and saw that other residents of the village were packing their belongings and leaving, because the military had apparently granted safe passage to the village's residents. The applicant and her family, together with their neighbours, entered a Gazel minibus and drove along Ordzhonikidze road, heading out of the village. While they were on the road, the planes reappeared, descended and bombed cars on the road. This occurred at about 3.30 p.m.

18. The applicant's son, Zelimkhan Isayev (aged 23) was hit by shrapnel and died within a few minutes. Three other persons in the vehicle were also wounded. During the same attack the applicant's three nieces were killed: Zarema Batayeva (aged 15), Kheda Batayeva (aged 13) and Marem (also spelled Maryem) Batayeva (aged 6). The applicant also submitted that her nephew, Zaur Batayev, was wounded on that day and became handicapped as a result. [...]

19. The applicant submitted that the bombardment was indiscriminate and that the military used heavy and indiscriminate weapons, such as heavy aviation bombs and multiple rocket launchers. In total, the applicant submits that over 150 people were killed in the village during the bombing, many of whom were displaced persons from elsewhere in Chechnya. [...]

23. According to the Government, at the beginning of February 2000 a large group of Chechen fighters, headed by the field commander Gelayev and numbering over 1,000 persons forced their way south after leaving Grozny. On the night of 4 February 2000 they captured Katyr-Yurt. The fighters were well-trained and equipped with various large-calibre firearms, grenade- and mine-launchers, snipers' guns and armoured vehicles. Some of the population of Katyr-Yurt had already left by that time, whilst others were hiding in their houses. The fighters seized stone and brick houses in the village and converted them into fortified defence points. The fighters used the population of Katyr-Yurt as a human shield. [...]

25. The federal troops gave the fighters an opportunity to surrender, which they rejected. A safe passage was offered to the residents of Katyr-Yurt. In order to convey the information about safe exit routes, the military authorities informed the head of the village administration. They also used a mobile broadcasting station which entered the village and a Mi-8 helicopter equipped with loudspeakers. In order to ensure order amongst the civilians leaving the village, two roadblocks were established at the exits from the village. However, the fighters prevented many people from leaving the village.

26. Once the residents had left, the federal forces called on the air force and the artillery to strike at the village. The designation of targets was based on incoming intelligence information. The military operation lasted until 6 February 2000. The Government submitted that some residents remained

in Katyr-Yurt because the fighters did not allow them to leave. This led to significant civilian casualties - 46 civilians were killed, [...].

27. According to the Government's observations on the admissibility of the complaint, 53 federal servicemen were killed and over 200 were wounded during the assault on Katyr-Yurt. The Government also submitted that, as a result of the military operation, over 180 fighters were killed and over 240 injured. No information about combatant casualties on either side was contained in their observations on the merits. The criminal investigation file reviewed by the Court similarly contains no information on non-civilian casualties.

28. The events at the beginning of February 2000 were reported in the Russian and international media and in NGO reports. Some of the reports spoke of serious civilian casualties in Katyr-Yurt and other villages during the military operation at the end of January - beginning of February 2000.

2. The investigation of the attack [...]

30. On 24 August 2002 the military prosecutor of military unit no. 20102 replied to the NGO Memorial's enquiry about a criminal investigation. The letter stated that a prosecutor's review had been conducted following the publication on 21 February 2000 in the Novaya Gazeta newspaper of article entitled "167 Civilians Dead in Chechen Village of Katyr-Yurt". The review established that between 3 and 7 February 2000 a special military operation aimed at the destruction of illegal armed groups had taken place in Katyr-Yurt. The Western Alignment of the army and the interior troops had performed the operation according to a previously prepared plan: the village had been blocked and civilians had been allowed to leave through a corridor. The command corps of the operation had assisted the villagers to leave the village and to remove their possessions. Once the commanders were certain that the civilians had left the village, missiles had been deployed against Katyr-Yurt. Other means had also been employed to destroy the fighters. No civilians had been harmed as a result of the operation, as confirmed by the commandant of the security area of the Urus-Martan district On the basis of the above, on 1 April 2000 the prosecutors refused to open an investigation into the alleged deaths of civilians due to the absence of corpus delicti. The criminal investigation file reviewed by the Court contained no reference to this set of proceedings. [...]

32. In their further submissions the Government informed the Court that on 16 September 2000 a local prosecutor's office in Katyr-Yurt, acting on complaints from individuals, had opened criminal case no. 14/00/0003-01 to investigate the deaths of several persons from a rocket strike in the vicinity of the village. The case concerned the attack on the Gazel minibus on 4 February 2000, as a result of which three civilians died and two others were wounded. In December 2000 the case file was forwarded to the office of the military prosecutor in military unit no. 20102. Later in 2001 the case-file was transferred for investigation to the military prosecutor of the Northern Caucasus Military Circuit in Rostov-on-Don.

33. The investigation confirmed the fact of the bombing of the village and the attack on the Gazel minivan, which led to the deaths of the applicant's son and three nieces and the wounding of her relatives. It identified and questioned several dozen witnesses and other victims of the assault on the village. The investigation identified 46 civilians who had died as a result of the strikes and 53 who had been wounded. In relation to this, several dozen persons were granted victim status and recognized as civil plaintiffs. The investigators also questioned military officers of various ranks, including the commanders of the operation, about the details of the operation and the use of combat weapons. The servicemen who were questioned as witnesses gave evidence about the details of the operation's planning and conduct. No charges were brought (see Part B below for a description of the documents in the investigation file).

34. The investigation also checked whether the victims had been among the insurgents or if members of the unlawful armed groups had been implicated in the killings.

35. On 13 March 2002 the investigation was closed due to a *lack of corpus delicti*. [...]

e) Identification and questioning of other victims *[...]*

59. Roza D. testified that their house on the edge of the village was bombed on the morning of 4 February 2000. The first explosion occurred in her courtyard and wounded her two year old son, who died of his wounds early in the morning on 6 February. She remained in a cellar until 6 February, when she, with some other people, attempted to leave for Valerik. However, the roadblock was closed and the soldiers told them that they had an order from General Shamanov not to let anyone out. They remained in the cellar of an unfinished house on the edge of the village, near the exit to Valerik, for one more day, and on 8 February she returned home. [...]

g) Statement by Major-General Shamanov

66. On 8 October 2001 the investigation questioned Major-General Vladimir Shamanov, who at the material time had headed the operations centre (OC) of the Western Zone Alignment in Chechnya, which had included the Achkhoy-Martan district [...].

69. On the morning of the day on which the operation started (Mr Shamanov could not recall the exact date) the fighters had attacked the federal forces. They were well-equipped and armed with automatic weapons, grenade-launchers and fire-launchers, and used trucks armoured with metal sheets. He stated:

"Realising that the identity check in the village could not be conducted by conventional means without entailing heavy losses among the contingent, Nedobitko, absolutely correctly from a military point of view, decided to employ army aviation and ground attack air forces, artillery and mine-launchers against the fortified positions of the fighters entrenched in the village. Failure to employ these firm and drastic measures in respect of the fighters would have entailed unreasonably high

losses among the federal forces in conducting the special operation and a failure to accomplish the operative task in the present case. All this would have demonstrated impotence on the part of the federal authorities, would have called into question the successful completion of the counter-terrorist operation and the reinstatement of constitutional order in Chechnya. Failure to accomplish these tasks would threaten the security of the Russian Federation. Besides, our indecisiveness would have attracted new supporters to the illegal armed groups, who had adopted a wait-and-see attitude at the relevant time. This would have indefinitely extended the duration of the counter-terrorist operation and would have entailed further losses among the federal forces and even higher civilian casualties."

70. He stated that the fire-power employed had been directed at the fighters' positions "on the edges of the village and in its centre, near the mosque". Civilians were allowed to leave the village. The fighters were offered surrender, with a guarantee of personal safety, which they refused. They thus used the villagers as a human shield, entailing high civilian casualties.

71. In his opinion, the population of Katyr-Yurt should have prevented the fighters' entry into the village. Had they done so, as had happened earlier in the village of Shalazhi, there would have been no need to conduct such a "severe mopping-up operation" and to deploy aviation and artillery, and thus the unfortunate civilian losses could have been avoided. The losses among fighters, in his estimation, were about 150 persons. The rest escaped from the village at night, under cover of thick fog.

72. He was asked what measures were taken to ensure maximum security of the civilians during the operation in Katyr-Yurt. In response, Mr Shamanov responded that Nedobitko used a Mi-8 helicopter equipped with loud-speakers to inform civilians about the safe exit routes he had established. [...]

h) Statement by Major-General Nedobitko *[...]*

74. [...]

"From Shamanov I learnt that a large group of fighters, having escaped from Lermontov-Yurt, had entered Katyr-Yurt. Shamanov ordered me to conduct a special operation in Katyr-Yurt in order to detect and destroy the fighters.

I drew up a plan of the special operation, which defined units of isolation, units of search, rules of fire in case of enemy fire, positions of ... roadblocks... Two roadblocks were envisaged - one at the exit towards Achkhoy-Martan, another - towards Valerik. ... The involvement of aviation was foreseen should the situation deteriorate. The artillery actions were planned ... in advance in order to target the possible bandit groups' retreat routes and the lines of arrival of reserves to assist the besieged groups. The artillery were only to be involved in the event of enemy fire against the search groups.

This plan was drawn up the night before the operation. On the evening of the same day Shamanov called me to the command headquarters of the Western Zone to discuss the details of the operation. We foresaw the presence of refugees and fighters, and planned to check documents. Early in the morning on the following day I was returning to our position with two APCs. On the eastern side of the village, towards Valerik, there had been an exchange of fire. An Ural truck was on fire, three dead bodies lay on the ground and there were a few wounded. These were OMON [special police force units] from Udmurtia. We were also attacked from the village.

We descended and fired back. Then, under cover of the APCs, we moved south toward our command point. I immediately informed Shamanov about the deterioration in the situation. He authorised me to conduct the special operation in accordance with my plan.

Colonel R., commander of ... regiment, informed me that he had met with the head of administration of Katyr-Yurt, who stated that there were no fighters in the village, just a small 'stray' group who had had a skirmish with OMON forces. I did not know the number of fighters in the village, so I ordered that the search be carried out by previously determined groups of special forces from the interior troops, without artillery or aviation support. If there were few fighters, they could be destroyed by the search groups. If their number was substantial, they could be destroyed by tanks shooting directly at specific points, i.e. by pinpoint attacks. And if it was a very big bandit grouping, then it would be impossible to avoid the use of artillery and aviation, because otherwise the personnel losses would be too high.

The search groups moved out ... they were attacked... and I ordered them to retreat. One group could not withdraw... Realising that the use of artillery and aviation could not be avoided, I ordered colonel R. to organise evacuation of the civilians from the village, which he did through the head of the village administration. For that purpose colonel R. used a vehicle equipped with loudspeakers, through which he was able to inform the population of the houses on the edge of the village about the need to leave. The civilians were leaving the village through the pre-established roadblocks." [...]

***i) Testimony by servicemen in the ground forces** [...]*

84. Servicemen from the special forces of the Samara interior troops gave evidence about their participation in the Katyr-Yurt operation. One of two testimonies was disclosed by the Government. Serviceman B. testified that his unit was on mission in Chechnya in January - March 2000. On some date at the beginning of February they were deployed to Katyr-Yurt. Their unit was attacked near the river. He understood that civilians had been given three days to leave the village. From their positions they could clearly distinguish fighters from civilians, based on the presence of firearms and beards. [...]

j) Testimony by servicemen from the air force, helicopters and tank battalion

87. Two pilots from the army air force were questioned in relation to the attack on Katyr-Yurt. They were identified by the Government as pilot no. 1 and pilot no. 2. Both pilots stated that their unit took part in the bombardment of Katyr-Yurt on 4 February 2000. The mission sortie was between 12 and 2 p.m. on two SU-25 planes, each carrying six FAB-250 bombs. They dropped the bombs from a height of about 600 metres. The weather conditions were quite bad, and normally in such conditions they would not fly, but on that day the ground troops were in serious need of support. The targeting was done by a ground air controller who was positioned at the operation centre near the village. He indicated the targets and later reported to them that the bombing had been successful. In response to the question of whether they had seen any civilians or civilian vehicles in the streets of the village, the pilots either responded that the visibility was so bad - because of

clouds and the smoke from burning houses - that they could not see anything, or that they did not see civilians or civilian transport. [...]

90. When asked if he was aware of a plan to evacuate civilians, the air-controller responded that on the first day of his arrival Nedobitko mentioned that his initial plan had been to offer the fighters a chance to surrender or for the civilians to leave, but once the OMON forces had been attacked he had called in fighter jets.

91. Several helicopter pilots were questioned. They testified about taking part in the Katyr-Yurt operation. They employed non-guided missiles against the area targets indicated to them by forward air-controllers. They did not see any civilians or civilian vehicles in the village, only fighters who attacked them with machine-guns. [...]

k) Other documents from the military *[...]*

94. The military aerodrome submitted information to the effect that the horizontal fragment dispersion of a high explosion aviation bomb FAB-250 was 1,170 metres.

l) Military experts' report

95. On 26 November 2001 the investigator requested an expert opinion from the Combined Armed Services Military Academy in Moscow. Six questions were posed to the experts, who were given access to the investigation file. The questions concerned the accuracy of planning and conducting of the operation, the kind of documents and orders that should have been issued and the question of compliance of the operation in Katyr-Yurt with internal military rules. The experts were also asked to evaluate the propriety of Major-General Nedobitko's decision to deploy aviation and artillery against the fighters' positions; another question was to evaluate whether all necessary measures had been taken by the command corps of the OC of the Western Zone Alignment to minimize civilian victims in Katyr-Yurt.

96. On 11 February 2002 six of the Academy's professors, with military ranks from lieutenant-colonel to major-general, produced their report. They had had access to military documents, such as the operational orders of the United Group Alignment, of the OC of the Western Zone Alignment, log-books etc. They also used six legal acts as a basis for their report, the titles of which were not disclosed to the Court. The report found as a fact that the decision to employ aviation and artillery was taken by Major-General Nedobitko after the forces under his command had been attacked when they tried to enter the village. Aviation and artillery fire power was involved from 8.30 a.m. on 4 February until 6 February 2000.

97. The expert report concluded that the actions of the officers of the internal troops involved in the special operation to eliminate illegal armed groups in Katyr-Yurt on 4-6 February 2000 were in conformity with the Army Field Manual and the Internal Troops Field Manual. Analysis of the operative and tactical situation, as well as a videotape reviewed, permitted the experts to conclude that the decision to involve aviation and artillery had been a

correct and well founded one. This conclusion was further reinforced by reference to article 19 of the Army Field Manual, which states: "The commanding officer's resolve to defeat the enemy should be firm and should be accomplished without hesitation. Shame on the commander who, fearing responsibility, fails to act and does not involve all forces, measures and possibilities for achieving victory in a battle".

98. As to minimising civilian losses, the report concluded that certain measures were taken to that effect: the commanding officers organised and carried out an exodus of the population from the village, and chose a localised method of fire. The administration and the population of the village were informed about the need to leave the area of the operation and the necessary time was provided for this. A roadblock was established at the village's western exit, equipped with a filtration point and manned by servicemen from the Ministry of the Interior and the Federal Security Service, located away from the area of the combat operations. The report further suggested that the losses could have been further minimised if additional time had been allocated for the civilians' departure. However, that same time could have been used by the fighters to prepare more thoroughly for defence of the village, which could have entailed additional losses among federal forces. Finally, the experts reported that it was not possible to reach any definite conclusions about what had prevented the village's entire population from leaving safely, but that it was probably the fighters. [...]

2. Additional witness statements submitted by the applicant [...]

110. The applicant submitted five additional testimonies by witnesses and victims about the attack on Katyr-Yurt. Witness A. testified that by the beginning of February 2000 the village was under the firm control of the federal forces and that there were about eight to ten thousand IDPs, because people thought there would be no fighting in Katyr-Yurt. There were military roadblocks around the village and a commandatura in its centre. The aviation strike at 9 a.m. on 4 February 2000 was totally unexpected. The witness tried to leave the village between 4 and 5 p.m. on 4 February, but the car he was travelling in was shot at from a helicopter and he and his relatives were wounded. He escaped on 5 February, having lost two relatives. On the road he saw many dead people and burnt cars. The road was covered with debris from destroyed houses. The road towards Achkhoy-Martan was filled with people trying to leave, and the soldiers would not allow anyone through, even the wounded. The witness received no assistance from the State. He stated that when he went to the head of the village administration to report the deaths of his relatives he saw a list with the names of 272 civilians who had been killed. Witnesses B., C. and D. gave evidence about heavy bombing on 4 and 5 February 2000, which involved aviation, helicopters, artillery and Grad multiple missile-launchers. They also testified about General Shamanov's arrival at the roadblock, when he allegedly ordered the soldiers not to let people out of the village. They cited his orders to "filter out" all men, but these orders were not enforced by the interior troops. [...]

II. RELEVANT DOMESTIC LAW AND PRACTICE

a) The Constitutional provisions

116. Article 20 of the Constitution of the Russian Federation protects the right to life.

117. Article 46 of the Constitution guarantees the protection of rights and liberties in a court of law by providing that the decisions and actions of any public authority may be appealed to a court of law. Section 3 of the same Article guarantees the right to apply to international bodies for the protection of human rights once domestic legal remedies have been exhausted.

118. Articles 52 and 53 provide that the rights of victims of crime and abuse of power shall be protected by law. They are guaranteed access to the courts and compensation by the State for damage caused by the unlawful actions of a public authority.

119. Article 55 (3) provides for the restriction of rights and liberties by federal law, but only to the extent required for the protection of the fundamental principles of the constitutional system, morality, health, rights and lawful interests of other persons, the defence of the country and the security of the state.

120. Article 56 of the Constitution provides that a state of emergency may be declared in accordance with federal law. Certain rights, including the right to life and freedom from torture, may not be restricted.

b) The Law on Defence

121. Section 25 of the Law on Defence of 1996 [...] provides that "supervision of adherence to the law and investigations of crimes committed in the Armed Forces of the Russian Federation, other Forces, military formations and authorities shall be exercised by the General Prosecutor of the Russian Federation and subordinate prosecutors. Civil and criminal cases in the Armed Forces of the Russian Federation, other forces, military formations and authorities shall be examined by the courts in accordance with the legislation of the Russian Federation."

c) The Law on the Suppression of Terrorism

122. The 1998 Law on the Suppression of Terrorism [...] provides as follows:

"*Section 3. Basic Concepts*

For the purposes of the present Federal Law the following basic concepts shall be applied:

... 'suppression of terrorism' shall refer to activities aimed at the prevention, detection, suppression and minimisation of the consequences of terrorist activities;

'counter-terrorist operation' shall refer to special activities aimed at the prevention of terrorist acts, ensuring the security of individuals, neutralising terrorists and minimising the consequences of terrorist acts;

'zone of a counter-terrorist operation' shall refer to an individual land or water surface, means of transport, building, structure or premises with adjacent territory where a counter-terrorist operation is conducted; ...

Section 13. Legal regime in the zone of an anti-terrorist operation

1. In the zone of an anti-terrorist operation, the persons conducting the operation shall be entitled:
   2) to check the identity documents of private persons and officials and, where they have no identity documents, to detain them for identification;
   3) to detain persons who have committed or are committing offences or other acts in defiance of the lawful demands of persons engaged in an anti-terrorist operation, including acts of unauthorised entry or attempted entry to the zone of the anti-terrorist operation, and to convey such persons to the local bodies of the Ministry of the Interior of the Russian Federation;
   4) to enter private residential or other premises ... and means of transport while suppressing a terrorist act or pursuing persons suspected of committing such an act, when a delay may jeopardise human life or health;
   5) to search persons, their belongings and vehicles entering or exiting the zone of an anti-terrorist operation, including with the use of technical means; ...

Section 21. Exemption from liability for damage

In accordance with and within the limits established by the legislation, damage may be caused to the life, health and property of terrorists, as well as to other legally-protected interests, in the course of conducting an anti-terrorist operation. However, servicemen, experts and other persons engaged in the suppression of terrorism shall be exempted from liability for such damage, in accordance with the legislation of the Russian Federation." [...]

f) Situation in the Chechen Republic

133. No state of emergency or martial law has been declared in Chechnya. No federal law has been enacted to restrict the rights of the population of the area. No derogation under Article 15 of the Convention has been made. [...]

THE LAW [...]

A. The alleged failure to protect life

1. Arguments of the parties

a) The applicant

163. The applicant submitted that the way in which the military operation in Katyr-Yurt had been planned, controlled and executed constituted a violation of Article 2. She submitted that that the use of force which resulted in the death

of her son and nieces and the wounding of herself and her relatives was neither absolutely necessary nor strictly proportionate.

164. The applicant stated that the commanders of the Russian federal forces must have been aware of the route taken by the rebel forces out of Grozny and could have reasonably expected their arrival at Katyr-Yurt, and either prevented it or warned the civilian population. Moreover, there is evidence to suggest that they had knowingly and intentionally organised a passage for the rebels which drew them into villages, including Katyr-Yurt, where they were attacked.

165. Once the rebels were in the village, the military used indiscriminate weapons such as "Grad" multiple missile-launchers, FAB-250 and FAB-500 heavy aviation bombs with a destruction radius exceeding 1,000 metres and "Buratino" thermobaric, or vacuum, bombs. In the applicant's view, the latter are prohibited by international law on conventional weapons. These weapons cannot be regarded as discriminate, nor as appropriate for the declared aim of "identity checks". No safe passage was provided for the civilians. Civilians who left the village did so under fire and were detained at the roadblock. As to the military advantage gained by the operation, the applicant referred to the absence of any specific data to that effect in the investigation file. It was not disputed that most of the rebels, together with their commanders, had escaped the village despite the heavy bombardment. There was no exact information about the number or descriptions of the fighters killed or captured during the operation, a description or list of weapons seized etc.

166. The applicant submitted that the military experts based their conclusion about the appropriateness of the attack on legal acts which permitted or even incited the use of indiscriminate weapons, such as Article 19 of the Army Field Manual, which ordered commanding officers to make use of any available weapons in order to achieve victory.

167. The applicant also referred to the third party submissions made in the cases of Isayeva v. Russia, Yusupova v. Russia and Bazayeva v. Russia (nos. 57947/00, 57948/00 and 57949/00) [available on www.echr.coe.int/], in which Rights International, a USA-based NGO, summarised for the Court the relevant rules of international humanitarian law governing the use of force during attacks on mixed combatant/civilian targets during a non-international armed conflict.

168. The applicant pointed to the Government's failure to produce all the documents contained in the case-file related to the investigation of the attack. In her opinion, this should lead the Court to draw inferences as to the well-foundedness of her allegations.

b) The Government

169. The Government did not dispute the fact of the attack or the fact that the applicant's son and her three nieces had been killed and that the applicant and her other relatives had been wounded.

170. The Government argued that the attack and its consequences were legitimate under Article 2 para. 2 (a), i.e. they had resulted from the use of force absolutely necessary in the circumstances for protection of a person from unlawful violence. The use of lethal force was necessary and proportionate to suppress the active resistance of the illegal armed groups, whose actions were a real threat to the life and health of the servicemen and civilians, as well as to the general interests of society and the state. This threat could not have been eliminated by other means and the actions by the operation's command corps had been proportionate. The combat weapons were specifically directed against previously-designated targets.

171. The Government further submitted that the applicant and other civilians were properly informed about the ensuing assault and the need to leave the village, for which purpose the military used a helicopter and a mobile broadcasting station equipped with loudspeakers. Military checkpoints were placed at the two exits from Katyr-Yurt. However, the federal forces' attempts to organise a safe exit for the population were sabotaged by the actions of the fighters, who prevented the residents from leaving and provoked fire from the federal forces, using them as a "human shield". The documents of the criminal investigation file demonstrated, in the Government's opinion, that the majority of the civilian casualties had been sustained at the initial stage of the special operation, i.e. on 4 February 2000, and in the centre of the village, where the most severe fighting between the federal troops and the insurgents occurred.

2. The Court's evaluation [...]

b) Application in the present case *[...]*

181. Accepting that the use of force may have been justified in the present case, it goes without saying that a balance must be achieved between the aim pursued and the means employed to achieve it. The Court will now consider whether the actions in the present case were no more than absolutely necessary for achieving the declared purpose. [...]

182. At the outset it has to be stated that the Court's ability to make an assessment of how the operation was planned and executed is hampered by the lack of information before it. The Government did not disclose most of the documents related to the military action. No plan of the operation, no copies of orders, records, log-book entries or evaluation of the results of the military operation have been submitted and, in particular, no information has been submitted to explain what was done to assess and prevent possible harm to civilians in Katyr-Yurt in the event of deployment of heavy combat weapons. [...]

184. The applicant submits that the military must have known in advance about the very real possibility of the arrival of a large group of fighters in Katyr-Yurt, and further submits that they even incited such an arrival. The Court notes a substantial amount of evidence which seems to suggest that the fighters' arrival was not so unexpected for the military that they had no time to take measures to protect the villagers from being caught up in the conflict. [...]

186. In contrast, the applicant and other villagers questioned stated that they had felt safe from fighting due to the substantial military presence in the district, roadblocks around the village and the apparent proclamation of the village as a "safety zone". An OMON detachment was stationed directly in Katyr-Yurt. The villagers' statements describe the arrival of fighters and the ensuing attack as something unexpected and not foreseen (see paras. 15, 59, 110 above).

187. The Court has been given no evidence to indicate that anything was done to ensure that information about these events was conveyed to the population before 4 February 2000, either directly or through the head of administration. However, the fact that the fighters could have reasonably been expected, or even incited, to enter Katyr-Yurt clearly exposed its population to all kinds of dangers. Given the availability of the above information, the relevant authorities should have foreseen these dangers and, if they could not have prevented the fighters' entry into the village, it was at least open to them to warn the residents in advance. The head of the village administration, whose role in communicating between the military and the residents of the village appears to have been perceived as a key one, was questioned only once and no questions were put to him about the circumstances of the fighters' arrival or about the organisation of a safe exit for residents.

188. Taking into account the above elements and the reviewed documents, the Court concludes that the military operation in Katyr-Yurt was not spontaneous. The operation, aimed at either disarmament or destruction of the fighters, was planned some time in advance. [...]

190. Once the fighters' presence and significant number had become apparent to the authorities, the operation's commanders proceeded with the variant of the plan which involved a bomb and missile strike at Katyr-Yurt. Between 8 and 9 a.m. on 4 February 2000 Major-General Nedobitko called in fighter jets, without specifying what load they should carry. The planes, apparently by default, carried heavy free-falling high-explosion aviation bombs FAB-250 and FAB-500 with a damage radius exceeding 1,000 metres. According to the servicemen's statements, bombs and other non-guided heavy combat weapons were used against targets both in the centre and on the edges of the village [...].

191. The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention [...]. The operation in question therefore has to be judged against a normal legal background. Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the

standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.

192. During the investigation, the commanders of the operation submitted that a safe passage had been declared for the population of Katyr-Yurt; that the population has been properly informed of the exit through the head of administration and by means of a mobile broadcasting station and a helicopter equipped with loudspeakers; and that two roadblocks were opened in order to facilitate departure.

193. The documents reviewed by the Court confirm that a measure of information about a safe passage had [...] been conveyed to the villagers. Several servicemen gave evidence about the steps taken, although these submissions are not entirely consistent. One resident confirmed having seen a helicopter equipped with loudspeakers in the morning of 4 February 2000, although she could not make out the words because of the fighting around [...]. The applicant and numerous other witnesses stated that they had learnt, mostly from their neighbours, that the military would permit civilians to exit through a humanitarian corridor. Although no document submitted by the military and reviewed by the Court indicated the timing of this pronouncement, the villagers indicated the timing at about 3 p.m. on 4 February 2000. It thus appears that the declaration of the corridor became known to the residents only after several hours of bombardment by the military using heavy and indiscriminate weapons, which had already put the residents' lives at great risk. [...]

195. Once the information about the corridor had spread, the villagers started to leave, taking advantage of a lull in the bombardments. The presence of civilians and civilian cars on the road leading to Achkhoy-Martan in the afternoon of 4 February 2000 must have been fairly substantial. One of the witnesses submitted that many cars were lined up in Ordzhonikidze Street when they were leaving (). The applicant stated that their neighbours were leaving with them at the same time [...]. Colonel R. stated that on the first day of bombing the villagers left Katyr-Yurt *en masse* by the road to Achkhoy-Martan [...]. The soldiers manning the roadblock leading to Achkhoy-Martan must have seen people escaping from the fighting. This must have been known to the commanders of the operation and should have led them to ensure the safety of the passage. [...]

199. The applicant submitted that the existing domestic legal framework in itself failed to ensure proper protection of civilian lives. She made reference to the only disclosed legal act on which the conclusions of the military experts based their report, namely, the Army Field Manual. The Court agrees with the applicant that the Government's failure to invoke the provisions of any domestic legislation governing the use of force by the army or security forces in situations such as the present one, whilst not in itself sufficient to decide on a violation of the State's positive obligation to protect the right to life, is, in the circumstances of the present case, also directly relevant to the Court's considerations with regard to the proportionality of the response to the attack [...].

200. To sum up, accepting that the operation in Katyr-Yurt on 4-7 February 2000 was pursuing a legitimate aim, the Court does not accept that it was planned and executed with the requisite care for the lives of the civilian population. [...]

DISCUSSION

1. a. Does the Court apply IHL? Could it do so under the European Convention of Human Rights (ECHR)?

   b. If the Court had applied IHL, would it have made the same balancing test as it did in paras. 181-199 of the judgment?

2. How would you qualify the fighting between the Chechen fighters and the Russian federal forces in February 2000? Does the Court classify the conflict? When the Court writes in para. 191 that the weapons were used "outside wartime", does this mean that there was no armed conflict in Chechnya?

3. Is Article 19 of the Army Field Manual referred to in paras. 97 and 166 (and considered by the Court to be an insufficient legal framework in para. 199) contrary to IHL? Sufficient under IHL?

   N.B.: Hereafter, when rules applicable to international armed conflicts are referred to, please discuss whether and why they may also apply in a non-international armed conflict.

4. If the village had been declared a "safe zone" as claimed by the appellant, should it have been awarded special protection under IHL? Was this changed with the arrival of the Chechen fighters? (*Cf.*, by analogy, Arts. 14 and 15 of Convention IV; Art. 60 of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rules 35 and 36.] p. 730.).

5. a. Was the plan described in para. 13 compatible with IHL? If the Russian federal forces had "knowingly and intentionally organised a passage for the rebels which drew them into villages", is this a violation IHL?

   b. Under IHL, should governmental armed forces have informed the local population earlier about the possible arrival of rebel fighters (as the Court decided under the ECHR in para. 187)? (*Cf.*, by analogy, Art. 57 of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rule 20.] p. 730.)

6. a. Did the rebel fighters violate IHL by entering the village? By intermingling with the civilian population? By using civilians as shields? By hindering civilians from leaving the village? (*Cf.*, by analogy, Arts. 28, 35 and 48 of Convention IV; Arts. 51 (7) and 58 of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rules 22-24.] p. 730.)

   b. Under IHL, should the population have prevented the fighters from entering the village? Had they the right, as civilians, to prevent fighters from entering the village?

7. Were the methods used to inform the population of the "safe passage" (informing the head of village and a helicopter equipped with loudspeakers) sufficient? Was it lawful to attack the village indiscriminately (para. 26: "the federal forces called on the air force and the artillery to strike at the village") after such "free passage" was granted? Even if some civilians actually had not left? Even if some civilians had not left based upon their free will? Is General Nedobitko correct in holding that "if it was a very big bandit grouping, then it would be impossible to avoid the use of artillery and aviation, because otherwise the personnel losses would be too high" (para. 74)? (*Cf.*, by analogy, Arts. 51 (4), (5), (7) and (8) of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rules 15-21.] p. 730.)

8. a. If there was an evacuation of the civilians through the "safe passage" as claimed by Major-General Nedobitko (para. 74), would the attack on the civilian vehicles trying to leave this way be a violation of IHL? What about attacks on civilians trying to leave a different way? What if there was no "safe passage"? (*Cf.* Art. 3 common to the Conventions; Arts. 4 (1) and 13 of Protocol II; by analogy, Art. 51 (2) of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rule 1.] p. 730.)

   b. If General Shamanov did order that no one should pass the roadblocks during the attack, was it a violation of IHL?

9. Under IHL, would the governmental forces have had to establish and keep the records mentioned in para. 182? Would such records be useful to implement the proportionality rule and the obligation of an attacker to take precautionary measures? (*Cf.*, by analogy, Art. 57 of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rules 15-18.] p. 730.)

10. What do you think of the choice of weapons? What are the relevant rules of IHL? Do they appear to have been respected? Under IHL, should General Nedobitko have specified what munitions the aviation should have used? (*Cf.* Art 13 of Protocol II; by analogy, Arts. 35, 51 (4) and 57 of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rules 15, 17, 70 and 71.] p. 730.)

11. What do you think of the Russian investigation of the attack, and the conclusions drawn? Did Russia have an obligation to investigate the allegations and punish those responsible for crimes? Assuming that it did, did this investigation fulfil this obligation? (*Cf.*, by analogy, Art. 49 of Convention I; Art. 50 of Convention II; Art. 129 of Convention III; Art. 146 of Convention IV and Art. 85 (1) of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rules 156 and 158.] p. 730.)

12. Is the exemption of liability of servicemen conducting anti-terrorist operations compatible with IHL? (*Cf.*, by analogy, Art. 3 of the Hague Regulations and Art. 91 of Protocol I; *See also* **Case No. 29**, ICRC, Customary International Humanitarian Law. [*Cf.* Rule 150.] p. 730.)

XXXVIII. THE NETHERLANDS

Case No. 232, The Netherlands, Public Prosecutor v. Folkerts

THE CASE

[**Source:** Lauterpacht, E (ed.), *International Law Reports*, Cambridge, Grotius Publication Limited, vol. 74, 1987, pp. 695-698; footnotes omitted.]

PUBLIC PROSECUTOR v. FOLKERTS

The Netherlands, District Court of Utrecht
December 20, 1977

SUMMARY

The facts: On September 22, 1977 the accused, a West German national, was approached by the police at the premises of a car-hire firm in Utrecht. Shots were exchanged, and two policemen were wounded, one of whom died from his injuries shortly afterwards. The accused was charged with murder, attempted murder and the unlawful possession of weapons.

Held: The accused was found guilty on all charges and was sentenced to a term of imprisonment of twenty years. [...]

The following is the text of the relevant part of the judgment of the Court:

... The accused's counsel has claimed that the Court has no jurisdiction to hear the case. He based his view on the following proposition: the accused is a member of the Rote Armee Fraction ("Red Army Faction"). The Faction is engaged in a class war, not only with its homeland, the German Federal Republic, but with any State in the world in which such a class war is going on.

Therefore, he contends that members of the Red Army Faction enjoy the protection of the four Geneva Conventions of August 12, 1949, having regard to the Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

Such a claim must fail on the ground that Protocol I, as appears from the Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, was not opened for signature by the States participating in the Conference, which included the Netherlands, until December 12, 1977 and, as appears from Article 95, was to enter into force "six months after two instruments of ratification or accession have been deposited", whilst "for each party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such party of its instrument of ratification or accession". Thus it is clear that this Protocol had not, and actually could not, have entered into force on September 22, 1977, nor is it valid as yet.

The District court additionally made the following observations:

The Protocol additional to the Geneva Conventions of August 12, 1949 will be applicable to the situations referred to in Article 2. This Article is common to the four Conventions and provides, in paragraph (1):

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

The above Protocol provides for the following extension (Article 1, paragraph 4):

> The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist 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.

Thus the Protocol brings members of liberation movements under the protection of the Geneva Conventions to the extent that such movements act in the exercise of their right of self-determination and are fighting against "colonial domination and alien occupation and against racist regimes".

The Red Army Faction, according to its objectives as set out by Folkerts' counsel, in no way fulfils these conditions. Nor has it in any way been proved or even been made to appear likely that, at the time of his arrest in Utrecht on September 22, 1977, the accused was involved in a struggle against the Netherlands State within the meaning of the above Protocol.

Folkerts' counsel also argued that his client should be discharged from prosecution because the offences with which he is charged are not criminal offences within the meaning of the law of war. This argument must fail on the same grounds.

On the basis of these established facts, the accused is liable to punishment.

[...]

The accused and his counsel went in great detail into the political background which they said had led to his acts which, if they could not be regarded as formal acts of war, in any case should be regarded... (at least that is how the Court understands the plea) as acts of resistance, which make Folkerts' conduct understandable and possibly even justifiable.

The Court dismisses this plea categorically, irrespective of the question of whether or not the Red Army Faction's objections to the policies of the USA and the FRG contain a core of truth.

It is totally unacceptable in democratic countries such as those just mentioned, and also in the Netherlands, for individuals who disagree with their country's policy, for that reason to resort to acts of violence such as those which took place here. Such acts attack the most fundamental principles of the constitutional State.

The Court is not concerned with any offences which the accused may possibly have committed abroad. His acts in the present case, however, cannot and may

not ever be justified or extenuated on the basis of membership of the Red Army Faction, as contended by his counsel...

[Report: 9 Netherlands Yearbook of International Law (1978), p. 348 (English translation).]

DISCUSSION

1. When did the Conventions and Protocols enter into force? When are they applicable to a given case? Could they apply even before they enter into force? (*Cf.* Arts. 58/57/138/153 respectively of the four Conventions and Art. 95 of Protocol I.)

2. Do you agree with the Court that this situation does not constitute an international armed conflict to which Protocol I applies? (*Cf.* Art. 1 (4) of Protocol I.)

3. a. What are the twofold requirements for the applicability of Art. 1 (4) of Protocol I?

   b. What does the right of self-determination mean? Who is entitled to the right of self-determination? (*Cf., e.g.,* Art. 1 (2) of the UN Charter, and the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.)
   [Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), October 24, 1970:
   a) all peoples have the right freely to determine their political status;
   b) every State has the duty to respect this right and to promote its realization;
   c) every State has the duty to refrain from any forcible action which deprives peoples of this right;
   d) in their actions against, and resistance to, such forcible action, peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter;
   e) under the Charter, the territory of a colony or other non-self-governing territory has a status separate and distinct from that of the State administering it.]

   c. Is the Red Army Faction a group entitled to exercise the right of self-determination? If not, is it possible for the twofold requirements of Art. 1 (4) to apply here? Or, perhaps, is the list provided in Art. 1 (4) not exhaustive?

   d. Supposing that the accused represented the German people or the working class in its right of self-determination, would Protocol I have been applicable?

   e. Supposing the accused was genuinely fighting for a group's self-determination could one consequently argue that there was an armed conflict such that Protocol I would apply?

4. If the accused had been a combatant in an international armed conflict, would the Netherlands have had jurisdiction over this case? Would Protocol I have barred the Netherlands from punishing him for those acts? (*Cf.* Arts. 82 and 85 of Convention III and Arts. 43 and 44 of Protocol I.)

XXXIX. WESTERN SAHARA

Case No. 233, UN, The Situation Concerning Western Sahara

THE CASE

[**Source:** UN Doc. S/25170 (January 26, 1993).]

THE SITUATION CONCERNING WESTERN SAHARA

Report by the Secretary-General

[...]

III. THE SITUATION IN MISSION AREA

[...]

24. On October 16, 1992, municipal elections were held in Morocco and in the Territory of Western Sahara. [...]

25. Subsequently, in various communications addressed to me, my Special Representative and the Force Commander of MINURSO, the Frente POLISARIO reported grave incidents allegedly involving violence and arrests throughout the Territory. While confirming the occurrence of public demonstrations in the Territory related to the electoral campaign, Morocco denied these allegations. It is pertinent to recall that while MINURSO's current military mandate is strictly limited to the monitoring and verification of the cease-fire, MINURSO, as a United Nations mission, could not be a silent witness to conduct that might infringe the human rights of the civilian population. Hence MINURSO patrols were alerted to possible unrest. Their reports did not corroborate the allegations made by the Frente POLISARIO. [...]

DISCUSSION

1. What is the mandate of MINURSO? Why could MINURSO, as a United Nations mission, not "be a silent witness to conduct that might infringe the human rights of the civilian population" (*para. 25*)? Because the UN has an obligation to ensure respect for those rights? Or because the Member States constituting MINURSO have that obligation?

2. Is MINURSO only concerned with human rights violations and not IHL, although similar acts constitute IHL violations as well? Could the term "human rights" mentioned in the Report by the Secretary-General and other documents of the United Nations be understood as "human rights in armed conflict," and thus referring to IHL? If so, does such a statement indicate an obligation on the UN,

which is not party to the Conventions, to enforce IHL? And also to be bound by IHL? Would such an obligation exist directly on the UN itself, or via the Member States constituting MINURSO because they are States Parties to the Conventions?

3. Does *para. 25* of this Report describe an ever-present obligation on UN forces? Is it an unwritten obligation in every UN mandate? Was it the case in the conflict, *e.g.*, in the former Yugoslavia? (*See* **Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia, particularly paras. 14 and 20. p. 1732.) Does *para. 25* clearly state the extent of the obligations and required actions of UN forces? Does such a statement not require further clarification? Yet, is it possible for UN forces, considering their resources and their expanding roles throughout the world, to be one of the most effective tools for implementing IHL? Why or why not?

Case No. 234, The Conflict in Western Sahara

THE CASE

A. Human Rights Watch Report, October 1995

[**Source:** Human Rights Watch Report, *Keeping it Secret. The United Nations Operation in the Western Sahara*, October 1995 Vol.I 7 No. 7, available on http://www.hrw.org/reports/1995/Wsahara.htm; to facilitate reading the chapter "History of the Conflict" has been moved to the beginning of the document.]

Keeping it secret
The United Nations operation in the Western Sahara [...]

HISTORY OF THE CONFLICT

The Western Sahara, or former Spanish Sahara, is an expanse of desert measuring over 260,000 square kilometers, bordered by Morocco, Algeria and Mauritania. The territory, which traditionally had a tribal, nomadic population, was under Spanish occupation from 1904 until 1975. Following the second world war, the rise of nationalist sentiment had a destabilizing effect on the European colonial powers. The United Nations eventually responded to the growing demands for self-determination by adopting a resolution on decolonization in 1960. [footnote 19: United Nations General Assembly, "Declaration on the Granting of Independence to Colonial Countries and Peoples," (New York: United Nations, 1960), A/15/1514 [available on http://www.unhchr.ch].] [...] However, Spain did not take any action towards organization of a referendum and, on May 10, 1973, the Popular Front for the Liberation of Saguia el Hamra and Rio de Oro, known as the Polisario Front, was formed to fight for Sahrawi independence from Spain. After two years of guerrilla warfare, Spain agreed to undertake a U.N.-sponsored referendum, scheduled to be held in the territory in 1975. In preparation for the process, Spain conducted a census in 1974 of the population present in the territory.

In the meantime, Morocco had put forth its own claims to sovereignty over the Western Sahara. [...] On December 13, 1974, the United Nations General

Assembly asked the International Court of Justice (ICJ) to provide an advisory opinion on whether the Western Sahara was, at the time of colonization by Spain, a *terra nullias* (no man's land) and, if not, what the legal ties were between this territory and the Kingdom of Morocco and Mauritania. The court's opinion, issued on October 16, 1975, found that there was no evidence "of any tie of territorial sovereignty" between the Western Sahara and either Morocco or Mauritania, but that there were "indications of a legal tie of allegiance between the [Moroccan] sultan and some, although only some, of the tribes in the territory." In addition, the court found "the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity ... and the territory of the Western Sahara." However, the court concluded that it "has not found legal ties of such a nature as might affect the application of [General Assembly] resolution 1514 (XV) in the decolonization of the Western Sahara and, in particular, of the principle of self-determination...."

Despite the ICJ's support for the principle of self-determination, King Hassan II of Morocco chose to interpret the opinion as an affirmation of Morocco's claims to the territory. Thus, King Hassan launched what has come to be known as the "Green March," during which an estimated 350,000 Moroccan citizens marched across the border into the Western Sahara; at the same time, the government began to build up its troops on the territory. The United Nations Security Council and General Assembly passed resolutions denouncing the Green March and calling for the withdrawal of all the participants in the march. [footnote 23: United Nations Security Council, "Situation Concerning Western Sahara," (New York: United Nations, 1975), S/RES/380 [available on http://www.un.org].] and United Nations General Assembly, "Question of Spanish Sahara," (New York: United Nations, 1995), A/30/3458. [available on http://www.arso.org/06-4-0.htm] However, on October 31, 1975, additional Moroccan forces entered the Western Sahara and armed conflict broke out between the Polisario Front and the Moroccan Royal Armed Forces. [...]

On November 14, 1975, Spain, Morocco and Mauritania concluded the secret "Madrid Accords," pursuant to which Spain agreed to cede administrative control of the territory to Morocco and Mauritania upon the official expiration of its mandate over the Western Sahara on February 27, 1976. The day after the Spanish withdrawal, Polisario proclaimed an independent Western Saharan state: the Sahrawi Arab Democratic Republic (SADR), with Polisario as its political wing. [...]

The military conflict between Polisario, Morocco and Mauritania continued until July 10, 1978, when the Mauritanian government was overthrown in a military coup. Polisario immediately declared a cease-fire and on August 5, 1979, signed a peace treaty with Mauritania, ending the latter's involvement in the conflict. Soon thereafter, however, Morocco occupied most of the Western Saharan territory relinquished by Mauritania, and the armed struggle between Morocco and Polisario continued. From 1980 until 1987, Morocco constructed a series of long defensive sand walls (the "berm"), which were heavily mined and fortified with barbed wire, observation posts and sophisticated early warning systems. At the same time, these walls served to enclose all of the major population centers of the Western Sahara and the territory's rich phosphate deposits.

Beginning in 1979, the Organization of African Unity (OAU) sought a resolution of the Western Sahara conflict and called for a cease-fire and a referendum to provide the right of self-determination. However, when the Sahrawi Arab Democratic Republic was admitted to the OAU in 1984, Morocco withdrew from the organization. [footnote 26. To date, no country has recognized Moroccan sovereignty over the Western Sahara. The SADR, for its part, has diplomatic relations with seventy-six countries, primarily from Africa, Latin America and Asia. Human Rights Watch interview with Boukhari Ahmed, Polisario representative to the United Nations, September 19, 1995.] [...] In September 1988, following the adoption of a series of resolutions related to the conflict, the U.N. proposed a settlement plan (the "Settlement Plan") for the region, which provided for a cease-fire, the organization and conducting of a referendum, the repatriation of refugees and the exchange of prisoners of war. Both parties eventually accepted the Settlement Plan and a cease-fire formally took effect in September 1991, with Morocco controlling the vast majority of the territory and Polisario controlling a sliver along the eastern and southern borders. [...]

SUMMARY

[...] Human Rights Watch has determined that Morocco, which is the stronger of the two parties both militarily and diplomatically, has regularly engaged in conduct that has obstructed and compromised the fairness of the referendum process. In addition, a lack of U.N. control over the process has seriously jeopardized its fairness. The U.N. has already been present in the Western Sahara for four years without being able to exercise the "sole and exclusive responsibility" over the referendum that it was to have assumed under the Settlement Plan. The Settlement Plan contemplated a "transitional period," which was supposed to start immediately after the cease-fire took effect in September 1991. The transitional period included, among other provisions, a timetable for the reduction of Moroccan troops in the territory, the exchange of prisoners of war by the parties and repatriation of refugees. [...] [footnote 3: United Nations Security Council, "The Situation Concerning Western Sahara: Report of the Secretary-General," (New York: United Nations Publications, 1990), S/21360, [available on http://www.arso.org/06-6-0.htm] paras. 47 and 71.] [...]

Opportunities for independent outsiders to observe and analyze the identification process are strictly limited. [...] MINURSO [United Nations Mission for the organisation of a referendum in western Sahara] staff members, including military observers, are subjected to constant surveillance by Morocco. This, and internal pressure from MINURSO, made them reluctant, even frightened, to speak to our organization, except on the explicit condition of anonymity. [...] Moroccan authorities' harassment of Human Rights Watch, as well as their strict surveillance of its activities, impeded the organization's ability to conduct a thorough investigation of human rights abuses in the Moroccan-controlled Western Sahara. [...]

CREATING FACTS ON THE GROUND

Both Morocco and Polisario have formally agreed to accept the results of the referendum. Nevertheless, pending the referendum, Morocco seems to be entrenching itself more firmly in the Western Sahara with each passing day,

taking steps that have dramatically altered the demography and other aspects of the territory. [...]

Morocco, which was estimated to have [deployed] over 120,000 troops in its Saharan military campaign, [accrued] military expenditures amounting to about $250 million a year for the period 1976 to 1986 alone.

The Moroccan government, which is in administrative control of most of the Western Sahara, has also carried out a variety of infrastructure projects, ranging from construction of roads, ports and administration buildings to the supplying of water, and provided social services, including housing, schools and hospitals.

Civilian expenditures in the four provinces of the Western Sahara totalled about US$2.5 billion between 1976 and 1989, or about $180 million a year.... Most of the total was allocated to Laayoune province, where nearly two-thirds of the population lives. The primary objective of these expenditures was to win the hearts and minds of the resident Sahrawi population. Over the longer term, the Moroccan government hopes to recoup its investment from profits from Saharan fisheries and phosphates.

MINURSO personnel also point to lucrative financial incentives provided to Moroccans who move to the Western Sahara, including tax-free salaries and subsidized food. These incentives succeeded in increasing the population of the Western Sahara from the 74,000 figure of the 1974 Spanish census to 162,000 in 1981, according to a Moroccan census. [...]

The most visible examples of Moroccan attempts to populate the region with its supporters are the "tent cities" that were created near the major Western Saharan cities in September and October of 1991. These encampments house 40,000 people who were transported to the Western Sahara in order to vote in the referendum. According to Moroccan authorities, these individuals are of Sahrawi origin, but had left the territory for a variety of reasons. [...]

Shortly after the population transfer in 1991, Johannes Manz, the secretary-general's special representative for the Western Sahara resigned his post, informing the secretary-general that

Concerning the non-military violations, the movement of unidentified persons into the Territory, the so-called 'Second Green March,' constitutes, in my view, a breach of the spirit, if not the letter of the peace plan. [...]

In fact, the population transfer clearly violated the letter of the Settlement Plan, specifically paragraphs 72 and 73, which only permit Western Saharans resident outside of the territory to return to the Western Sahara after their eligibility to vote has been established by the Identification Commission. [footnote 120: U.N. Doc. S/21360 [available on http://www.arso.org/06-6-0.htm], paras. 72 and 73.] [...]

It is commonly alleged that the tent people are not Sahrawi at all but were brought in, and are being kept in the region, by force, in order to increase Moroccan votes in the referendum. Human Rights Watch was unable to investigate this issue, since our representative was detained by Moroccan security forces when she attempted to enter a tent city in Laayoune () Indeed, the area is strictly off limits to foreigners, except during visits conducted in the

presence of government authorities. Jarat Chopra, who visited the region as part of an American bi-partisan delegation visiting the region in July 1993, remarked,

The rows of white tents bear black symbols of the Moroccan royal family. This is not a spontaneous movement of people but appears an orchestrated effort... [...]

Following a trip to the region in 1992, Chopra testified before the U.S. Senate Foreign Relations Committee that, "If any [of the inhabitants of the tent cities] have come to vote and keep the Sahara Moroccan there is no evidence that they will stay. These are temporary camps, not settlements, where civilians can do nothing but wait. One year later, many are trying to leave but are threatened with arrest if they do."

OTHER HUMAN RIGHTS ISSUES RELATED TO THE WESTERN SAHARA CONFLICT

Freedom of Expression and Assembly in the Moroccan-Controlled Western Sahara [...]

Hundreds of cases of individuals who reportedly "disappeared" up to two decades ago also remain unresolved. In June 1991, the Moroccan government released over two hundred individuals, most of whom "disappeared" because they or their family members had challenged the government's claims to the Western Sahara. [footnote 130: However, a July 8, 1994 general amnesty, pursuant to which 424 Moroccan political prisoners were released, explicitly excluded those who had advocated independence for the Western Sahara.] The victims were usually held in secret detention centers and subjected to torture, some for almost two decades. [...] [footnote 131: Amnesty International, "Breaking the Wall of Silence: The Disappeared in Morocco."]

Based on testimony from family members and from the former "disappeared," AFAPREDESA [Association of Families of Prisoners and Disappeared Sahrawis] reports that at least 526 Sahrawis are still "disappeared" and may be detained in Morocco or in the Moroccan-controlled Western Sahara.

The Refugee Camps in Tindouf

The armed conflict in the Western Sahara caused the displacement of tens of thousands of Sahrawis to the eastern border of the territory. In January 1976, the Moroccan bombardment of camps that had been set up outside the Western Saharan cities caused thousands of casualties and forced tens of thousands of Sahrawi to flee once again, this time taking refuge in southwestern Algeria. Twenty years later, [the camps] are home to 165,000 refugees [...].

Prisoners of War Camps

Over 2,400 prisoners of war (POWs), both Moroccan and Sahrawi, captured in the course of the armed conflict, have been held in difficult conditions for up to twenty years. Morocco states that it holds only seventy-two POWs [...]. [footnote 146: Human Rights Watch takes no position on whether the armed conflict between Morocco and the Polisario Front was of an internal or an international character, as defined in the Geneva Conventions of August 12, 1949. However, we refer to the combatants captured during the armed conflict as "prisoners of war," in order to be consistent with the terminology used in the United Nations Settlement Plan for the Western Sahara, as well as by the secretary-general

and the Security Council.] Polisario refutes this figure, asserting that Morocco actually holds 200 - 300 prisoners.

The International Committee of the Red Cross (ICRC) registered eighteen Polisario prisoners held by Morocco in April 1978 but, following that visit, Morocco denied access to the ICRC until May 1993. Since that date, the ICRC has made four additional visits to Sahrawi prisoners in the southern Moroccan city of Agadir; to date, it has registered a total of seventy-two prisoners. Polisario permitted the ICRC access to Moroccan prisoners it was holding during the first two years of the conflict. Then, from 1976 until 1984, Polisario suspended ICRC visits, presumably in protest of continued denial of access to the ICRC by Morocco. Since 1984, the ICRC has attempted to make regular visits to the Moroccan prisoners held Polisario. [...]

Some [Moroccan prisoners] complained about their physical treatment at the hands of prisonguards, while others emphasized that this had improved since 1986 or 1987. [...] Indeed, conditions in the camps appear to have fluctuated over the past twenty years, in accordance with the political tide, and the most marked improvement seems to have occurred since 1987.

Everyone complained about medical problems, particularly the lack of medication. [...]

It is compulsory for prisoners to work outside of the camps, in Polisario-administered locations, doing work ranging from construction to mechanics to tailoring. They are not paid for their labor, in violation of international standards. [footnote 151: Article 62 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War requires that "prisoners of war be paid a fair working rate." [...] It should also be noted that, due to its lack of monetary resources, Polisario does not pay Sahrawi refugees either [...].] The climatic conditions in which the prisoners work, as well as their long working hours, also fall short of international standards. [...] [footnote 153: See, e.g., Articles 51 and 53 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War which, even if were not binding, would serve as a guideline for detention conditions.] Since 1993, [...], prisoners have been able to send and receive messages, mail and even packages on a regular basis, principally through the ICRC. [...]

Released Prisoners of War

Perhaps most tragic, however, is the plight of 184 elderly, ill and disabled Moroccan POWs who were released by Polisario for humanitarian reasons on May 8, 1989, prior to the signing of the Settlement Plan. In an astonishing move, Morocco has refused to take these prisoners back because it believes that this act would constitute a recognition of Polisario and be exploited by Polisario for public relations purposes. Instead, Morocco has insisted that it will not take back any prisoners until all POWs are released. This violates the right to enter one's country, guaranteed in Article 12 of the International Covenant on Civil and Political Rights, ratified by Morocco on August 3, 1979. [...]

[T]he ICRC has been involved in this issue from the outset and has made countless demarches to the Moroccan government, but to no avail. [...]

B. The Issue of the "Disappeared"

[**Source:** Amnesty International, Day of the "Disappeared" - families still await truth and justice; AI INDEX: MDE 29/003/2002, 30 August 2002 Press release 148/02; available on http://www.amnesty.org/]

Morocco/Western Sahara: Day of the "Disappeared" - families still await truth and justice

AI INDEX: MDE 29/003/2002
30 August 2002

As the world observes the Day of the "Disappeared" 2002 today, Amnesty International is calling on the Moroccan authorities to finally end the suffering of hundreds of Moroccans and Sahrawis still awaiting news of relatives who "disappeared" at the hands of the Moroccan security services in previous decades.

"*If my relative is dead, I want to receive the body or remains for burial and begin the grieving process that would allow me to come to terms with the loss. If my loved one is alive, I want the chance to see him for what little time he may have left.*" Amnesty International has heard the same message from dozens of families of the "disappeared" in Morocco/ Western Sahara, from Morocco's economic capital, Casablanca, to the desert town of Smara in Western Sahara.

"*It is cruel and inhuman that a woman whose husband was arrested in front of her during the 1960s or 1970s should still be trying to obtain an answer from the authorities on whether he continues to be held in secret detention or was tortured to death*," the organization said, adding "*It is high time those answers were given.*"

Amnesty International has publicly welcomed the series of positive initiatives undertaken by the Moroccan authorities in recent years to improve the human rights situation, including the establishment by King Mohamed VI in July 2000 of an arbitration commission to decide on compensation for material and psychological damage suffered by victims of "disappearance" and their families. Compensation has so far been awarded in several hundred cases. "*However, there can be no substitute for truth and justice*," Amnesty International said.

On this day, Amnesty International adds its voice to those families of "disappeared" and calls on the Moroccan authorities to conduct prompt, thorough, independent and impartial investigations into each individual case of "disappearance" and to bring those responsible to justice.

Background

The issue of "disappearances" has marked the history of Morocco/Western Sahara in the past four decades and remains one of the most painful unresolved human rights problems. More than a thousand people, the majority of them Sahrawis, "disappeared" between the mid-1960s and the early 1990s at the hands of Moroccan security services.

Several hundred Sahrawis and Moroccans were released in the 1980s and 1990s after spending up to 18 years completely cut off from the world in secret

detention centres. Dozens more "disappeared" are reported to have died in secret detention. However, the fate of hundreds of others remains unknown. [...]

C. The Issue of Prisoners of War

[**Source:** ICRC Press Release, 03/10, 26 February 2003; available on http://www.icrc.org.]

Morocco/Western Sahara: 100 Moroccan prisoners repatriated

Geneva (ICRC) - On 26 February, the International Committee of the Red Cross (ICRC) repatriated 100 Moroccan prisoners released by the Polisario Front.

Accompanied by an ICRC team, the prisoners left Tindouf, Algeria, aboard an aircraft chartered by the organization and were handed over to the Moroccan authorities at the Inezgane military base, near Agadir. Before the operation, ICRC delegates had interviewed the prisoners individually to make sure that they were being repatriated of their own free will. All the prisoners were allowed to take their personal effects with them.

The ICRC welcomes the release of the prisoners, most of whom are elderly and sick. The organization nevertheless remains concerned about the plight of the 1,160 Moroccans still being held captive and reiterates its call for their release, in conformity with the provisions of international humanitarian law. The matter is all the more pressing given the age and poor health of the remaining prisoners, some of whom have been deprived of their freedom for more than 20 years. On 7 July 2002, 101 Moroccan prisoners were released under ICRC auspices.

ICRC delegates visit prisoners held by the Polisario Front twice a year. Their most recent visit took place in December 2002. The delegates provide the prisoners with medical aid in particular and enable them to exchange news with their families by means of Red Cross messages.

[N.B.: In August 2005, the Polisario had released all the Moroccan prisoners in its custody. *Cf.* ICRC Press Release 05/44, 18 August 2005, online: http://www.icrc.org.]

DISCUSSION

1. a. How do you categorize the conflict between Morocco and the Polisario Front - is it a non-international or an international armed conflict? Because the Polisario Front, which is fighting for the independence of the Saharawi Arab Democratic Republic (SADR), is supported by Algeria? Because the SADR is internationally recognized as a State by some 50 countries and is a member State of the African Union? Or because the Polisario Front is a national liberation movement fighting for the right of self-determination of the Saharawi people? Does the fact that Western Sahara is considered by the UN to be a "non-self-governing territory" have an influence on the classification of the conflict? Does the fact that Morocco is not party to Protocol I influence the classification of the conflict? (*Cf.* Art. 2 common to the Conventions and Art. 1 (4) of Protocol I.)

b. As a ceasefire has been in effect since 1991, can the situation still be categorized as an armed conflict? If not, is International Humanitarian Law (IHL) applicable? When does the applicability of IHL begin and end? What provisions of IHL remain applicable? All provisions protecting those detained in connection with the conflict? All provisions protecting the population of an occupied territory? (*Cf.* Art. 2 (2) common to the Conventions; Art. 5 (1) of Convention III; Art. 6 of Convention IV and Arts. 1 (4) and 3 of Protocol I.)

2. Is Western Sahara an occupied territory? (*Cf.* Art. 42 of the Hague Regulations, **Document No. 1**. p. 517.) Is Western Sahara "under *de facto* control of enemy forces"? Which provisions of Convention IV cease to be applicable "one year after the general close of military operations," and which provisions are applicable throughout the period of occupation? (*Cf.* Art. 6 (3) of Convention IV.) Does Protocol I have a broader scope inasmuch as it ceases to be applicable "on the termination of the occupation"? (*Cf.* Art. 3 (b) of Protocol I.) From what moment is it determined that there is no longer an "occupation" - from "the liberation of the territory or [...] its incorporation in one or more States in accordance with the right of the people or peoples of that territory to self-determination"? (*Cf.* Commentary of Art. 3 (b) of Protocol I, online: http://www.icrc.org/ihl) What if the referendum on self-determination, which the UN has been attempting to organize for 15 years, never takes place? What would the consequences be, in terms of IHL, of the various possible outcomes of this conflict?

3. a. Which of the applicable provisions of IHL are in your opinion being violated by the parties to the conflict? Those concerning occupied territory? Those concerning protected persons? Protected civilians? Prisoners of war? (*Cf.* Art. 3 common to the Conventions; Arts. 109, 110 and 118 of Convention III; Arts. 31, 32, 33 (1), 33 (3), 49 (6), 52 (2), 53, 71 (1), 76 and 143 of Convention IV and Arts. 32, 33 and 75 of Protocol I.) Are these violations war crimes? (*Cf.* Art. 130 of Convention III; Art. 147 of Convention IV and Art. 85 of Protocol I.)

b. Does Morocco's transfer of part of its own civilian population into Saharawi territory constitute a violation of IHL? (*Cf.* Art. 49 (6) of Convention IV.) A war crime? Do torture and arbitrary arrest and sentencing constitute violations of IHL? War crimes? Only if committed against Saharawis, or equally if committed against any civilian? Do the practice of enforced disappearance and the failure to provide information on missing persons constitute violations of IHL? War crimes? (*Cf.* Art. 147 of Convention IV and Art. 85 of Protocol I; see also Art. 7 (2) (i) of the ICC Statute for a definition of "enforced disappearance"; *see* **Case No. 15**. p. 608.) Did the Polisario's failure to release the Moroccan prisoners of war it was holding constitute a violation of IHL? A war crime? Did exacting compulsory labour from them constitute a violation of IHL? A war crime? (*Cf.* Arts. 62 and 130 of Convention III and Art. 85 (4) (b) of Protocol I.)

XL. UNITED STATES OF AMERICA

Case No. 235, US, US v. Marilyn Buck

THE CASE

[**Source:** United States District Court for the Southern District of New York, 690 F. Supp. 1291 (1988); footnotes omitted.]

UNITED STATES OF AMERICA, v. MARILYN BUCK, Defendant

UNITED STATES OF AMERICA v. MUTULU SHAKUR, Defendant

Nos. SSS 82 Cr. 312-CSH; 84 Cr. 220-CSH
July 6, 1988

[...]

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge

Defendant Mutuku Shakur moves to dismiss indictment SSS 82 Cr. 312 (CSH). He contends that the acts charges in the indictment are political acts which are not properly the subject of criminal prosecution. He further contends that under applicable treaties and international law he is a prisoner of war, and thus immune from prosecution for the acts charged in the indictment. Defendant Marilyn Buck joins the motion "as it applies to the conspiracy [charges in indictment 84 Cr.220 (CSG) and as it applies to, in particular, the breakout of Joanne Chesimard, also known as Assata Shakur." Trial Tr. at 10,178, March 22, 1988.

I.

When he was arraigned on the indictment in 1985, Shakur appealed orally to the "Geneva Conventions" and a "prisoner of war" status.

Thereafter, and on several occasions, Shakur's counsel stated an intention to move to dismiss the indictment under international law. [...]

II.

Defendants motions rest on their perception of the political situation faced by Americans of African ancestry and of the role of the Republic of New Afrika ("RNA") in responding to that situation. In brief, defendants view the RNA as a sovereign nation engaged in a war of liberation against the colonial forces of the United States government. The Fifth Circuit summarized that premise in a case involving a member of the Provisional Government of the Republic of New Afrika:

> The RNA claims that it is an independent foreign nation composed of "citizens" descended from Africans who were at one time slaves in this country. It contends that the African slaves in America were converted into a free community by, successively, the Confiscation Acts of 1861 and 1862, the Emancipation Proclamation of January 1863, and the Thirteenth Amendment to the Constitution of the United States. It further insists that the citizenship of the slaves, upon being freed, reverted to that of their ancestors at the time they were brought to America. That means to the RNA that they resumed African citizenship and owed no allegiance to this country. The RNA contends that it, and not the United States, is sovereign over Mississippi, Louisiana, Alabama, Georgia, and South Carolina, because those are lands "upon which the Africans had lived in the majority traditionally and which they had worked and developed. It says that it has asserted sovereignty over those lands ever since the "blacks occupying it took up arms against the authority of the United States and thus asserted their New African nation's claim to the land, and, briefly, to independence" when President Andrew Johnson issued proclamations in 1865-1866 giving that land back to its former owners. The RNA says that its sovereignty over the lands in the five named states has never ceased, add that the United States has merely operated there without right or authority. It claims that its efforts to regain that land have intensified since the "formal revival and organization" of the New African Government by proclamation on March 31, 1968.

United States v. James, 528 F.2d 999, 1005 (5th Cir.1976), *rehearing denied* 532 F.2d 1054, *cert. denied* 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976).

In support of their view of the sovereign status of the RNA, defendants have submitted an affidavit of counsel detailing some of the history of African peoples in North America, with particular emphasis on incidents of resistance to slavery and incidents of former slaves establishing self-governing communities throughout the southeastern United States. Defendants conclude from this history that people of African descent are and have been engaged in a struggle to assert their right to self determination. They see local, state and federal law enforcement agencies as their opponents in the struggle. [...]

IV.

Defendants also contend they are entitled, under international law including treaties of the United States, to treatment as prisoners of war.

Defendants argument begins with the assertion that the New Afrikan Nation, which as noted under Point II they define as all people of African ancestry living in the United States, shares with all other peoples of the world the right to self-determination. They contend that:

> As is the case with every colonial experience, the New Afrikan Nation as a colony has no independent economic structure. The vast majority of the population of New Afrika, however, has at all points in history been contained within the same imperialist economic structure, and has shared the misfortune of suffering discriminatory treatment within it. Indeed it is appropriate to say in the case of New Afrika, as in the case of most colonies, that New Afrikans as a

> National population are an underclass frozen at the bottom of the American economy.

Memorandum in Support at 22. Defendants argue that as a colonized people engaged in a struggle for self-determination, New Afrikans are entitled to judicial recognition of the war-like nature of their struggle. They assert:

The New Afrikan Liberation Struggle is acknowledged and respected in many parts of the world, especially in nations that were former colonies of European powers, but the American government has never afforded this Movement the international rights and protections it so justly deserves.

We believe that the struggle waged by New Afrikan/Black people against racial oppression in American [sic] incorporates all the elements of warfare, that the petitioner [Shakur] has demonstrated his resistance to that oppression in the war, and that he should be accorded prisoner of war status while held in the custody of the United States Government.

Reply memorandum at 5

In short, on this branch of their motion defendants do not seek to extend by analogy to the case at bar principles derived from a separate body of law. On the contrary, they appeal directly to principles of international law. [...]

[3] The sources of international law enforceable in the federal courts are treaties ratified by the United States; executive or legislative acts declaring the principle sought to be enforced; the decision of an appellate court binding upon the trial court; and, in the absence of any of these, a more amorphous but nonetheless well-recognized body of authority. The "law of nations", the Supreme Court said in *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820), "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." [...]

[...] The defendants at bar, claiming a prisoner of war status exempting them from prosecution under these indictments, rely primarily upon two sources of international law. The first is the Geneva Convention Relative to the Protection of Prisoners of War of August 12, 1949 (6 U.S.T. 3316, T.I.A.S. No. 3364), which the United States has ratified. Second, defendants rely upon principles articulated in the first of two Protocols to the Geneva Conventions of 1949 which, in 1977, the Swiss government opened for signatures. [...]

Protocol I deals with international armed conflicts. Consistent with their view that "the Provisional Government of the Republic of New Africa in legal, political, and international affairs" represents New Afrikans struggling for independence, brief in support at 6, defendants lay particular emphasis upon Protocol I. Protocol II deals with internal armed conflicts, generally referred to as civil wars. The President of the United States, recommended ratification of Protocol II to the Senate, but recommended against ratification of Protocol I.

I consider the Geneva Convention and Protocol I separately.

[4] As to the Convention, defendants observe that Article 2 provides that the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, *even if the state of war is not recognized by one of them*". (emphasis added). From that disclaimer, defendants pass on to Article 4, which defines "prisoners of war" in part as follows:

> "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

The United States responds with the argument that Article 4 of the Convention cannot apply to these defendants since the case at bar does not involve armed conflict "between two or more of the High Contracting Parties," as defined in Article 2. In other words, although the Convention applies even if a state of war is not recognized by one of such Parties, nonetheless the conflict must be between two or more High Contracting Parties. However the Provisional Government of the Republic of New Afrika may be characterized, the United States continues, it is not a High Contracting Party to the Geneva Conventions. Accordingly, the government concludes, the only applicable provisions of the Convention are found in Article 3, applicable to internal armed conflicts "not of an international character", whose provisions do not include references to prisoners of war.

In my view, the United States is correct in arguing for the non-applicability of Article 4 of the Convention to the Republic of New Afrika, or to these defendants. But even if that were not so, it is entirely clear that these defendants would not fall within Article 4, upon which they initially relied. Article 4(A)(2) requires that to qualify as prisoners of war, members of "organized resistance movements" must fulfill the conditions of command by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. The defendants at bar and their associates cannot pretend to have fulfilled those conditions. For comparable reasons, Article 4(3)s reference

to members of "regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power", also relied upon by defendants, does not apply to the circumstances of this case.

I come then to Protocol I of 1977.

[5] The Conference which resulted in the Protocols was convened largely to address concerns of new nations that the laws of war did not reflect the reality of modern warfare, particularly in the context of wars of national liberation. It was approached "with caution and concern" by the United States delegation.

> [We] had seen in other contexts the risk that conferences of one hundred or more countries would be dominated by a majority of developing countries, a majority of which all too often seems to be led by radical states bearing grudges against the wealthy countries in general and against the United States in particular. These concerns were, in fact, justified as shown by the political debates during the first two sessions.... Consistent with these concerns, we approached the Conference as more of a hazard than an opportunity. (Report of the United States Delegation to the Conference, Fourth Session, at 28-29, quoted in the governments memorandum in Response at 4-5.)

Defendants rely on Protocol I's treatment of Combatant and Prisoner of War Status as support for the present claim. *See* Articles 43-47, Protocol I. The United States Ambassador to the Conference, George H. Aldrich, has termed Protocol I's approach to the problem of prisoner of war status as comprehensive and novel. Aldrich, *Guerilla Combatants and Prisoner of War Status,* 31 Am.Univ.L.Rev. 871, 874 (1982).

The novel and comprehensive approach undertaken by Protocol I is rooted in its definition of the armed forces of a Party to a conflict, which are expansively defined as "all organized 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 recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." (Article 43, quoted in Aldrich, *supra,* at 874 n. 2.)

Under this approach, the key issue for determining whether a person is a member of armed forces entitled to prisoner of war status is a factual issue, i.e. the existence of a command link from a Party to the conflict to the alleged prisoner of war, rather than a political issue, i.e. recognition by the adverse Party. Article 45 places the burden of proof on this issue squarely on the detaining power, which provides:

> A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war... 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. (Quoted in Aldrich, *supra,* at 875.)

> Defendants argue that Protocol I, and its expanded entitlement to prisoner of war status, form a part of that international law which the federal courts are bound to apply. [...]

That passage is particularly applicable to the case at bar because "(o)ne of the main reasons for convening the diplomatic Conference was the view of many Third World countries that the strict international standards on what constitutes an international armed conflict should be broadened to include so-called wars of national liberation. This view was not shared by the United States and its major allies." Government brief in opposition at 9. That basic division among the nations is precisely the sort of ideological division which prompted the Supreme Court in Sabbatino to reverse the lower courts for undertaking to apply "international law" to the rights and obligations of the parties.

Although the United States delegation originally endorsed Protocol I, the matter was studied further, and in the event President Reagan recommended against its ratification. In the President's view, Protocol I "politicizes humanitarian law and purports to eliminate the traditional distinction between international and non international conflicts in a harmful manner"; grants combatant status to irregular forces in certain circumstances event if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the existing laws of war"; and is "not acceptable as a new norm of international law." Government brief in opposition at 10. As noted, the Senate has not ratified Protocol I.

The United States argues at bar that the President's decision not to recommend ratification of Protocol I constitutes a "controlling executive act." Brief in Opposition at 14. From that premise, the United States argues that under *The Pacquete Habana, supra,* this court cannot look to international law, since *The Pacquette Habana* "stands for the proposition that customary international law applies only where there is no treaty or controlling executive, legislative or judicial action and where it becomes necessary to resort to customary law to determine the applicable law." *Id.* at 13.

I am not prepared to carry that submission to its logical conclusion. One can conceive of the executive branch of government taking a "controlling act" which flies in the face of the law of all civilized nations. I am reluctant to conclude that an independent judiciary would be powerless to enforce an otherwise universally accepted rule of international law, lest it be compared with the compliant Nazi judges in Hitler Germany. But the question arises only in the presence of "a settled rule of international law" by "the general assent of civilized nations", the *Pacquete Habana, supra,* 175 U.S. at 694, 20 S.Ct. at 297; and that degree of uniformity is difficult to demonstrate, as Judge Kaufman made clear in *Filartiga* [...]. After an exhaustive review of conventions, treaties, and legal writings, the Court of Appeals concluded in *Filartiga* that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the

international law of human rights, regardless of the nationality of the parties." 630 F.2d at 878.[...]

However, one source indicates that as of October, 1980 the Protocol was formally accepted by only 15 nations. *See Aldrich, New Life for the Laws of War,* 75 Am. J. Int'l.L- 764 (1981) (Botswana, Cyprus, El Salvador, Ecuador, Ghana, Jordan, Libya, Niger, Sweden, Tunisia, Yugoslavia, Mauritania, Gabon, the Bahamas and Finland.)

This apparent slight acceptance of the text of Protocol I is itself evidence that its terms lack the general assent of international law. In addition, defendants refer me to no instance where Protocol I' s definition of prisoner of war status was actually enforced, and I have found no such instance in my own research. The only reported case in this country rejects the claim. *United States v. Morales,* 464 F. supp. 325 (E.D.N.Y.. 1979). This lack of utilization indicates that the prisoner of war definition in Protocol I has not achieved that level of "custom and usage" necessary to elevate its principles to the status of international law.

[6] It follows that the present defendants are not asking an independent judiciary to make universally accepted international law a part of domestic law, notwithstanding the opposition of an intransigent and tyrannical executive. Rather, on an issue which has divided and continues to divide the nations of the world, defendants ask this Court to ignore the President's decision to recommend rejection of Protocol I, and to act as if the Senate had ratified the Protocol, whereas in fact it has not. The judiciary lacks authority thus to intervene in issues committed by the Constitution to coordinate political departments.[...]

[...]

For the foregoing reasons, the defendants' effort to avoid the charges contained in these indictments lacks foundation in international or domestic law. Their motions are accordingly denied in their entirety.

It is SO ORDERED.

DISCUSSION

1. Does the decision of the Court imply that if the US had been a party to Protocol I, the defendants would have had POW status? Under Protocol I, which conditions other than fighting for the self-determination of a people must a person fulfil to be granted POW status? Is the existence of a command link to a Party to the conflict really the key issue under Protocol I? (*Cf.* Arts. 1 (4), 43 and 44 of Protocol I.)

2. In spite of the US refusal to ratify Protocol I, could the Federal Court acknowledge the applicability of some its provisions? Under which conditions?

3. Upon which provisions could the defendant have construed his case in order to gain POW status? Could his case be sustainable in the national court of your country?

4. Is the argument of the defendant sustainable when he argues that the movement to which he belongs, namely the New Afrikan Nations shares the right of self-determination? Which provisions does he infer by making this type of statement? What are the necessary criteria to qualify as a movement of national liberation?
5. Do you accept the argument of the defendant that the New Afrikan Nations are waging a war against the United States and that he should therefore be recognized as a combatant?
6. The Defendant argued that the provisions relating to POWs in Protocol I form part of that International Law which federal courts are bound to apply. What does this mean? Does he imply that these provisions are customary international law and hence applicable regardless of whether the US has ratified the Protocol?
7. Do you agree with the reasoning used by the Judge that there is not a uniform custom in relation to the provisions of POW status in Protocol I?
8. Having in mind that the judge gave the decision in 1988, would you say that since then one could state that the provisions regarding POW status in Protocol I are emerging customary law or even customary? Today, could the defendant therefore have POW status?
9. If the defendant had POW Status, would he therefore necessarily be immune from prosecution? For acts of violence? For conspiracy? For conspiracy in the breakout of a prisoner?

Case No. 236, US, The September 11 2001 Attacks

[N.B.: On 11 September 2001, members of the al Qaeda terrorist network orchestrated the most devastating terrorist attack in the history of the United States when they hijacked US domestic flights and plunged four commercial airliners into the World Trade Center in New York City, the Pentagon near Washington D.C., and an open field in rural Pennsylvania. Approximately 3,000 civilians were killed that day and the US and world economy was severely damaged.]

THE CASE

A. The Day the Free World entered a New War

[**Source:** JACOT Martine, "Le jour où le monde libre est entré dans une nouvelle guerre", in *Le Monde*, 12 September 2001. Original in French, unofficial translation.]

The day the Free World entered a new war

"What emerges from foreign editorials is that the political face of the world has changed since the attacks perpetrated against New York's nerve centre on Tuesday, 11 September. The date is regarded as marking a new era, an era in

which international terrorism has become a weapon of global warfare capable of striking anywhere. Fear too seems to have spread across the planet live on TV and the internet. The entire free world is now at war, many claim. Editorial writers are divided into several camps, however. The most bellicose among them feel that if responsibility for these attacks is claimed abroad they constitute acts of war which must be responded to with force; the more numerous 'pacifists' voices argue that they should be dealt with through the criminal justice system and not by means of the indiscriminate and unjust violence of retaliation. Which voice will be heeded?" [...]

IN THE EUROPEAN PRESS

Süddeutsche Zeitung: "America at war"

"America has been at war since the morning of Tuesday, 11 September. This series of attacks poses a threat to United States sovereignty not seen since Pearl Harbor [...] Not even in their blackest scenarios have terrorism experts and security specialists ever imagined such treachery or destructive power. Nor did they conceive of such precision, such determination, or such desire to kill. [...] Nowhere in the annals of terrorism can one find an event combining such brutality and such symbolism in one diabolical stroke. New York's World Trade Center was America's flagship, emblematic of its economic and cultural power - a national symbol. The Pentagon in Washington is the nerve centre of military power and the concrete symbol of an invincible nation [...] certain that it could never be attacked from the outside." [...]

Frankfurter Allgemeine Zeitung: "Right in the heart"

"[...] It is not yet known who is behind these attacks. However, one thing is certain: terrorism has become a weapon of war in the twenty-first century." [...]

The Times (London): "The day that changed the modern world"

"The United States, its allies and the civilised world are at war today against an enemy which, while undeclared, is as well organised and as ruthless as any that a modern state has confronted. [...] The American dream itself was the target of yesterday's co-ordinated and deadly terrorist attacks on the most potent symbols of Western political, commercial and military power. But it was more than that; it was an attack on civilised liberal society, designed to force all countries that could conceivably be targets to become, in self-defence, high security states. Very few events, however dramatic, change the political landscape. This will." [...]

B. United States: ICRC condemns Attacks

[**Source:** ICRC, Press Release, 01/30, 11 September 2001, available on http://www.icrc.org]

Geneva (ICRC) - The International Committee of the Red Cross (ICRC) is appalled by the devastating attacks that have been perpetrated in the United States today. It expresses its heartfelt sympathy to the victims and their families at this tragic time.

The ICRC condemns in the strongest terms these acts, which have targeted people in the course of their daily lives, spreading terror and inflicting grief among the population. Such attacks negate the most basic principles of humanity.

DISCUSSION

1. a. Were the terrorist acts carried out on 11 September 2001 on the territory of the United States of America acts of war? Was the United States involved in an armed conflict against those who carried out these acts? Were they acts that triggered an armed conflict? From this viewpoint, is International Humanitarian Law (IHL) applicable to these acts? Don't these acts fall under other branches of international law? Which ones? Or under domestic criminal law? Can a terrorist act constitute an armed conflict only when it causes a very large number of civilian victims, as was the case for the acts committed on 11 September (over 3,000 deaths)? Did the act of terrorism carried out against the World Trade Center in New York on 26 February 1993, which resulted in six deaths and injuries to approximately 1,000 persons, constitute an armed conflict?

   b. Can the questions in point 1.a. be answered without knowing who the perpetrators of the acts were? What would your answers be if the perpetrators were *de facto* or *de jure* agents of a State? Of a terrorist group? Of a terrorist group supported by a State? Of a terrorist group finding itself under the effective control of a State? Under the overall control of a State? Of a terrorist group supported by a government not recognized internationally? Does the fact that these acts were launched from United States soil influence your answer? Does it matter whether the authorities harbouring this terrorist group were or were not aware that it was going to carry out such acts?

   c. Is IHL applicable to any conflict that might take place between the United States and a terrorist group, if the latter is not acting on behalf of a State? What is the definition of an armed conflict? Of international armed conflict? Of non-international armed conflicts? Are the acts of terrorism of 11 September covered by the law of non-international armed conflict? And the fight of the United States against the terrorist groups?

2. a. Is terrorism a matter for IHL? If these acts are considered to have been committed "in time of war," were they violations of IHL? War crimes? What does IHL have to say about terrorism? (*Cf.* Art. 33 (1) of Convention IV; Art. 51 (2) of Protocol I and Arts. 4 (2) (d) and 13 (2) of Protocol II.)

   b. If these acts are considered to have been committed "in time of peace," were they crimes against humanity? What are the elements of a crime against humanity? (*Cf.* Art. 7 of the ICC Statute, *see* **Case No. 15**, The International Criminal Court. p. 608.)

3. a. To what extent can the United States react to these terrorist acts? Did these acts entail the applicability of Art. 51 of the United Nations Charter on self-defence? What happens when the perpetrators are not the agents of a State? If the State harbouring the perpetrators of these acts has been identified, can the United States pursue the perpetrators by intervening militarily in that State, on grounds of the right of self-defence? Even if the State did not have overall control over the perpetrators? What happens if the members of the organization that planned and implemented these acts are scattered throughout a large number of States all over the planet?

   b. How would you characterize the conflict if the United States used armed force to destroy terrorist bases or camps or to kill members of a terrorist organization on the territory of a State that gave its consent to such a military intervention? If the State in question did not give its consent?

   c. Can it be held that since 11 September 2001 the United States has been involved in a "fight against terrorism," which constitutes in its entirety a single armed conflict within the meaning of IHL? Or is it rather a series of armed conflicts taking place wherever the United States forces intervene militarily? What are the consequences in terms of applicability of IHL to the various actions taken in connection with the fight against terrorism? Isn't it rather the case that, when there are no armed hostilities, the fight against terrorism is a vast international police operation to which domestic and international criminal law - not IHL - are applicable?

   d. Do all the persons arrested and detained in connection with the fight against terrorism belong to one of the categories of detainees provided for under IHL? Could they be prisoners of war? Protected civilians? Only if they were arrested in the context of an international armed conflict? (*Cf.* Arts. 4 of Convention III; Arts. 2 and 4 of Convention IV.)

4. Could the act of terrorism committed against the Pentagon near Washington D.C. be lawful within the meaning of IHL, inasmuch as the building could be considered a military objective? Would this act be unlawful under IHL inasmuch as it was committed by means of a civilian airliner? Inasmuch as the attackers were disguised as civilians? Inasmuch as a large number of civilians were victims of the attack? Would it be an act of perfidy under IHL? (*Cf.* Art. 37 (1) (c) of Protocol I.)

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.

How Does Law Protect in War? is the first book of its kind in the field of International Humanitarian Law (IHL). In this second, expanded and updated edition, a selection of more than two hundred and thirty cases provides university professors, practitioners and students with the most updated and comprehensive collection of documents on International Humanitarian Law available. A comprehensive outline of International Humanitarian Law puts the contents of these cases into their systematic context and theoretical perspective.

Part I presents IHL carefully and systematically. This Part of the book provides an outline of important and non-controversial elements on each topic through Introductory Texts. In addition, readers are enabled and encouraged to expand their knowledge on a given subject as they are directed to references to the pertinent parts of Cases and Documents on that issue that are reproduced in Part III. For each topic, references to articles from the Geneva Conventions and their Additional Protocols and references to the Rules of the ICRC Study on Customary IHL are also provided. Finally, a selected bibliography facilitates further study and deeper understanding of each topic.

Part II provides advice and recommendations on how to teach IHL and a series of teaching outlines, which may be useful for university professors who wish to introduce a course on IHL. The suggested teaching outlines are primarily addressed to law faculties, but they also target faculties of journalism and political science. This Part ends with eleven course outlines written by experts in IHL.

Part III, entitled Cases and Documents, is the main body of the present book. In this Part, the reader can find all the Cases and Documents in chronological and geographical order. The nature of each Case or Document varies according to the topic: the student or scholar will thus find national and international tribunal judgements, Security Council resolutions, extracts from documents, or press releases. Each Case and Document has been carefully edited according to the specific topic(s) of International Humanitarian Law referred to in Part I. The originality of this section lies in the second part of each case, entitled "Discussion", where the reader is asked questions that raise issues in relation to the case at hand.

The main goal of this book is to show that International Humanitarian Law remains relevant in contemporary practice and that it provides – although inherently insufficient – answers to the humanitarian problems in armed conflicts.

The first English edition of this work was published in 1999; an updated French version appeared in 2003. This second English edition has incorporated the significant revisions and updates of the French edition, which included some 40 new Cases and Documents, revised Introductory Texts and considerable improvements to the section on Teaching International Humanitarian Law. A further 30 Cases and Documents reflecting the most recent practice have been added in this new English edition. Furthermore, some Introductory texts have been added, others revised.

In publishing this edition, the ICRC hopes to encourage practice-related teaching of International Humanitarian Law in universities world-wide and to provide practitioners with a reference book on contemporary practice in International Humanitarian Law.

ICRC

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